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A Critical Guide to Marbury v. Madison

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A CRITICAL GUIDE TO MARBURY V. MADISON

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The concept of judicial review of the constitutionality of state and federal statutes by the Supreme Court is generally rested upon the epic decision in Marbury v. Madison. *The controversies which have surrounded the exercise of this power by the Supreme Court require a periodic reexamination of the concept of judicial review at its source, the* Marbury *opinion. This article proceeds by examining the historical context in which the case arose and analyzes the opinion in terms of various alternative approaches which might have been utilized by Chief Justice Marshall. The specific holding of the case is isolated in contrast to later interpretation given it, and a collection of relevant historical materials is presented to lend insight into the constitutional viewpoints of the period.*

INTRODUCTION

THE DECISION in *Marbury v. Madison*[1] was written under seemingly inauspicious circumstances. Its author, John Marshall, the fourth Chief Justice of the United States, had come to the Supreme Court without prior judicial experience and had served on the Court a scant three years before rendering this decision. Marshall was appointed to the post from the President's cabinet as a second choice in the aftermath of a national election in which the President and his party had been deposed. The decision itself partly turned upon facts of which the Chief Justice had personal knowledge

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

because of his previous involvement in the controversy while serving as Secretary of State. Though he wrote for a unanimous Court in *Marbury v. Madison,* he was widely criticized to the point of concern lest he be impeached—as was one of his colleagues during these early years when the Court was a most fragile institution.

Yet, the judgment of history has been far more kind to John Marshall than were many of his contemporaries, and today he is overwhelmingly regarded as the greatest judicial figure to have graced the Supreme Court of the United States. Of all his significant contributions to our constitutional history, none has been more acclaimed or seems more secure as enduring precedent than his decision in *Marbury v. Madison.*

The unique significance of Marshall's opinion in *Marbury* is thought to be memorialized in the following language of a more contemporary, but equally unanimous, Supreme Court:

> 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.[2]

Or as Mr. Justice Jackson put it, addressing himself to the finality of the Court's authority to interpret the Constitution as upheld in *Marbury*: "We are not final because we are infallible, but we are infallible only because we are final."[3] *Marbury* presumably is also the authoritative basis of the following remark by Charles Evans Hughes (later Chief Justice of the United States) so incautiously phrased as to jar democratic sensibilities: "We are under a Constitution, but the Constitution is what the judges say it is. . . ."[4]

Practically every era in which the Court subsequently employed its power of constitutional review to invalidate popular legislation produced new critics and scholars who subjected Marshall's opinion in *Marbury* to searching reexamination. There is, as a consequence, a far greater abundance of published scholarly criticism of the case than students of constitutional law can hope to pull together within the little time available even in the best law

[2] Cooper v. Aaron, 358 U.S. 1, 17-19 (1958).

[3] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[4] Hughes, *Speech Before the Elmira Chamber of Commerce,* ADDRESSES AND PAPERS 133, 139 (1908).

school courses. Everything else in the course inevitably turns back to this early case, since everything else is examined in the context of other cases wherein the Court exercised its power of constitutional review; yet the materials are least available here, at the beginning, where they might be most helpful.

I have, therefore, thought it useful to try to put together in this one place a reasonably comprehensive and critical guide to *Marbury v. Madison*, frankly acknowledging that this guide is largely a compendium of others' work. The article proceeds in five parts:

I. A Description of the Context of the Case.
II. An Analysis of the Opinion.
III. A Specification of the Holding Respecting Constitutional Review.
IV. Some Supplementary Materials Respecting the Legitimacy of National Substantive Constitutional Review.
V. A Selected Bibliography, exclusive of cases.

I. The Context of the Case

On January 20, 1801, President John Adams offered the name of John Marshall for approval by the Senate as the fourth Chief Justice of the United States. The President's action followed the resignation of Oliver Ellsworth (who resigned as the third Chief Justice for reasons of health), and an unsuccessful overture to John Jay (the first Chief Justice) who declined the President's appointment on grounds of age and the necessity of sitting on the circuit courts. Marshall was forty-five years old, with twelve years practice but no prior judicial experience, and he was serving as Adams' secretary of state at the time of his appointment to the Court. The Senate approved the appointment and Marshall took the oath of office on February 4, 1801. A strong Federalist, Marshall was already at political odds with Thomas Jefferson who was about to take office as President, and his relationship with Jefferson became more antagonistic as subsequent events began to unfold.

In the presidential election of 1800, Jefferson had received a popular majority over Adams, but Federalist strength among the electors resulted in an electoral-vote tie between Jefferson and Aaron Burr. The election was therefore committed to the House of Representatives. Before the House acted on the presidency, however, the Federalist holdover Congress took a number of actions in an effort to preserve vestiges of party influence during the next

administration. Two of these actions had a direct bearing on the federal judiciary.

On February 13, 1801, just nine days after Marshall took office as Chief Justice and four days before Jefferson was declared president by the House, the Federalist Congress adopted the Circuit Courts Act.[5] This act altered the federal judiciary by relieving Supreme Court Justices of circuit duty, reducing the number of Supreme Court Justices from six to five (reportedly to keep Jefferson from appointing a replacement for Mr. Justice Cushing who was ill), and establishing six new circuit courts with sixteen judges all of whom were to be appointed by Adams and quickly approved by Congress before Jefferson took office. On March 2, 1801, two days before the government passed to Jefferson and the Republicans, Senate confirmation of all judicial posts was completed. Virtually all of the appointees were Federalists.

The Circuit Court Act itself, however, was not the immediate source of the legal issue subsequently reviewed in *Marbury v. Madison.* Rather, that issue arose from still another post-election Federalist effort to secure control of certain offices during the anticipated Jefferson administration. Pursuant to an act passed on February 27, 1801,[6] Adams appointed forty-two justices of the peace for the District of Columbia and Alexandria, each to serve for a five-year term as provided by the Act itself. These appointees were all confirmed by the Senate on March 3, 1801, just one day before the national government changed hands. The commissions for these posts were made out in John Marshall's office, as Marshall was still serving as holdover Secretary of State although he had also been Chief Justice for nearly a month, but by midnight of March 3, at least four commissions had not yet been delivered.

Immediately upon assuming office, Jefferson ordered his new Secretary of State, James Madison, to hold up all commissions which had not yet been delivered. One of these was that of William Marbury.

On December 21, 1801, Marbury filed suit in the Supreme Court seeking a writ of mandamus to compel Madison to deliver his commission which, he claimed, Madison had no right to withhold. Marbury was represented by Charles Lee who had served as

[5] Act of February 13, 1801, ch. 4, 2 Stat. 89.

[6] Act of February 27, 1801, ch. 15, § 11, 2 Stat. 107.

Attorney General under Adams. Madison received notice, but declined to acknowledge the propriety of the suit even by appearing through counsel. The order to show cause was issued by the Court and the case was set down for argument on the law for the next term. Thus the stage was already set for several important and politically incendiary issues: (1) Was the Secretary of State answerable in court for the conduct of his office? (2) Could the Court countermand a presidential decision respecting subordinate appointments? (3) By what means could any such judicial decision possibly be enforced?

The issue of judicial review came to independent prominence the next year, in 1802, while Marbury's case was still pending, when the Republican Congress debated its own authority to repeal the Circuit Courts Act. There was some apprehension that the Federalist-dominated Supreme Court might presume to declare the proposed act of repeal unconstitutional.[7]

Early in 1802, however, the new Congress overcame its doubts respecting its own authority and that of the Court, and repealed the Circuit Courts Act.[8] To gain time to strengthen Republican control of the national government, Congress also eliminated part of the 1802 Term of the Supreme Court, thus postponing a test of the Repeal Act's constitutionality, of judicial review itself, and of Marbury's case as well. All three matters awaited the Court's determination in 1803.[9]

In any case, the critical events immediately staging Marbury's case were all telescoped into a single month, in early 1801:

February 4, 1801:	Appointed by Adams, Marshall takes office as Chief Justice while continuing to serve as Secretary of State.

The issue involved in the proposed repeal of the Circuit Courts Act was whether elimination of the newly established courts would be deemed a violation of section one of Article III which subjects federal judges to removal only by impeachment, and whether the act of repeal might be deemed to violate the concept of separation of powers arguably implicit in the plan of Articles I, II, and III.

[8] Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

[9] Six days after the decision in *Marbury v. Madison* the Court decided Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), upholding the Republican Repeal Act. Indeed, after *Marbury*, fifty-four years were to pass before the Supreme Court again held an act of Congress to be unconstitutional. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856). As of today, moreover, scarcely more than a hundred of the many thousands of federal statutes adopted by Congress have been held unconstitutional.

February 13, 1801: Federalist Congress adopts the Circuit Courts Act establishing six new circuit courts with sixteen judges, and reduces the Supreme Court to five Justices.

February 17, 1801: Presidential electoral deadlock from 1800 is broken by the House in favor of Jefferson.

February 27, 1801: Federalist Congress adopts Act authorizing Adams to appoint 42 Justices of the Peace for five-year terms.

March 2, 1801: Senate confirmation of new circuit court appointees completed.

March 3, 1801: Senate confirmation of the Justices of the Peace completed, but several commissions still undelivered at midnight.

March 4, 1801: Jefferson takes office and Madison is instructed to withhold the undelivered commissions.

II. AN ANALYSIS OF THE OPINION

The First Issue

Rather than writing about the opinion in general, we may more successfully deal with it in the manner in which one is in fact expected to analyze cases—by taking them on their own terms, raising and resolving questions each step of the way. Thus, it seems logical to begin with the Court's own beginning.

The Court declares that the "first" issue presented by the case is: "Has the applicant a right to the commission he demands?" At least two criticisms of this beginning have been made. Both arise in answer to the question: Was Marbury's entitlement to the commission he demanded really the issue which the Court should have examined first? Arguably, it was not.

Surely the Court ought first determine whether it has any authority to decide any issues whatever respecting the merits of the case, *i.e.*, it should first resolve the preliminary question of its own jurisdiction. The Court's jurisdiction was ostensibly based on section 13 of the Judiciary Act of 1789 which Marbury alleged to empower the Court to issue a writ of mandamus in this sort of case. But if the Act did not in fact provide for such jurisdiction, or if it were invalid in attempting to provide for such jurisdiction, the Court would be

without proper authority to consider the merits of Marbury's claim. Thus, it may be said, the "first" issue was solely the question of the Court's jurisdiction and it should have spoken to that issue at the beginning. The logic of such an approach was subsequently well stated in Ex parte *McCardle*:[10]

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[11]

Additionally, such a course would be better adapted to avoid a "peculiar delicacy" of the case which Marshall himself recognized was present in passing upon the amenability of a cabinet officer to suit, especially under circumstances which might reflect adversely upon that officer and the President of the United States. If the Court determined that it had no jurisdiction, it would have no occasion to reach the matter of "peculiar delicacy." It was therefore improper for Marshall to begin as he did.

Perhaps it can be said, however, that this second criticism is not well taken by itself since the amenability of a cabinet officer to suit was not of course the *only* issue of "peculiar delicacy." Of at least equal delicacy was the question of the Court's relationship to Congress, *i.e.*, its capacity to second guess the constitutionality of acts of Congress. Since the Court might avoid the necessity of confronting the constitutionality of the Judiciary Act by disposing of the case on other grounds (assuming that it were to find Marbury not entitled to his commission), it should seek to do so where possible, as here. Such a course, to avoid passing upon the constitutionality of an act of Congress where decision is possible on other grounds, was especially well defended in a later era by Mr. Justice Brandeis.[12] Under this view, perhaps Marshall cannot be faulted for postponing consideration of judicial review and the constitutionality of the Judiciary Act until he had first exhausted other possible bases for disposing of the case.

Even the first criticism, that the Court must logically deal first with the threshhold question of its jurisdiction to hear the case, may also be used to show that it was not necessarily inappropriate for the

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[10] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[11] *Id.* at 514.

[12] *See* Ashwander v. TVA, 297 U.S. 288, 341, 346 (1936).

Court to consider Marbury's entitlement to the commission as the "first" issue. For it is arguable that that issue partly depends upon whether, under the circumstances, Madison is answerable in court for the conduct of his office as Secretary of State, *i.e.*, whether he is subject to the Court's jurisdiction in an action brought against him in his official capacity. Thus, in one sense, the Court did begin with an issue respecting "jurisdiction."

Ultimately, we may reach a stalemate on this point. There may scarcely be any way the Court can begin without necessarily deciding something associated with jurisdiction and without implicitly deciding some constitutional issue. To be sure, the validity of the Judiciary Act of 1789, and the authority of the Court to determine that validity, pose a grave constitutional question—but then so does the amenability of a cabinet officer to answer in a court of law. On the other hand, to begin with a treatment of Marbury's claim against Madison cannot be justified on the grounds that this approach may more nearly respect the separation of powers by avoiding the necessity of passing upon the constitutionality of an act of Congress, since it will itself involve the necessity of deciding the extent to which a cabinet officer is or is not constitutionally immune from suit.

Finally, however, there is clearly an "issue" of sorts which preceded any of those touched upon in the opinion. Specifically, it would appear that Marshall should have recused himself in view of his substantial involvement in the background of this controversy. Remember, too, that the Court thought it important to establish whether Marbury's commission had already been signed and sealed before it was withdrawn—to determine whether Marbury's interest had "vested" and whether Madison was refusing to carry out a merely ministerial duty, or whether the commission was sufficiently incomplete that matters of executive discretion were involved. Proof of the status of Marbury's commission not only involved circumstances within the Chief Justice's personal knowledge, it was furnished in the Supreme Court by Marshall's own younger brother who had been with him in his office when, as Secretary of State, he had made out the commissions. Arguably the first issue, then, was the appropriateness of Marshall's participation in the decision.[13]

[13] Assuming that a lower court decision today might be reversed for failure of the presiding judge to have recused himself under such circumstances, it is not clear what relief, if any, would be available against such an indiscretion at the level of the Supreme Court.

Marbury's "Right" to the Commission

On the basis of the Act of 1801[14] providing for the appointment of justices of the peace for a five-year term plus findings of fact that the appointment had "vested," the Court held that Marbury had a "right" to the commission. The Act itself was based on the power of Congress granted by the Constitution in Article 1, section 8, clause 17, "to exercise Legislation in all Cases whatsoever, over" the District of Columbia. Marshall concludes that once the commission had been signed and sealed by President Adams, Marbury's claim to the office was complete.

Marshall reasonably could have concluded, however, that no interest actually "vested" in Marbury prior to actual delivery of the commission. Jefferson evidently thought that the better conclusion, subsequently insisting that Marshall's decision on this point was a "perversion of law," and maintaining that "if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed."[15] Even if Jefferson overstated the law, and even assuming authority could be found urging that certain interests "vest" prior to delivery, it would not necessarily be dispositive of this case. The Court is reviewing an aspect of executive power and passing judgment upon the propriety of conduct by a co-ordinate branch of government here, a consideration not present in an ordinary civil suit between private litigants. Then, too, it is arguable that there is no comparable need in this kind of case to locate the point of "vesting" in a fairly mechanical fashion as in real property transactions where one may need a more rigid rule to facilitate planning, personal security, and reasonable reliance. Indeed the Court did not advert to any evidence that Marbury had in fact detrimentally relied upon the commission after it was signed and sealed, but before he had notice of its withdrawal.

Marshall observed not only that the appointment had proceeded so far that Marbury's right had "vested," but that the office was "for five years, independent of the executive," and "not revocable." Presumably Marshall reasoned that (1) failure to deliver the commission might otherwise be taken as implied revocation by Jefferson, and (2) if the commission is revocable without cause, from

[14] Act of February 27, 1801, ch. 15, § 11, 2 Stat. 107.

[15] Letter from Jefferson to William Johnson, June, 1823, in S. PADOVER, THE GENIUS OF AMERICA 130 (1960).

moment to moment, Marbury may be unable to show any injury. With this additional "finding" Marshall decided a significant constitutional issue, one which the Supreme Court has substantially modified. The issue is whether Congress can prescribe the term of office and limit the conditions for the removal of subordinate federal officers, or whether such attempts violate the separation of powers and infringe upon the executive's implied removal power that accompanies his power to appoint and his power to see that the laws are faithfully executed, as well as his broad power as Chief Executive. It is clear that Marbury was not appointed as an Article III judge (since his term in office was limited), and it is arguable that he was more of a "legislative" subordinate than an "executive" subordinate. In the few cases where the executive's removal power has been successfully challenged, moreover, the only *remedy* ever granted was a judgment for salary. Restoration to the office itself apparently has never been granted to an official removed by the President.[16]

A Right—A Remedy

The Court declares that the second issue is, assuming that Marbury "has a right [to the commission], and that right has been violated, do the laws of his country afford him a remedy?"[17] The first

[16] In Myers v. United States, 272 U.S. 52 (1926), Chief Justice Taft expressly disapproved this part of *Marbury* in holding that a requirement for senatorial approval of the President's removal of second class postmasters (whose term by statute was unlimited) was unconstitutional under Article II, sections 1 through 3, and primarily under section 2, clause 2, the appointment power. In Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941), executive removal of a TVA director contrary to statutory provision by Congress was sustained on the same basis. Compare Humphrey's Executor v. United States, 295 U.S. 602 (1935), upholding the power of Congress to limit the President's power to remove a member of the Federal Trade Commission "for cause" where the appointment was for seven years, and awarding salary to a Commissioner removed by President Roosevelt without cause; and Weiner v. United States, 357 U.S. 349 (1958), a similar holding respecting a War Claims Commissioner under appointment for a three-year term who was awarded back salary after removal by Eisenhower contrary to statutory provision. The issue generally turns on (1) the character of the office in question, *i.e.*, whether it is primarily "executive," "legislative," or "judicial" in function; (2) specificity of the congressional power pursuant to which the office was established; and (3) length of term of the appointment. For an excellent review of *Humphrey's Executor* with a fresh discussion of this issue, *see* Leuchtenberg, *The Case of The Contentious Commissioner: Humphrey's Executor v. U.S.*, FREEDOM AND REFORM 276-312 (Hyman & Levy, eds., 1967).

[17] When Marshall asks if the laws of this country afford Marbury a remedy, one might observe that Marshall is deciding implicitly still another significant issue of constitutional law even before examining the jurisdiction of the Court to proceed on the merits.

step in the argument seems gentle but compelling: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." The declaration is a kind of self-evident matter: *ubi ius, ibi remedium.* More than that, it is a prophetic definition of "legal right" itself, anticipating Holmes' statement by a hundred years: "For legal purposes, a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who are said to contravene it. . . ."[18]

Necessarily, however, Marshall is deciding the extent to which sovereign immunity plus the concept of separation of powers does and does not immunize ranking cabinet officers from suit and from liability in the federal courts, even when the cabinet officer is acting pursuant to direction by the President. Indeed this was regarded at the time as the more critical issue, with Jefferson taking the position that the Court had no authority thus to examine the exercise of executive prerogatives. It is clear, moreover, that Marshall himself is not prepared to go the full distance since his opinion indicates that there are discretionary decisions and political questions for the executive which are not reviewable in the courts even assuming that they adversely affect private interests.[19]

Marshall explicitly qualifies his statement that one may claim redress in the courts whenever he receives an injury. In doing so, he anticipates problems still not clearly resolved. One of these concerns the matter of "political questions."

> [W]here 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,

i.e., not subject to judicial review but subject only to electoral review and perhaps to congressional pressure. Here it could be contended that Madison was acting "merely to execute the will of the president," but Marshall rejected that view in favor of two more

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[18] Holmes, *Natural Law,* 32 HARV. L. REV. 40, 42 (1918).

[19] Had Marbury sued for his *salary,* rather than delivery of his commission, and had he brought his action against the United States as such, he could not recover without a waiver of sovereign immunity (as provided in the Federal Tort Claims Act, the Urgent Deficiencies Act, etc.) even today.

limited tests: (1) "cases in which the executive possesses a constitutional . . . discretion," and (2) "cases in which the executive possesses . . . a legal discretion."

"Constitutional discretion" might, for instance, involve the exercise of the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment" under Article II, section 2, clause one,[20] or the veto power in Article I, section 7, clauses 2 and 3. Arguably, the Constitution itself precludes judicial review of the grounds of presidential exercise of these powers. Presumably, "legal discretion" would cover a situation where a statute authorizing the executive to act left the occasion and character of the act to his discretion.[21]

Marshall's discussion of this matter carries through his treatment of the next item as well and the indefiniteness of the opinion is bound to generate problems in the future.[22] Thus Marshall says: "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." (Query: Is it always possible to do the first without necessarily doing the second as well?) "Questions in their nature political, *or* which are, by the constitution and laws, submitted to the executive, can never be made in this court." (Emphasis added.) Note that here "political questions" are judicially unreviewable and are separate from still other questions explicitly made unreviewable by the Constitution or laws. Thus some questions not made judicially unreviewable by the Constitution itself are nonetheless judicially unreviewable because they are "in their nature political." What does that mean? How shall it be reconciled with statements appearing later in this case: *e.g.*, "The judicial power of the United States is extended to *all* cases arising under the Constitution." (Emphasis added.) "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

[20] *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

[21] The concept of "legal discretion" would seem to apply to Marbury's case at a slightly earlier step, when Adams had submitted Marbury's name for the post, the Senate had approved, but the commission had not actually been signed and sealed before Jefferson took office. This point is very close to the one made earlier in trying to determine precisely when it was that Marbury's "right" "vested."

[22] *See, e.g.*, Colgrove v. Green, 328 U.S. 549 (1946); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See Mr. Justice Brennan's discussion of "justiciability" in Baker v. Carr, 369 U.S. 186 (1962).

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*?" (Emphasis added.) Here, then, is another seminal issue generated by *Marbury v. Madison:* Assuming that all the requisites of a "case" are present in the limited sense required by Article III, assuming also that judicial relief or remedy is sought for a palpable injury allegedly resulting from an executive action in violation of the Constitution, and assuming finally that the resolution of the constitutional issue is not reserved by the Constitution itself to executive interpretation, how can the Court refuse to consider the constitutional issue thus presented on the basis that the question is "political" in nature? In such a situation, what meaning is left to the determination that a citizen has a "right," if the Court determines that "the laws of his country [do not] afford him a remedy?"[23]

Appropriateness of Mandamus

The next question is whether Marbury "is entitled to the remedy for which he applies," in the narrow sense of whether common-law usage makes mandamus appropriate. As thus narrowed, there may be less controversy over Marshall's treatment of the point.[24] The writ is a "legal" one but extraordinary in character and issuing only when other legal remedies are inadequate and only then to compel the doing of a specific act ministerial and nondiscretionary in character, clearly required by law, and easily supervised by the court. Simple delivery of the sealed commission to Marbury in the circumstances of this case seems to meet these common law tests and the Judiciary Act of 1789 states that the writ is to issue "in cases warranted by the principles and usages of law, to . . . persons holding office under the authority of the United States."

[23] *Cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). For a recent illustration, see Mora v. McNamara, 389 U.S. 934 (1967). For three of the most provocative discussions of this problem, see Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1963); Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principles and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[24] In next considering the appropriateness of mandamus and in reserving the jurisdictional issue to the end, Marshall seems to be saying that Marbury should prevail in an action against Madison if he would bring his action in a court of original jurisdiction. Reportedly Marbury never received his commission; the five-year term expired first.

The Power of the Court

The final question examined in the opinion is "the power of this court" to issue the writ. The opinion treats this as though it involved two parts only: (1) Is section 13 of the 1789 Judiciary Act which purports to grant such power unconstitutional in that it attempts to enlarge the original jurisdiction of the Supreme Court in violation of Article III, and (2) is the Court free to make its own determination of this question in deciding whether it should proceed with this case? Arguably, however, there are other questions distinctly involved, and again, it may be said that even with respect to these two questions the Court should have treated them in a different order.[25]

Statutory Interpretation

Certainly the first question is the following one of statutory interpretation which was just barely treated in the opinion: Did section 13 of the Judiciary Act authorize this action to originate in the Supreme Court? The section provides:

> *And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.[26]

[25] If acts of Congress are not judicially reviewable on grounds of constitutionality, by definition, the Court is not to consider the constitutionality of the Judiciary Act.

[26] Section 14 of the Judiciary Act grants power to federal courts "to issue writs of *scire*

Marshall quotes only the fragment at the end, perfunctorily notes that Madison holds office under the authority of the United States and therefore "is precisely within the letter of the description," and since he has already established that mandamus would otherwise be an appropriate remedy he quickly concludes that section 13 purports to authorize this case. But there is no discussion of whether this section *confers* original jurisdiction over suits seeking mandamus against persons holding office under the authority of the United States, or whether it merely authorizes mandamus to be so employed by the Court in cases properly *on appeal* or in aid of its original jurisdiction in cases involving foreign ministers or states. If it means only the latter, and if Marbury has no other basis for commencing his case in the Supreme Court, then the Court should simply dismiss the case for want of (statutory) jurisdiction and it need not, and ought not, examine the constitutionality of section 13 under some other construction. An argument can be made, of course, that section 13 did not attempt to grant original jurisdiction in Marbury's case.

The section opens by describing the Court's original jurisdiction and then moves on to describe appellate jurisdiction ("hereinafter specially provided for"). Textually, the provision regarding mandamus says nothing expressly as to whether it is part of original or appellate jurisdiction or both, and the clause itself does not speak at all of "conferring jurisdiction" on the court. The grant of "power" to issue the writ, however, is juxtaposed with the section of appellate jurisdiction and, in fact, follows the general description of appellate jurisdiction in the same sentence, being separated only by a semicolon. No textual mangling is required to confine it to appellate jurisdiction. Moreover, no mangling is required even if it attaches both to original and to appellate jurisdiction, not as an enlargement of either, but simply as a specification of power which the Court is authorized to use in cases which are *otherwise* appropriately under consideration. Since this case is not otherwise within the specified type of original jurisdiction (*e.g.*, it is not a case in which a state is a party or a case against an ambassador), it should be dismissed.

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facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the case of commitment." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

Such an interpretation would have eliminated any question regarding the constitutionality of the section, and thus it should have been made. Indeed the statute readily bears such an interpretation when compared with the very modest change in language Congress subsequently made in response to *Marbury v. Madison:*

> The Supreme Court shall have power to issue writs of prohibition in 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 under the authority of the United States, or to persons holding office under the authority of the United States, *where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party.*[27]

Judicial Review

Assuming that section 13 of the Judiciary Act of 1789 does confer original jurisdiction in this case, is its constitutionality subject to judicial review? Marshall initially responds to this question, which, of course, is the issue which has made the case of historic importance,[28] by posing his own rhetorical question: "whether an Act repugnant to the Constitution can become the law of the land." That it cannot is clear, he says, from the following considerations.

The people in an exercise of their "original right," established the government pursuant to a written constitution which defines and limits the powers of the legislature. A "legislative act contrary to the constitution is not law," therefore, as it is contrary to the original and supreme will which organized the legislature itself.

> 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? . . . 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,

[27] Rev. Stat. § 688 (emphasis added).

[28] At the time *Marbury* was decided judicial review may have been of less political interest than the question of executive accountability through the courts. See note 48 *infra* and accompanying text.

like other acts, is alterable when the legislature shall please to alter it. . . .

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. . . .

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. . . .

That the Constitution is a "written" one yields little or nothing as to whether acts of Congress may be given the force of positive law notwithstanding the opinion of judges, the executive, a minority or majority of the population, or even of Congress itself (assuming that Congress might sometimes be pressed by political forces to adopt a law against its belief that it lacked power to do so) that such Acts are repugnant to the Constitution. That this is so is clear enough simply from the fact that even in Marshall's time (and to a great extent today), a number of nations maintained written constitutions and yet gave national legislative acts the full force of positive law without providing any constitutional check to guarantee the compatibility of those acts with their constitutions.[29]

This observation, moreover, leads to the conclusion that Marshall presents a false dilemma in insisting that "[t]he constitution is *either* a superior paramount law, unchangeable by ordinary means, *or* it is on a level with ordinary legislative acts, and,

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[29] *E.g.*, France, Switzerland, and Belgium (and to some extent Great Britain where Magna Carta and other written instruments are roughly described as the constitution but where acts of Parliament are not reviewable).

The French Constitution of 1789 stated explicitly: "The tribunals cannot interfere in the exercise of legislative power, nor suspend the execution of the laws, nor encroach upon the administrative functions, nor cite before them the administrators on account of their functions." Title 3, Ch. 5, Art. 3. *See generally* H. MORRISON, THE FRENCH CONSTITUTION 18 (1930).

like other acts, is alterable when the legislature shall please to alter it." Remember, the question he has posed is "whether an Act repugnant to the Constitution can become the law of the land." The question is not whether Congress can alter the Constitution by means other than those provided by Article V, and the case raises no issue concerning an alteration of any provision in the Constitution. We may assume that Congress cannot, by simple act, alter the Constitution and still we may maintain that an act which the Court or someone else *believes* to be repugnant to the Constitution shall be given the full force of positive law until repealed. Again, this is the situation which prevails in many other countries, and no absurdity is felt to exist where such a condition obtains.

To be sure, situations can be imagined (and may arise in fact) where an act of Congress seems so clearly repugnant to the Constitution that one may wonder what function the Constitution can usefully serve if such a law is nevertheless given the full force of positive law until repealed. Marshall's illustrations of such situations are quite compelling in this regard, *e.g.*, an act of Congress providing that one may be convicted of treason upon testimony of a single witness, or confession out of court, in the "very teeth" of the provision in Article III, section 3, that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt Act, or on Confession in open Court."

This leads, then, directly to the third point Marshall makes with a rhetorical flourish: "To what purpose are powers limited, . . . if these limits may, at any time, be passed by those intended to be restrained?" Thus he argues by implication that no other purpose can be imagined and so it follows that the purpose of preventing acts of Congress repugnant to the Constitution from being given the effect of positive law is the necessary purpose of prescribing written limitations on its power. Again, however, a variety of excellent purposes are felt to be served in other countries with similar constitutional provisions but without detracting from the positive law effect of all legislative acts. Thus the written limitations serve as a conscientious check on the legislators, admonishing each and advising each concerning the responsibility he has to respect the limitations thus laid down. The very fact, for instance, that the minimum proof for treason is prescribed in Article III makes it far less likely than otherwise that Congress would attempt to enact a

lesser standard, and this is so wholly aside from whether such an attempt would still be given the effect of positive law. Again, the written limitations may be useful politically; they may figure in congressional debates, furnishing argumentative force as well as a personal conscientious restraint, against the enactment of repressive bills.[30] Finally, there is the purpose the Constitution would serve in providing a political check upon Congress by the people, even assuming that all acts of Congress were given the full effect of positive law by the courts as well as by the executive. Indeed consistent with Marshall's own observation that *the people* themselves established these written limitations, the democratic approach is to leave the judgment and remedy for alleged legislative usurpation with the people. If *they* conclude the Constitution has been violated, they can exert political pressure to effect the repeal of the offending act or to replace their congressmen at times of election with representatives who will effectuate that repeal. The document thus provides the people with a firm, written normative standard to which to repair in making political decisions.

Unwillingness of the courts to give effect to acts of Congress which the Supreme Court might conclude were repugnant to the Constitution is thus quite unnecessary to the accomplishment of several significant purposes which might still be served. In certain respects, moreover, it may even be said to work at cross purposes with these other salutary aims. For instance, it tends to encourage congressional indifference to considerations of constitutionality by implying that questions of this sort are none of its concern and are entrusted, rather, only to the Court. Such a tendency was utilized by President Roosevelt when he urged a House subcommittee chairman to resolve all constitutional doubts about a given bill in favor of the bill, "leaving to the courts, in an orderly fashion, the ultimate question of constitutionality."[31] In addition it may frustrate acts of

[30] Congress frequently considers the constitutionality of its bills and the character of the debate is as often as not less concerned with whether the bill, if enacted, would be upheld by the Supreme Court and more concerned simply with whether the bill seems basically compatible with the Constitution. For instance, in the debate accompanying the school-aid bills, compatibility with the first amendment was widely discussed even though it was generally assumed that the bill, if enacted, probably could not be brought to the Supreme Court for review due to Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 477 (1923). *But see* Flast v. Cohen, 392 U.S. 83 (1968).

[31] 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1938).

Congress even when the people, whose "original and supreme will organizes the government," find no repugnance to their own Constitution.[32]

Finally, however, there is the reference to the supremacy clause in Article VI which Marshall uses partly to show, again, "that a law repugnant to the constitution is void" (as well as to show that it does not bind the judiciary). To be sure, the clause does provide that "[t]his Constitution, and the Laws of the United States which shall be made in *Pursuance* thereof . . . shall be the supreme Law of the Land," and thus the text appears to require that acts of Congress be made "pursuant" to the authority (and limitations) of the Constitution to be effective as supreme law. But this does not necessarily support Marshall's conclusion that no act of Congress believed by the Court to be repugnant to the Constitution shall be given full positive-law effect.

The phrase "in pursuance thereof" might as easily mean *"in the manner prescribed by this Constitution,"* in which case acts of Congress might be judicially reviewable as to their procedural integrity, but not as to their substance. An example of this more limited, procedural, judicial review is found in *Field v. Clark.*[33] It is, moreover, far more common in other countries than is substantive constitutional review.[34]

> In brief, while [substantive] judicial review has recently attracted more attention abroad, the actual institutional consequences of this show of interest have so far been negligible.
>
> On the other hand, it is a commonly recognized principle of public law in continental countries that courts of final jurisdiction may inquire whether statutes involved in cases before them were

[32] See note 49 *infra* and accompanying text.

[33] 143 U.S. 649 (1892).

[34] For an early English example of procedural judicial review, see Pylkington's Case, Y.B. 33 Henry VI, 17 pl. 8, discussed in Lloyd, *Pylkington's Case and Its Successors*, 69 U. PA. L. REV. 20 (1920).

One might assume that inasmuch as the Court will exercise procedural review over Acts of Congress, it would surely also exercise procedural review over amendments to the Constitution where the issue is appropriately raised in a particular case. Ironically, however, the Court has indicated that it may exercise very little review respecting the constitutionality of the manner in which an amendment is promulgated, allegedly because the issues tend to raise "political questions." *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939). The uncertainty thus created with respect to Article V of the Constitution is well illustrated by the series of articles in 66 MICH. L. REV. (1968), commenting on recent efforts by thirty-two states to convene a constitutional convention.

> enacted by the proper constitutional procedure. This type of judicial review, if such it should be considered, may be termed "formal," to distinguish it from "material," or true, judicial review. The one is concerned with the procedure of statutory enactment, the other with the substance and content of the statutes. Formal, or procedural, judicial review is much the less rigorous of the two. While a content forbidden by the courts may be supplied by the legislature only in consequence of a constitutional amendment or the reversal by the courts of their unfavorable attitude, a misstep in the process of legislative enactment is usually easily remediable.[35]

Thus, the only constitutional issue to be raised in a judicial forum to determine whether an act of Congress should be given effect is whether the bill has been enacted according to the forms prescribed in the Constitution. Its substantive constitutionality, *e.g.*, whether it exceeds the enumerated powers of Congress or violates a stated limitation on those powers, is reserved for the people to determine and for them to resolve through the political process. It is, therefore, significant that the clause does *not* provide as follows: "This Constitution, and the Laws of the United States *authorized and not limited thereby* . . . shall be the supreme Law of the Land."

The phrase might also mean merely that only those statutes adopted by Congress *after* the re-establishment and reconstitution of Congress pursuant to the Constitution itself shall be the supreme law of the land, whereas acts of the earlier Continental Congress, constituted merely under the Articles of Confederation, would not necessarily be supreme and binding upon the several states. Under this view, acts of Congress, like acts of Parliament, *are* the supreme law and not to be second-guessed by any court, state or federal, so long as they postdate ratification of the Constitution.[36]

Finally, however, there is another point which also necessarily shades into Marshall's related discussion of whether an act repugnant to the Constitution is nonetheless binding upon the courts. The point is that Marshall arguably may have begged a critical

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[35] Corwin, *Judicial Review*, VIII ENCYCLOPEDIA OF SOCIAL SCIENCES 457, 463 (1932).

[36] For a careful elaboration of this point, see W. CROSSKEY, II POLITICS AND THE CONSTITUTION 990-1007.

As distinguished from acts of Congress, treaties were binding upon the several states according to this view merely by having been entered into "under the Authority of the United States," and irrespective of whether they were approved by the Senate as it was proposed to be established pursuant to the new Constitution.

question, *i.e.*, he failed to acknowledge and thus to answer a question critical to the position he takes. *Assuming that an act repugnant to the Constitution is not a law "in pursuance thereof" and thus must not be given effect as the supreme law of the land, who, according to the Constitution, is to make the determination as to whether any given law is in fact repugnant to the Constitution itself?* Such alleged repugnance is ordinarily not self-demonstrating in most cases, as we well know. Marshall never confronts this question. His substitute question, whether a law repugnant to the Constitution still binds the courts, *assumes* that such "repugnance" has appropriately been determined by those granted such power under the Constitution. It is clear, however, that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that this prerogative to determine repugnancy belongs to it.

On its face, the clause does not say by whom or how or at what time it shall be determined whether certain laws of the United States were adopted pursuant to the Constitution. Again, the phrase that only such laws shall be part of the supreme law could mean merely that the people should regard the Constitution with deep concern and that *they* should act to prevent Congress from overstepping the Constitution. It might even imply, moreover, a right of civil disobedience or serve as a written reminder to government of the natural right of revolution against tyrannical government which oversteps the terms of the social compact. Such a construction would be consistent with philosophical writings of the period, consistent with the Declaration of Independence, and consistent also with the view of some antifederalists of the period. As a hortatory reminder to the Government of the ultimate right of the people, however, it clearly does not authorize the Court to make the critical judgment as to which laws, if any, were not made in pursuance of the Constitution.

There are still other points earnestly pressed by Marshall to be considered, but they are made in response to a slightly different issue which we shall have to restate in order to stay with our concern regarding who is constitutionally authorized to determine whether an act of Congress may be repugnant to the Constitution.

Marshall makes certain effective additional points in attempting to answer the question: "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?" We shall look at the discussion, however, partly to see whether it provides anything of a convincing character that the determination of whether an act of Congress *is* repugnant to the Constitution shall be made by the *courts*. Marshall makes the following points:

> 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.

The argument blurs the distinction between *ordinary* judicial review and substantive *constitutional* review. It implies, wrongly, that substantive constitutional review is as customary and necessary as ordinary judicial review. To be specific, Marshall analogizes between the acknowledged custom and authority of courts to determine whether a given statute was in fact duly adopted, to interpret statutes, and to choose between conflicting statutes, and the allegedly equal propriety and necessity of choosing between the Constitution and a statute which conflicts with it. From the proposition that the judicial department must necessarily say what the law "is," *i.e.*, how a statute is to be interpreted, he derives the corollary that therefore the judicial department must also say what is "law" in some sense beyond that of determining merely whether a purported statute is in fact an authentic legislative act, duly adopted and properly enrolled. It does not necessarily follow, however, that the powers of statutory interpretation, reconciliation, and procedural review embrace the power of substantive constitutional review. Again, in those countries such as England, where substantive constitutional review does not exist,[37] courts still routinely interpret

[37] The position of the English courts respecting acts of Parliament and substantive constitutional review is well portrayed in the following statement by Lord Chief Justice Holt: "An Act of Parliament can do no wrong, though it may do several things that look pretty odd." City of London v. Wood, 12 Mod. 669 (1700).

the meaning and pass upon the formal authenticity of statutes. Similarly, if two "laws" (statutes) conflict, such courts may apply certain rules to determine which shall control the case, *e.g.*, the later in time. In fact they may have to do so in order to decide the case before them. If the conflict is allegedly only between a statute and a portion of the Constitution, however, the court can readily give full effect to the law while declining to consider the alleged conflict with the Constitution *on the basis that such a matter is reserved solely to the judgment of the people.* Indeed in the sense of Marshall's special usage, it was "emphatically the province and duty" of *legislative* departments to say what the law is, and the customary duty of judicial departments was merely to apply the law to the case once the meaning and formal authenticity of the law were established. There is, consequently, nothing either necessary or customary to the claim of power which the Court presumed to assert in this case.[38]

> (2) 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 statement is only partly true, and is otherwise misleading. Again the Court might well be vouchsafed the necessary prerogative of constitutional review in the limited sense of being free to determine whether an act of Congress was adopted in a manner consistent with the *forms* described in the Constitution.[39] Such "procedural" review need not carry any implication regarding a similar propriety or necessity for substantive review. That review is made by the people who exercise a firm political check on the constitutional judgment of Congress.

> (3) This doctrine (that the Court lacks the power of substantive constitutional review) would subvert the very foundation of all written constitutions.
>
> . . . .
>
> 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.

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[38] *See* Eakin v. Raub, 12 S. & R. 330, 345-57 (Pa. 1825) (Gibson, J., dissenting).

[39] To be consistent with the forms prescribed by the Constitution an act must be properly enrolled, receive a majority vote in both Houses, be signed by the president, etc.

We have already examined this point which Marshall made earlier. It is sufficient to repeat here that a written constitution may serve highly significant purposes without judicial review. In reposing the judgment of constitutionality in the people alone, moreover, the constitution may more nearly respond to a democratic view.

> (4) But the peculiar expressions of the Constitution . . . furnish additional arguments in favor of its rejection (*i.e.*, rejection of the position that the Court lacks the power of substantive constitutional review of Acts of Congress).
>
> 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?
>
> . . . .
>
> 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!
>
> . . . .
>
> 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?

This seems by all means the most effective part of Marshall's presentation, drawing highly plausible support from the text of Articles III and VI. For convenience, the latter point, the significance of the judges' oath of office "to support this Constitution," will be considered first.

Perhaps the best known response to this line of reasoning is contained in the following passages by Justice Gibson, dissenting in *Eakin v. Raub*:[40]

> But the judges are sworn to support the Constitution, and are

[40] 12 S. & R. 330 (Pa. 1825).

> they not bound by it as the law of the land? . . . The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the Constitution, only as far as that may be involved in his official duty; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath . . .
>
> But do not the judges do a positive act in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas, the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests. . . .

But does the Chief Justice finally strike paydirt when he observes that Article III provides that "the judicial Power . . . shall be vested in one supreme Court," etc., and that this "judicial power shall extend to all Cases . . . arising under this Constitution," etc.? To paraphrase Marshall, what sense does it make to say that all cases arising under the Constitution are within the judicial power if, at the same time, the Court is never free in such a case to consider the constitutionality of an Act of Congress which has been drawn into question in that very case?

Is it sufficient to reply that the Court may consider the question of constitutionality, but that it must resolve that question according to Congress' interpretation of the Constitution rather than according to its own interpretation? Some have so suggested, noting again that the Constitution itself is silent as to *whose* constitutional interpretation shall be controlling even in the disposition of a case, and contending that the interpretation made by Congress and subject only to popular, but not judicial, review would be more compatible

with the theory of democratic government. There are, however, several shortcomings to this criticism. One is that the business of deciding a *case* does seem emphatically to be a part of judicial business. In the absence of a provision expressly withdrawing from the courts the power to decide for themselves any significant issue which must be resolved in order to dispose of the whole case, including of course the challenged constitutionality of an act of Congress, or instructing the Court to resolve any such issue according to the decision of Congress or someone else, it would appear to be the more natural inference that the judicial prerogative is the same as to this issue as to any other unavoidably presented by the case. It is not a sufficient answer to this point merely to say that the issue of substantive constitutionality is so different in kind from all other issues and that its reservation to Congress and to the people is so fundamental to democratic theory that this difference alone is sufficient to withdraw it from the courts. If it *was* felt to be so different, we should expect the difference to be expressed and provided for in the Constitution itself.

If the Court is always to resolve a question of substantive constitutionality of an act of Congress only according to Congress' own constitutional interpretation of its authority, necessarily it will always uphold the act and the "judicial review" thus being exercised seems to amount to nothing at all. Under these circumstances, it seems trivial and strange that Article III would extend the judicial power to *all cases arising under the Constitution.* It seems that it would have been more logical not to bother with this category on the understanding that acts of Congress are simply not to be questioned, either by federal or by state courts, on grounds of constitutionality.

This necessarily leads to the question: Unless these phrases in Article III contemplate independent judicial review of the substantive constitutionality of Acts of Congress drawn into question in cases arising under the Constitution, what purposes or functions can this category of judicial power possibly or usefully serve? Arguably, it would still serve a variety of very important functions.

A case may arise under the Constitution in a clear and straightforward sense *and not in the least involve an Act of Congress.* Thus a person might file suit for damages from police officers who he claims broke into his house without a warrant, allegedly violating the fourth amendment via the fourteenth

amendment. His "claim" arises under the Constitution in that he asserts that the due process clause of the fourteenth amendment *itself* furnishes him with a remedial right to damages under these circumstances. The case thus "arises" under the Constitution, it would be reviewable in due course under the Court's appellate jurisdiction (unless Congress excepted such jurisdiction),[41] and the Court would be competent to decide for itself whether or not the claim was well made. In the course of doing so, the Court might well interpret the Constitution to determine whether the fourth and fourteenth amendments implicitly provide for recovery in money damages or whether they do not.[42] Here, in such a situation the case itself does arise under the Constitution, Congress has adopted no act which provides an interpretation of the constitutional issue in question, and quite naturally and necessarily the Court could review the matter. Thus the clause has a function and an importance independent of extending it to mean that the substantive constitutionality of acts of Congress are judicially reviewable. In fact this reading of the clause seems more natural and straightforward than the one proposed by Marshall. Here the claim itself is asserted as arising under the Constitution. Marshall would read the clause as though it said "all cases in which an issue of constitutionality is presented." But, of course, it does not say this.

Again, the clause might permit judicial review of cases involving the federal constitutionality of state laws or state constitutional provisions where Congress has adopted no act dispositive of the question. Or the clause may even contemplate a limited review of acts of Congress drawn into question in a case thus alleged to arise under the Constitution, but the review would be strictly limited to *procedural* constitutionality of the congressional act, as discussed earlier.

It appears to follow, then, that cases may arise under the Constitution having nothing to do with acts of Congress, and that even in cases involving acts of Congress there is no inherent necessity for the Court to exercise a power of independent substantive constitutional review. To be sure, our analysis concedes the propriety

[41] Article III appears to provide that Congress may create "exceptions" to the Supreme Court's appellate jurisdiction. See textual paragraph *infra* preceding the paragraph containing notes 44-45.

[42] *See* Bell v. Hood, 327 U.S. 678 (1946).

of such review in certain cases, not involving acts of Congress, while denying it in others where acts of Congress are involved. To establish a final point in Marshall's favor, does not a simple principle of consistency require that judicial review should either be granted in *all* cases, whether or not an act of Congress is challenged on constitutional grounds, or in none of the cases all of which arise under the Constitution? An argument can be made that the answer is "no." Indeed we have already canvassed the argument and need only summarize it here. In cases raising constitutional issues *which Congress has not attempted to resolve,* the Court must of necessity render its own interpretation of the part of the Constitution in question if only to decide the case. Moreover, it should do so "to support the Constitution." Where Congress has considered the issue and has interpreted the Constitution in the course of adopting relevant legislation, however, the matter is properly foreclosed to the courts which are not to oppose themselves to Congress which is itself fully answerable to the people. The Court is not similarly answerable, of course, and thus certainly ought not supererogate a power of judicial review for which it is politically unaccountable in what we believe to be a democratic republic.[43]

Looking back, it may seem that an unfairness has been done to Marshall's opinion. Each argument, and each textual fragment on which the argument rested, may not seem especially compelling by itself. However, perhaps the separate pieces support each other, the fragments draw together, and the "whole" of Marshall's argument is much better than each part separately considered.

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[43] A different point based in Articles III and VI has been raised in favor of judicial review elsewhere, and might briefly be considered at this time. The point is that Article VI contemplates that *state* courts shall have to pass upon questions of constitutional interpretation, and that it is hardly imaginable that the scope of judicial review of such decisions in the Supreme Court would be less broad. The point does not carry far. Again, the prerogative of state and federal courts to interpret the Constitution other than when an act of Congress is involved need not be denied. Moreover, even though Article VI may anticipate that state courts will initially be reviewing acts of Congress which are simply drawn into controversy in cases properly originating in the state courts, that does not mean that such courts are to question the constitutionality of such acts. Rather, it may mean only that *the state court judges are bound to apply those acts* as the supreme law, "anything in the Constitution or Laws of any state to the contrary notwithstanding." More than this, if Congress becomes dissatisfied with state court treatment of its statutes, rather than worrying about it Congress may simply forbid such matters to be litigated in the state courts. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

Constitutionality of Section 13

Assuming that section 13 of the Judiciary Act of 1789 does confer original jurisdiction in this case, and assuming also that its substantive constitutionality is subject to independent judicial review, is that section constitutional? In view of the extended discussion above, this issue is almost anti-climactic. Still, it has its own practical and legal importance. If the Court had concluded that the act was constitutional, presumably it would have issued the writ against Madison. If Madison, on Jefferson's instruction, had refused to honor that writ how would it have been enforced? Who would enforce it? The prospect of this problem may well have influenced the decision as to the constitutionality of section 13.

Essentially, Marshall's argument that the act is unconstitutional comes to this: Article III *restricts* the original jurisdiction of the Supreme Court to certain limited types of cases, those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." Section 13 of the Judiciary Act attempts to expand the Court's original jurisdiction beyond the limitation provided in Article III, and section 13 is therefore repugnant to the Constitution. Since a close reading of Article III itself will not discover any explicit statement clearly providing that the Court's original jurisdiction cannot be expanded to absorb some cases that might otherwise fall only within its appellate jurisdiction, however, it becomes necessary to study Marshall's opinion to determine on what basis he correctly, or incorrectly, inferred such a limitation. Marshall acknowledges the point just made and attempts to answer in the following fashion:

> 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.

Here, as elsewhere, Marshall's essential point is that any interpretation other than the one he finds would leave the text being interpreted without any significance and would have to serve no useful purpose.[44] In this, he has clearly overstated the situation. Indeed his own interpretation may *weaken* the Court's power far more than another interpretation wholly compatible with the text of Article III, section 2, clause two.

The clause readily supports a meaningful interpretation that the Court's original jurisdiction may not be *reduced* by Congress, but that it may be supplemented by adding to it original jurisdiction over some cases which would otherwise fall only within its appellate jurisdiction. Such a reading makes sense and makes no part of the clause surplusage. Thus it might be supposed that certain kinds of cases—those affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a Party—could have been regarded by the framers of Article III as of such importance that they should enjoy original access to the Supreme Court. Cases affecting Ambassadors might be felt as involving such sensitive relations with foreign countries, and cases in which a state is a party might be felt as involving sensitive issues of federalism or interstate relations, that neither a state nor an Ambassador should be answerable in an inferior court. Arguably, therefore, these cases merely constitute an *irreducible minimum* of Supreme Court original jurisdiction: cases which Congress may not relegate exclusively for trial elsewhere.

It is true, of course, that the very next sentence provides that "in *all* the other Cases before mentioned (including cases arising under

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[44] It can be plausibly argued, however, that the Article III division of judicial power between appellate and original jurisdiction served a useful purpose other than that insisted upon by Marshall. Had Congress *not* adapted the Judiciary Act of 1789 or taken any other action describing Supreme Court jurisdiction, the division itself would have provided a guideline for the Court to follow until Congress was inclined to act. Not knowing whether that future Congress would consider the issue, perhaps the framers merely provided for the division of Supreme Court jurisdiction against the contingency of congressional action.

'the Laws of the United States' such as Marbury's case), the Supreme Court shall have appellate jurisdiction, both as to Law and Fact," but the comma is immediately followed by the qualification: "*with such Exceptions,* and under such Regulations as the Congress shall make." It is reasonable to read this as saying that Congress may except certain cases otherwise subject only to the Court's appellate jurisdiction *by adding them to the Court's original jurisdiction*, which, it might be added, is precisely what Congress did in section 13 of the Judiciary Act. This construction of the whole clause is sensible and leaves nothing as mere surplusage.

It is also noteworthy that the Judiciary Act of 1789 was adopted by the first Congress organized under the new Constitution, just two years after the Constitution was proposed and in the same year that it took effect, and that some of the same men who participated in the Constitutional Convention also participated in the enactment of the Judiciary Act. The Court should assume that the first Congress knew what it was doing. In *McCulloch v. Maryland*,[45] Marshall upheld a federal statute and observed: "The power now contested was exercised by the first Congress elected under the present constitution. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance."

In other respects, affirmative words have not been taken as negativing other objects than those affirmed, although they more generally have been so treated. For instance, Article I, section 8, clause 6 authorizes Congress "to provide for the Punishment of counterfeiting the Securities and current Coin of the United States," but this has not been construed as impliedly forbidding Congress to impose penalties for other reasons.[46]

But more practically, Marshall's construction of Article III does much more to weaken the Court's power, including even its power of constitutional review, than would have resulted from another construction perfectly available to him. It is ironic that this would have occurred in the very case celebrated because of its alleged aggrandizement of judicial power. Under Marshall's construction, Congress may not add to the Court's original jurisdiction but it

[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] *See also* Cohens v. Virginia, 20 U.S. (6 Wheat.) 264 (1821).

may, by simple act, *subtract* from the Court's appellate jurisdiction, such jurisdiction being subject to "such Exceptions . . . as the Congress shall make." It is really cases within its appellate jurisdiction, however, where nearly all of the Court's significant work is done. Thus Marshall's opinion implies that Congress may readily undercut the whole power of constitutional review simply by cutting back on the Court's appellate jurisdiction in such a fashion that it never gets a case in which to exercise its power of that review.[47] Similarly, Congress could avoid constitutional review of its acts in the inferior courts by eliminating such courts—something clearly within its constitutional authority.[48]

However this may be, it is possible that Marshall missed a chance for the Court. He could have held: (a) the Article III grant of Supreme Court original jurisdiction is an irreducible minimum; and (b) Congress may supplement that jurisdiction by excepting cases otherwise within the appellate jurisdiction; and (c) indeed the *only* way in which Congress may create exceptions to the Court's appellate jurisdiction is by means of adding such cases to its original jurisdiction because Article III itself provides that "the judicial Power of the United States *shall* be vested in one supreme Court," and this necessarily means that the *whole* power shall be vested in one way or the other. However, it is conceivable that such a theory could work against the Court, by allowing Congress to sink the Court beneath an unbearable workload of cases assigned to its original jurisdiction.

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[47] *See, e.g., Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[48] If Congress could block review by state courts, as well as federal courts, it thus could effectively establish congressional supremacy. *See* Yakus v. United States, 321 U.S. 414 (1944). *But see* Oestereich v. Selective Service System Local Board No. 11, 37 U.S.L.W. 4053, 4056 n.6 (U.S., Dec. 16, 1968) (concurring opinion) ("It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims."); Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) ("There is a serious question whether the McCardle case could command a majority view today."). *See also Hearings on "The Supreme Court" Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968). Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sedler, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99 (1958).

III. A Specification of the Holding on Constitutional Review

In litigation before the Supreme Court, the Court may refuse to give effect to an act of Congress where the act pertains to the judicial power itself. In deciding whether to give effect to such an act, the Court may determine its decision according to its own interpretation of constitutional provisions which describe the judicial power.

Thus described, the holding in *Marbury v. Madison* is less remarkable than generally supposed. It is also, however, far more defensible because it draws upon one's sympathy to maintain the Court as a co-ordinate branch of government, and not as a superior branch. It represents a defensive use of constitutional review alone, acquiring considerable support from the concept of *separated* powers. It merely minds the Court's *own* business (*i.e.*, what cases shall originate in the Court, what cases shall be treated on appeal or otherwise). Were the Court to lack *this* capacity, it could scarcely be able to maintain even the ordinary function of *non*constitutional judicial review.

An excellent statement which deflates and rehabilitates *Marbury v. Madison* appears in a recent article by Professor Strong.[49] As he puts it:

> Very possibly this is one explanation of the fact that the full development of judicial review of constitutionality was a much slower process than is almost universally assumed. *Marbury v. Madison* claimed this power for the United States Supreme Court only in the defensive sense of safeguarding the Court's original jurisdiction from congressional enlargement. A clearer case of defensive judicial review of constitutionality for the protection of the judicial power against legislative tinkering had been *Bayard v. Singleton* (1 N.C. (1 Martin) 48 (1787)), the decision of the Supreme Court of North Carolina which is generally acknowledged to have been the strongest precedent for constitutional review prior to the Philadelphia Convention. Of *Bayard v. Singleton* Louis Boudin wrote with rare insight, "Not only did this case not involve the confiscation laws as such, but it did not even involve the question of trial by jury, which it is commonly alleged to have involved. For the question was not whether a trial ought to be with or without a jury,

[49] Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111, 249 (1967).

but whether there should be a trial at all *i.e.*, whether the judges had a right to hear the cases. And one need not be a supporter of the Judicial Power in any of its formulations in order to believe that the Judiciary have a right to hear and determine cases." (1 GOVERNMENT BY JUDICIARY 66 (1931).

If Mr. Boudin had no quarrel with the North Carolina case, what made his two-volume work on *Government by Judiciary* so severe a condemnation of what he called the Judicial Power? The explanation lies in the extension of constitutional judicial review to acts of Congress; to separation-of-powers conflicts between legislative and executive branches, which are of no such concern to the courts as are those conflicts involving the courts' own powers; to federalistic questions; and to direct limitations on the powers of government. These several forms of extension occupied a considerable portion of the nineteenth century; the end of the full development can be dated as late as 1890, the year in which *Chicago, M. & St. P. Ry. v. Minnesota* (134 U.S. 418 (1890)) subjected rate regulation to the rigors of substantive due process. That the great portion of the development of judicial review of constitutionality, measured at least in terms of significance, postdates *Marbury v. Madison* is the insight of a commentator on the development of American constitutional law. Observed he: 'It is with *Fletcher v. Peck* [1810] that the unforeseen possibilities of judicial review begin to appear.' (WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 78 (1942)).

We have thus far described the holding respecting constitutional review in *Marbury* as a very limited thing by concentrating on the character of the act of Congress actually involved in the case. As thus limited, it is fair to conclude that the case does not establish constitutional review of acts of Congress regarding any subject other than the judicial power itself, *e.g.*, it does not establish such review for acts concerning "separation-of-powers conflicts between legislative and executive branches, which are of no such concern to the courts as are those conflicts involving the courts' own powers; to federalistic questions; and to direct limitations on the powers of government."

It must be conceded, however, that this view of "the holding" is one we bring to the case rather than one which clearly characterizes Marshall's opinion. Even an unhurried rereading of the case is not likely to suggest that Marshall was emphasizing, or limiting himself to, the legitimacy of constitutional review used only defensively in

the protection of the balance of judicial power. For instance, he does not emphasize the concept of separation of powers in *this* limited sense, but considers it in the more grandiose sense that the whole business of interpreting "law"—including the "law" of the Constitution—is emphatically judicial business. Remember also his statement, which seems to look well beyond the character of the case at hand: "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?"

It is unsurprising, therefore, that the "holding" has been generally regarded as a broader one which carries at least this far: *In litigation before the Supreme Court, the Court may refuse to give effect to an act of Congress where, in the Court's own view, that act is repugnant to the Constitution.*

This is, of course, a significantly broader holding than the first one suggested. It means that the Court will withhold its power even when the efficacy of an act of Congress depends on the co-operation of that power against private citizens, corporate interests, state interests, or executive interests, whenever the Court concludes that the act is repugnant to the Court's own interpretation of some constitutional provision. It may be characterized by the phrase "national, substantive constitutional review."

Even this breadth of holding, however, falls far short of cementing the notion of "judicial supremacy." It does not mean, for instance, that either Congress or the President need defer to Supreme Court interpretations of the Constitution so far as their own deliberations are concerned and so far as the efficacy of their power does not depend upon judicial co-operation.

When a bill is under consideration, for example, Congress might conscientiously reject the bill believing that bill to be unconstitutional even assuming that the Court has provided no precedent for that belief and even assuming that the Court has itself upheld similar legislation adopted by an earlier Congress. Similarly, the President may veto the bill on the grounds of his own interpretation of the Constitution—whether or not it is the same as the Court's. So, too, might he decline to enforce an act of Congress on such a basis.[50]

[50] Should a president refuse to enforce an act of Congress on the ground that he believed the act to be unconstitutional, he may incur the political risk of impeachment if Congress chooses to describe his conduct as failing in his duty faithfully to execute the laws.

The concept of national, substantive judicial *review*, moreover, does not preclude independent prerogatives of Congress and the President to prefer their own constitutional interpretations even when the Court, for its part, has interpreted the Constitution in such a manner as to sustain the bill. A clear instance might involve the use of the executive clemency power, used by Jefferson to pardon those convicted under the Alien and Sedition Acts which had been upheld in the lower federal courts, on the grounds that in the President's own view those acts were repugnant to the Constitution. A harder instance might involve the decision of the President not to enforce an act of Congress because of his own belief that it was unconstitutional, even after the act had been tested and upheld in the Supreme Court.

There is, then, no doctrine of national, substantive judicial *supremacy* which inexorably flows from *Marbury v. Madison* itself, *i.e.*, no doctrine that the only interpretation of the Constitution which all branches of the national government must employ is the interpretation which the Court may provide in the course of litigation.

Beyond this lies the observation that *Marbury* does not pass upon the separate question of *federal* substantive constitutional review or *federal* substantive judicial supremacy. The case provides no occasion to determine the role of the states in the interpretation of the Constitution; no issue of federalism is present in the case. By itself, it does not settle any of these questions: (1) Are state courts bound by Supreme Court interpretations of the Constitution respecting the constitutionality of *federal* laws, and (2) are state courts bound by Supreme Court interpretations of the Constitution respecting the constitutionality of *state* laws? To put the matter more orthodoxly, are state court judgments involving interpretations of the United States Constitution subject to revision by the Supreme Court? This question presents new considerations of federalism not treated in *Marbury*. They might have been answered in favor of state determinism, without disturbing *Marbury's* "holding" as to national, substantive judicial review.[51] The issue was, of course, resolved in favor of federal constitutional review.[52]

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[51] *See* J. MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800).

[52] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

If, at this juncture, it should be thought surprising that *Marbury v. Madison* could sensibly be considered by anyone as authoritatively establishing the doctrine of federal substantive judicial supremacy, however, one need look no further than the Supreme Court itself to find an example of such a view! In *Cooper v. Aaron*,[53] the Court said the following with respect to the exclusiveness of its own constitutional interpretations as applied to state laws and the obligations of state officials:

> This decision [*Marbury v. Madison*] 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.

IV. SUPPLEMENTARY MATERIALS RE THE "LEGITIMACY" OF HORIZONTAL CONSTITUTIONAL REVIEW

Because of the difficulty in drawing together the various historical source materials, the following excerpts are here collected to lend some insight into the constitutional viewpoints contemporary with the *Marbury* decision.

Excerpts from The Federalist (Nos. 78, 81)

> [T]he judiciary . . . will always be the least dangerous to the political rights of the Constitution. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
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> . . . .
>
> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. . . . 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

[53] 358 U.S. 1, 17-19 (1958).

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.

. . . .

From a body [such as Congress] which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in that of judges.

Excerpts from The Antifederalist Papers (Borden, ed., 1965, pp. 222-40; the following by "Brutus" [thought to be either Thomas Treadwell or Robert Yates], and originally appearing in the New *York Journal*, March 20-April 10, 1788)

The judges in England are under the control of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will control the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress. They are to give the constitution an explanation, and there is no power above them to set aside their judgment.

. . . .

The power of this court is in many cases superior to that of the legislature. I have showed, in a former paper, [see Antifederalist Nos. 80, 81, 82] that this court will be authorized to decide upon the meaning of the constitution, and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution; they cannot assume any of the rights annexed to the judicial; for this plain reason, that the same authority which vested the legislature with their powers,

vested the judicial with theirs. Both are derived from the same source; both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial. The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. . . . The judges are supreme—and no law, explanatory of the constitution, will be binding on them.

Earlier Expressions by John Marshall

In a speech in the Virginia Constitutional Convention of 1788, Marshall approved the Judiciary Article and declared:

> If they [Congress], were to make a law not warranted by any of the powers enumerated, it would be considered by the [National] judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. *They would declare it void.* . . . To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection. A. BEVERIDGE, I THE LIFE OF JOHN MARSHALL 452 (1916).

Compare the following position communicated by Marshall to Mr. Justice Chase on January 23, 1804, in the course of Chase's impeachment trial:

> According to the ancient doctrine a jury finding a verdict against the law of the case was liable to an attaint; & the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.
>
> As, for convenience & humanity, the old doctrine of attaint has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault. A. BEVERIDGE, III THE LIFE OF JOHN MARSHALL 177 (1916).

Expressions in the Philadelphia and State Conventions

Remarks by Elbridge Gerry (Massachusetts) in opposition to a proposal that the Constitution provide for a Council of Revision consisting of the Justices of the Supreme Court and the President of the United States, with power to veto Acts of Congress, speaking in the Philadelphia Convention meeting as a Committee of the Whole, June 4, 1787:

> Mr. GERRY doubts whether the judiciary ought to form a part of it, as they will have a sufficient check against 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 against the constitution. This was done, too, with general approbation. It was quite foreign from the nature of their office to make them judges of the policy of public measures. He moves to postpone the clause, in order to propose, "that the national executive shall have a right to negative any legislative act which shall not be afterwards passed by _____ parts of each branch of the national legislature. [Motion adopted, 6 votes to 4.] V ELLIOT'S DEBATES 151 [Madison's Diary] (1937).

Remarks by Luther Martin (Maryland), in opposition of joining Supreme Court Justices in a Council of Revision, speaking in the Philadelphia Convention, July 21, 1787:

> Mr. L. MARTIN considered the association of the judges with the executive as a dangerous innovation, as well as one that could not produce the particular advantage expected from it. A knowledge of mankind, and of legislative affairs, cannot be presumed to belong in a higher degree to the judges than to the legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the executive on the revision, and they will have a double negative. It is necessary that the supreme judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the legislature. Besides, in what mode and proportion are they to vote in the council of revision? V ELLIOT'S DEBATES 346-47 [Madison's Diary] (1937).

Then follow remarks by Madison, favoring combining the Judges and the Executive in the Council of Revision, followed by Mason (Virginia) to the same effect, and adding:

> Col. MASON observed, that the defense of the executive was not

the sole object of the revisionary power. He expected even greater advantage from it. Notwithstanding the precautions taken in the constitution of the legislature, it would still so much resemble that of the individual states, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It should have the effect, not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It has been said, (by Mr. L. Martin), that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges, they would have one negative. He would reply, that in this capacity they could impede in one case only the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust, oppressive, or pernicious, that did not come plainly under this description, they would be under the necessity, as judges, to give it a free course. He wished the further use to be made of the judges of giving aid in preventing every improper law. (The motion so to join the judiciary in the revision of laws then lost, 3 votes to 4, 2 states dividing, one not present.) V ELLIOT'S DEBATES 347-48 [Madison's Diary] (1937).

Remarks by Gouverneur Morris (Pennsylvania), John Dickinson (Delaware), and John Mercer, on further proposal by Madison for vesting limited legislative veto power partly in the judiciary, speaking in the Philadelphia Convention, August 15, 1787:

Mr. MERCER heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative, but equally so, that it ought to be independent of that department. The true policy of the axiom is, that legislative usurpation and oppression may be obviated. He disapproved of the doctrine, that the judges, as expositors of the Constitution, should have the authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.

Mr. GERRY. This motion comes to the same thing with what has been already negatived.

[Madison's motion was then voted upon and lost, 3 votes to 8].

. . . .

Mr. DICKINSON was strongly impressed with the remark of Mr. Mercer, as to the power of the judges to set aside the law. He thought no such power ought to exist. He was, at the same time, at a loss what expedient to substitute. The justiciary of Arragon, he observed, became by degrees the law giver.

Mr. GOUVERNEUR MORRIS suggested the expedient of an

absolute negative in the executive. He could not agree that the judiciary, which was part of the executive, should be bound to say, that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences; but view the danger on the other side. The most virtuous citizens will often, as members of a legislative body, concur in measures which afterwards, in their private capacity, they will be ashamed of. Encroachments of the popular branch of the government ought to be guarded against. V ELLIOT'S DEBATES 429-30 [Madison's Diary] (1937).

Remarks by James Wilson in the Pennsylvania ratifying convention, speaking on December 7, 1787:

The article respecting the judicial department is objected to as going too far, and is supposed to carry a very indefinite meaning. Let us examine this: "The judicial power shall extend to all cases, in law and equity, *arising under this Constitution and the laws of the United States.*" Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them? The honorable gentleman from Cumberland (Mr. Whitehill) says that laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous. For my part, Mr. President, I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers to government being defined, will declare such law to be null and void: for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law. II ELLIOT'S DEBATES 489 (1937).

Letter by Luther Martin, delegate from Maryland to the Philadelphia Convention, to Speaker of the House of Delegates of Maryland, explaining sources of his dissatisfaction with the proposed Constitution. The context is one of examining the weak position of the states in the determination of the constitutionality of Acts of Congress:

Whether, therfore, any laws or *regulations* of the Congress, any acts of *its President* or *other officers*, are contrary to, or not warranted by, the Constitution, rests only with the judges, who are appointed by Congress, to determine; by whose determinations every state must *be bound*. I ELLIOT'S DEBATES 344, 380 (1937).

Antecedent Judicial Practice

Professor Sutherland (CONSTITUTIONALISM IN AMERICA 236-39 (1965)) points out that constitutional review of federal statutes had been exercised by the Supreme Court even prior to *Marbury v. Madison*, and that *Marbury* was simply the first case in which a statute had been voided, rather than upheld, in the course of such review. In *Hylton v. United States*, 3 Dallas 171 (1796), for instance, an unapportioned tax on carriages was upheld against a complaint that it was a "direct" tax and therefore unconstitutional because not apportioned. Consideration of the argument on its merits implicitly affirmed the Court's prerogative to refuse judicial enforcement of a federal statute not authorized by the Constitution as interpreted by the Court itself.

The same point is developed more elaborately by Professor Mason (THE SUPREME COURT 73-76 (1962)) where he says, in part:

> Before Marshall, the Court had not actually asserted the authority to declare acts of Congress unconstitutional. But it had entertained that right in several important cases, including *Hayburn's Case* (1792), *Van Horne's Lessee v. Dorrance* (1795), and *Hylton v. United States* (1796). In 1797 the Court set aside a Virginia statute regulating the rights of British creditors as in conflict with a federal treaty. 'It is, indeed, a general opinion,' Justice Chase commented in *Cooper v. Telfair*, 'it is expressly admitted by all this bar, and some of the Judges have, individually, in the circuits, decided, that the Supreme Court can declare an Act of Congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point.'

See also the chapter by Professor Kernochan in DOWLING & GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 19-31 (1965), adding evidence of state court practice of constitutional review of state legislation (the review being under written state constitutions or natural law) before 1789 as well as before 1803.

Is it truly important that the Court possess the power of horizontal (or national) substantive constitutional review? Consider this statement:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

Consider, too, that the denial of such power would still leave the Court the more ordinary authority of judicial review to *interpret* Acts of Congress involved in litigation. As to this, it has been said:

> [W]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them. GRAY, NATURE AND SOURCES OF THE LAW (2d ed. 1924) (Bishop Hoadly).

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