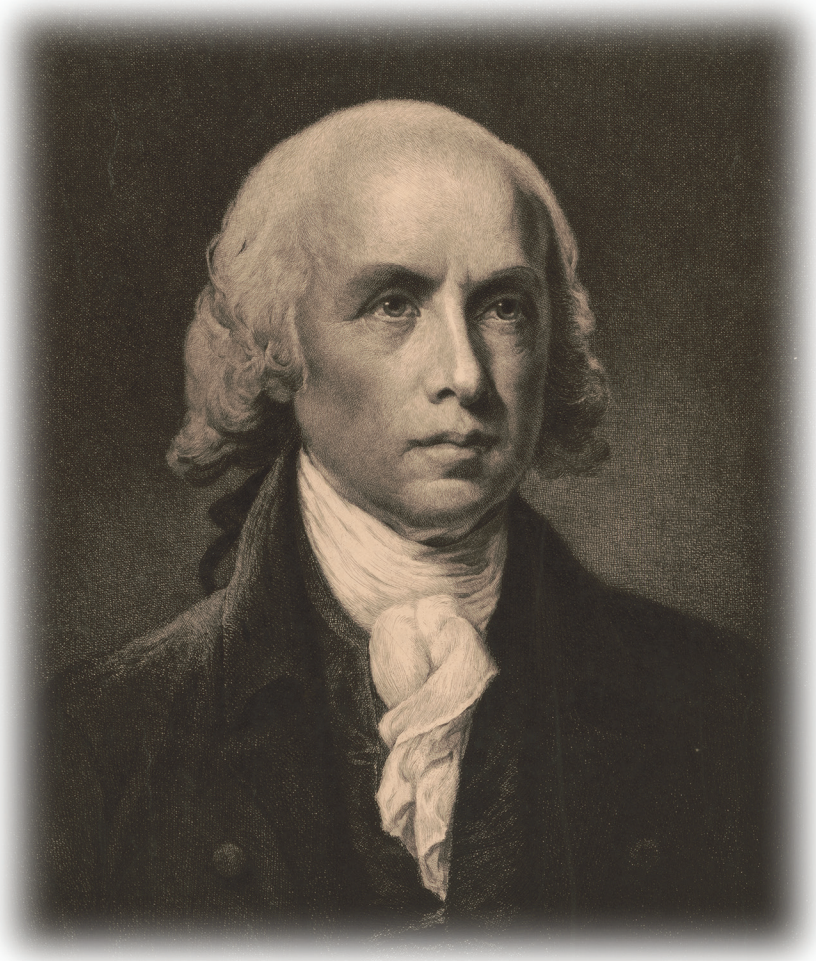
Cases that Shaped the Federal Courts

# *Marbury v. Madison*

## 1803



President James Madison

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# Central Question

Could federal courts invalidate laws made by Congress that violated the Constitution?

## Historical Context

*Marbury v. Madison* (1803) was the first case in which the Supreme Court of the United States invalidated a law passed by Congress. Chief Justice John Marshall's opinion for the Court articulated and defended the theory of judicial review, which holds that courts have the power to strike down legislation that violates the Constitution. Though judges rarely used this power before the U.S. Civil War (1861–1865), it increasingly framed an important element of the judiciary's role in interpreting the Constitution. In part because of this, and in part because the facts of the case implicated a political struggle between the nation's leading political figures, many scholars identify *Marbury* as one of Supreme Court's most important decisions.

## Legal Debates Before *Marbury*

Historians debate the degree to which Marshall's *Marbury* decision broke new ground. While the Constitution anticipated that the courts might hear cases "arising under" its provisions, it did not explicitly mention judicial review. The framers had considered plans for a "counsel of revision," comprised of the President and federal judges, which would rule on constitutional issues, but ultimately rejected the idea. There were also relatively few historical precedents for judges striking down laws. The British Privy Council had invalidated some colonial legislation, but this procedure was unpopular with many Americans. Moreover, although a 1610 case had suggested that English courts might strike down laws that were "against common right and reason," there was widespread consensus that English courts could not, in fact, invalidate acts of Parliament by the time the colonies declared their independence in 1776. England, however, did not have a written constitution, and it was unclear whether the new U.S. Constitution, which created an independent national judiciary, granted American judges new powers.

During its ratification, some prominent figures argued that the Constitution implicitly required courts to strike down unconstitutional legislation. In *Federalist* no. 78, for example, Alexander Hamilton asserted that "[n]o legislative act … contrary to the constitution can be valid" and defended "the right of the courts to pronounce legislative acts void." In 1788, future Chief Justice Oliver Ellsworth assured delegates at Connecticut's ratifying convention (a body formed to debate the adoption of the Constitution) that "upright, independent judges" would guard the Constitution by striking down laws violating its pro-

tections. Marshall made similar statements to the Virginia convention. Some critics of the new Constitution also suggested that judges would invalidate state and federal legislation, though they saw this as a flaw in the document's design. The Anti-Federalist "Brutus," for example, referred to judicial review as an "uncontroulable power[.]" In the years following ratification, a few state courts struck down statutes on constitutional grounds; scholars debate how much weight these precedents carried.

## The Case

In the late 1790s and early 1800s, American political life was dominated by the animosity between Federalists, led by John Adams, and Democratic-Republicans, led by Thomas Jefferson. The Democratic-Republicans defeated the incumbent Federalists in the congressional and presidential elections of November 1800, but the "lame-duck" Federalists retained control until the following March. In that time, Congress created several new judicial positions, to which the outgoing President Adams attempted to appoint Federalist allies. Many Federalists saw these appointments as a way to influence the government while they were out of political power. As a result, the appointment of these so-called "midnight judges" proved controversial.

When Ellsworth resigned for health reasons shortly after the election, Adams also gained the opportunity to fill the vacant Chief Justice position. John Jay (who had previously served as Chief Justice, but resigned to run for Governor of New York in 1795) turned the position down. Adams then nominated Marshall, his Secretary of State. The Senate quickly confirmed Marshall to the post. Somewhat unusually, Marshall continued serving as Secretary of State after his judicial appointment. In a twist of fate that would have implications for the *Marbury* case, this role required him to process commissions (legal documents formalizing government appointments) for the recently appointed judges, including William Marbury.

On March 2, 1801, the day before the end of his presidency, Adams nominated Marbury to serve in the newly created post of justice of the peace in the District of Columbia. The Senate approved Marbury's nomination the next day. Adams promptly signed Marbury's commission and Marshall affixed an official seal to the document. Marshall's brother, James, was supposed to deliver the commissions to the judges, but returned several, including Marbury's, when he found he could not carry them all. Marbury had not received his commission when Marshall left office shortly after Adams.

At Jefferson's behest, Marshall's successor refused to deliver the commission (future President James Madison eventually filled the post of Secretary of State, but it appears the initial decision involved Attorney General and temporary Secretary of State Levi Lincoln). Marbury sued Madison in the Supreme Court, seeking a writ of mandamus. Petitions for

writs of mandamus requested court orders commanding an official to perform his or her duty. While the petition was pending before the Court, Congress passed a law changing the timing of the Supreme Court's term, meaning the Court did not reopen until February 1803.

## The Supreme Court's Ruling

When the Supreme Court finally heard the case, Madison declined to appear, apparently believing that the Court did not have the power to compel him to give Marbury his commission. After hearing Marbury's arguments, Marshall wrote an opinion for a unanimous Court. Marshall broke the case down into three questions:

1) Was Marbury entitled to the judicial commission?
2) Did the law provide him with a "remedy" (a way to get the commission)?
3) Was the appropriate remedy a writ of mandamus from the Supreme Court?

Marshall answered "yes" to the first two questions. Once the commission had been signed and sealed, Marbury had been appointed a judge and the delivery of the commission was a simple formality that Madison was duty-bound to perform. Madison's high office did not insulate him from accountability to the law.

Marshall's answer to the final question, however, proved more complicated. A part of the Judiciary Act of 1789, the federal law that organized the federal court system, provided that the Supreme Court had the power to issue writs of mandamus. However, Marshall held that this grant of power exceeded the Court's jurisdiction under Article III of the Constitution. Article III listed two sets of cases that the Supreme Court may hear: appeals and original suits. Marbury's case was clearly not an appeal from a lower court, so he had to show it was within the Court's original jurisdiction. The Court's original jurisdiction was limited to a narrow group of cases (suits involving ambassadors, for example). Since petitions for writs of mandamus were not among the original jurisdiction cases listed in Article III, suits like Marbury's were not included in the Supreme Court's original jurisdiction under Article III. Marshall reasoned that Congress could not give the Court powers that were not included in the Constitution, so the part of the Judiciary Act that gave the Court the ability to hear original suits seeking writs of mandamus was unconstitutional.

## Aftermath and Legacy

*Marbury v. Madison* is now widely regarded as one of the Supreme Court's most important opinions. Many subsequent landmark federal cases have relied on the judiciary's ability to strike down acts of Congress. The case has also had many critics, however. Thomas Jef-

ferson criticized Marshall for engaging in unnecessary editorialization, believing the case should have begun and ended with the conclusion that the Court did not have jurisdiction. Edward Corwin, one of the leading legal scholars of the first half of the twentieth century, went further, claiming the case bore "many of the earmarks of a deliberate partisan coup." Moreover, while the Supreme Court did not strike down another federal statute for more than fifty years, the second case in which it did so became one of the most infamous decisions in American legal history. In *Scott v. Sandford* (1857), often known as the *Dred Scott* case, Marshall's successor, Roger Brooke Taney, invalidated the Missouri Compromise of 1820, reasoning in part that it improperly interfered with slaveholders' rights to transport enslaved people as their property and exceeded Congress's power to regulate federal territories. In 1861, President Abraham Lincoln, likely thinking of *Dred Scott*, argued for a limited form of judicial review. Similarly, federal cases striking down economic legislation during the 1930s angered President Franklin Roosevelt and many of his supporters and led to arguments for restraints on judicial power.

## Discussion Questions

- Some scholars have argued that the concept of judicial review flows inevitably from the existence of a written Constitution and a Supreme Court. Do you agree? How might American government be different if Marshall had held that courts could not question the constitutionality of laws once Congress passed them and the President signed them?
- Did the heated political climate around this case influence the outcome? Do you see any signs of partisanship in Marshall's opinion, or was it a neutral exercise of judicial interpretation?
- Unlike the President and members of Congress, federal judges are not elected and do not have specific term limits. Is their exercise of judicial review over laws passed by such elected officials democratic?
- Some commentators have noted the unusual situation of Marshall judging a case in which he played an important part. What potential difficulties might follow from judges hearing cases in which they are involved? Should Marshall have decided the case at all? What rules should govern whether judges can hear cases?

# Documents

## "Brutus XII," *The Anti-Federalist Papers*, 1788

*This essay, one of several urging New York to reject the proposed Constitution of the United States, was written by an anonymous author adopting the pseudonym "Brutus." It argues that the power of judicial review would make the judiciary too strong. Though the essay was written before* Marbury*, it reflects many concerns with judicial review that persisted into the 1800s.*

In my last, I shewed, that the judicial power of the United States under the first clause of the second section of article eight, would be authorized to explain the constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.…

It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined. And there is little room to doubt but that they will come up to those bounds, as often as occasion and opportunity may offer, and they may judge it proper to do it. For as on the one hand, they will not readily pass laws which they know the courts will not execute, so on the other, we may be sure they will not scruple to pass such as they know they will give effect, as often as they may judge it proper.…

Document Source: "Brutus XII," *The Anti-Federalist Papers* (February 7, 1788).

## Alexander Hamilton, *Federalist* no. 78

*Like Brutus, Alexander Hamilton, writing under the pen name "Publius," argued that the federal courts would have the power of judicial review. Unlike his Anti-Federalist counterpart, however, Hamilton rejected the idea that this power was prone to abuse.*

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.…

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

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

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not other-

wise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.…

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

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

Document Source: Alexander Hamilton, *Federalist* no. 78 (1788).

## Supreme Court of the United States, Opinion in *Marbury v. Madiso*n, February 24, 1803

*One of the many changes Marshall brought to the Supreme Court was the abolition of "seriatim" opinions. Under this style, each individual justice provided his reasoning for the decision in*

*the case separately. Marshall instead insisted that the justices speak with one voice whenever possible. This portion of his opinion for the unanimous Court discusses the issue of judicial review.*

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

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

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.…

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

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

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

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

Could it be the intention of those who gave this power, to say that, in using it, the

constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.…

[I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

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

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

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

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

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

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

Document Source: *Marbury v. Madison*, 5 U.S. 137, 176–80 (1803).

## Letter from Thomas Jefferson to Justice William Johnson, June 12, 1823

*Thomas Jefferson's first Supreme Court appointee, William Johnson, served on the Court from 1804 to 1834. He frequently disagreed with Marshall and became known for his dissenting opinions. In this letter, an elderly Jefferson replied to Johnson's request for the former President's view on the Supreme Court's role. Jefferson's response focused on a critique of two major cases*

*in which, he claimed, Marshall had gone beyond the appropriate role of judge:* Marbury *and* Cohens v. Virginia *(1821), which held the Supreme Court could overturn state criminal convictions that violated the Constitution.*

You request me confidentially, to examine the question, whether the Supreme Court has advanced beyond its constitutional limits, and trespassed on those of the State authorities? [Jefferson then noted criticisms of Marshall's opinion in *Cohens.*] …

This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly perhaps, because it in some measure, bore on myself. among the midnight appointments of mr Adams were commissions to some federal justices of the peace for Alexandria. these were signed and sealed by him, but not delivered. I found them on the table of the department of State, on my entrance into the office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme court, for a Mandamus to the Secretary of State (mr Madison) to deliver the commission intended for him. the court determined at once, that being an original process, they had no cognizance of it; and there the question before them was ended. but the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit, that they should command the delivery. the object was clearly to instruct any other court having the jurisdiction, what they should do, if Marbury should apply to them. besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? for 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. although signed and sealed, yet as long as it remains in the hands of the party himself, it is in fieri [incomplete] only, it is not a deed, and can be made so only by his delivery. in the hands of a third person it may be made an escrow. but whatever is in the executive offices is certainly deemed to be in the hands of the President; and in this case was actually in my hands, because, when I countermanded them, there was as yet no Secretary of state. yet this case of Marbury and Madison is continually cited by bench & bar as if it were settled law, without any animadversion on its being merely an obiter [incidental to the case] dissertation of the Chief justice.…

But the Chief justice say 'there must be an ultimate arbiter somewhere'. true there must …. the ultimate arbiter is the people of the Union, assembled by their deputies in Convention, at the call of Congress, or of two-thirds of the states. let them decide to which they meant to give an authority claimed by two of their organs. and it has been the peculiar wisdom and felicity of our constitution to have provided this peaceable appeal, where that of other nations is at once to force.…

Document Source: Thomas Jefferson to Justice William Johnson, June 12, 1823, available from the Library of Congress.

## Jack N. Rakove, *Stanford Law Review*, 1997

*In this essay, constitutional historian Jack Rakove takes issue with the conventional wisdom that* Marbury *was an especially important opinion. In this part of his critique, Rakove argues that* Marbury'*s prominence is partly due to its convenience as a point of departure for teachers and scholars to discuss themes broader than the case itself.*

While leading scholars of constitutional law often apprentice at the Supreme Court, mere constitutional historians visit the Court only as tourists. Thus in 1983, I found it a great pleasure, while attending a conference on international constitution-making held at the Supreme Court, to receive a tour of the chambers guided by Chief Justice Warren Burger and Justice William Brennan. The most intriguing facet of that tour was the visit to the Court's private dining rooms. I was not surprised that a portrait of John Marshall presides over the room where the full Court can dine together. But there was also an inner sanctum serving five, presumably reserved for occasions when a bare majority of justices need to cabal late into the night over a decision. And which judicial luminary hangs on the wall to grace such occasions …? In fact, the place of honor belongs to none other than that disappointed judicial wannabe, William Marbury ….

It is neither unfitting nor improper that Marbury's ruddy visage should hang there. For all intents and purposes, the story of his suit to compel Secretary of State James Madison (whose portrait hangs next to him) to produce the commission that his predecessor, John Marshall had failed to deliver on time marks the dramatic opening scene of the master narrative of the history of American constitutional interpretation.… *Marbury v. Madison* is so firmly enshrined as the dramatic founding moment of the doctrine of judicial review that it is difficult to imagine how it could ever be displaced.…

[T]he primacy of *Marbury* seems so deeply entrenched in legal teaching as well as scholarship that the wages of revisionism appear paltry. One … advantage of retaining *Marbury* as the scene-setting episode of the narrative is that it allows judicial review to be presented as a problem unsullied by the messiness of federalism. *Marbury* is a pure separation of powers case, requiring no nod to the concurrent existence of the states. This reading of *Marbury* makes it easier to exploit, for introductory pedagogical purposes, within the classic Montesquieuian framework of three kinds of power.… For scholars and teachers of constitutional law, *Marbury* has become a story that has to be told less because it is really necessary to know how or where or why judicial review originated, but because agreement on a common point of departure makes it easier to frame and dispute the issues that matter today.…

If we did not already know that *Marbury* was so momentous a case, we would be hard pressed to explain why it is so celebrated.… However intriguing its politics (including

Marshall's failure to recuse himself), the fact remains that the decision had little palpable import. If it did contribute something to the acceptance of judicial review, its impact was limited to the least controversial category of cases: matters relating to the proper duties of the judiciary itself, where the seemingly threatening power was being deployed only to prevent the legislature from encroaching on some carefully drawn, essentially procedural aspect of judicial authority. Most citizens could care less, after all, whether or not the Supreme Court was the proper forum to issue the writ of mandamus that *Marbury* sought.…

[S]uppose that William Marbury (still crushed by the loss of his magistracy) had been out on a bender one evening in 1802 and tumbled into the Potomac, never to be heard from or seen again. His case would have been nonsuited, the issue would never have reached the Court, and no such opinion as *Marbury* would ever have been pronounced. Casebooks and syllabi across the land today would take a somewhat altered form—but does anyone seriously think that American constitutional theory and practice would be any different?…

Document Source: Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49 (1997): 1035, 1037–38, 1039, 1040–41 (footnotes omitted).

## James B. Thayer, *Harvard Law Review*, 1893

*Ninety years after* Marbury*, Harvard Law School professor James Thayer questioned the basis for the doctrine of judicial review and advocated judicial deference to legislation except for the clearest violations of the Constitution. This portion of the article includes Thayer's historical account of the evolution of judicial review in the decades around* Marbury.

How did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?…

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there.…

How came we then to adopt this remarkable practice? Mainly as a natural result of

our political experience before the War of Independence,—as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means,—by forfeiture of the charters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one.…

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took this place; that is to say, our own home population in the several States were now their own sovereign.… After this the … new constitutions . . . were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort.

[Thayer proceeded to describe the process by which several states adopted judicial review as a replacement of British authority over colonial lawmaking.] …

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the [eighteenth] century.…

[Thayer then described state court opinions that gradually accepted an increasingly robust form of judicial review.]

Finally, in 1803 came *Marbury v. Madison* …. The people, it was said, have established written limitations upon the legislature; these control all repugnant legislative Acts; such Acts are not law; this theory is essentially attached to a written constitution; it is for the judiciary to say what the law is, and if two rules conflict, to say which governs; the judiciary are to declare a legislative Act void which conflicts with the constitution, or else that instrument is reduced to nothing. And then, it was added, in the Federal instrument this power is expressly given.…

Much of this reasoning, however, took no notice of the remarkable peculiarities of the situation; it went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations.…

In 1796 Mr. Justice Chase, in the Supreme Court of the United States, said, that without then determining whether the court could declare an Act of Congress void, "I am free to declare that I will never exercise it but in a very clear case." And in 1800, in the same

court, as regards a statute if Georgia, Mr. Justice Patterson … said that in order to justify the court in declaring any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication." …

This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much of which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.…

The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.

Document Source: James B. Thayer, "Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 129, 130–31, 132, 139, 141, 144, 156 (footnotes omitted).

## Randy E. Barnett, *Supreme Court Economic Review*, 2004

*In this article, legal scholar Randy Barnett examines the existing notes from the Constitutional Convention in an effort to determine whether the founders intended to give the courts the power of judicial review Marshall asserted in* Marbury.

Several members of the Constitutional Convention in Philadelphia explicitly assumed that the power to nullify unconstitutional legislation resided in the judiciary even before they settled on the particular wording of the various clauses.… Roger Sherman of Connecticut argued that such a power was "unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union." James Madison of Virginia favored such a negative because states "will accomplish their injurious objects before they can be … set aside by the National Tribunals." … Gouverneur Morris of Pennsylvania argued that the legislative negative was unnecessary because "A law that ought to be negative will be set aside in the Judiciary department." No one in this discussion disputed the power of the judiciary to set aside unconstitutional laws passed by states.

Nor did anyone question that federal judges would have the same power to set aside unconstitutional legislation from congress. Much is made by critics of judicial review of

the Convention's rejection of the proposed council of revision. They infer from the refusal to adopt such a council an intention of the framers that the judiciary defer to legislative will. They rarely mention, however, that the most discussed and influential reason for rejecting the council of revision proposal was the acknowledged existence of a judicial negative on unconstitutional legislation. . . .

During a debate concerning whether judges should be included with the executive in a council empowered to revise laws, the comments of several delegates revealed their assumption that federal judges had the inherent power to hold federal laws unconstitutional. Luther Martin of Maryland stated that "as to the Constitutionality of laws, the point will come before the Judges in their proper official character. In this character they have a negative on the laws." . . .

What is striking in light of these statements is that, throughout the duration of the Convention, I could find no one who disputed the existence of a judicial power to nullify unconstitutional laws. No one. . . .

Document Source: Randy E. Barnett, "The Original Meaning of the Judicial Power," *Supreme Court Economic Review* 12 (2004): 121–23 (footnotes omitted).

# Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the U.S. Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?