**Marbury v. Madison (1803)**

***John Marshall***

Most judicial scholars would agree that *Marbury* v. *Madison* is *the* great case in United States constitutional law. With this case, Chief Justice John Marshall confirmed the Supreme Court's power to review the constitutionality of laws. But the idea of using the law and the courts to restrain excessive government power is deeply rooted in our heritage. Centuries earlier in England, Sir Edward Coke boldly confronted King James I with the assertion that the "King is under God and the law." Throughout the revolutionary period Americans asserted that any infringement of their rights was unconstitutional and void, and once they declared independence, codified these rights in written constitutions with bills of rights.

How should you enforce the written guarantees of these rights? The American answer is judicial review. Between the end of the American Revolution and the ratification of the Constitution, most Americans gradually accepted this idea. After 1780 a number of states asserted judicial review; in fact, state courts disallowed laws in at least twenty cases before 1803. Conservatives came to view judicial review as an excellent way to curb radical legislatures, and advocates of the masses saw them as the best way to protect "the people's" rights from encroachment by the state. Both the New York Constitution of 1777 and later the Pennsylvania Constitution specifically gave their highest courts the right to review the acts of the legislature. Certainly the Founding Fathers believed in judicial review. The decision that there would be a federal judiciary and it should be supreme was made early at the Constitutional Convention. During the debates both supporters of the Constitution [Madison, James Wilson, Elbridge Gerry] and future opponents of the document [George Mason, Luther Martin] agreed that the judiciary would have the power of deciding if laws were constitutional. Even leaders opposed to judicial review saw no viable alternative. During the state debates over ratifying the Constitution, both sides assumed that judicial review of laws was an essential part of the new government. Concern about this prompted Yates to write several of his "Brutus" letters, and caused Alexander Hamilton to pen *Federalist* No. 78 in reply. Thus when Marshall asserted this power for the Supreme Court in 1803, he was not inventing something never heard of before.

Nevertheless, the Constitution does not explicitly call for judicial review by the Supreme Court. So where does Marshall claim this right for the Supreme Court? Start with the Supremacy Clause, that the Constitution is the highest law of the land. Connect that with Article III, which establishes the power of the Supreme Court to decide cases. The Federal Judiciary Act of 1789 provides for Supreme Court review of state cases concerning constitutionality of federal laws, and the Founding Fathers dominated the Congress that passed this legislation. Add in Hamilton's argument from *The Federalist* No. 78 and you can understand Marshall's reasoning. If courts are supposed to interpret the law and decide what it means, and the Constitution is the highest law of the land, then it is the duty of the Supreme Court of the United States to say what the Constitution means and strike down laws in conflict with the document. What hypothetical examples did Marshall use to prove his point? Do you agree with his reasoning?

Marshall is ranked with Charles Evans Hughes and Earl Warren as the greatest chief justices in Supreme Court history. Certainly he created a framework for interpreting the Constitution and governmental powers that dominated the first third of the nineteenth century and affects us yet today. He also ended the practice of every justice issuing separate decisions in favor of a united "opinion of the court," and initiated the conference system used today to hammer out consensus. Marshall was born in Virginia and had a lengthy record of public service before serving on the court. He was an officer in the Continental Army, a member of the Virginia Legislature and state ratifying convention, a special envoy to France, secretary of war, and finally secretary of state before his appointment as chief justice in 1801. His experiences, as well as his close relations with George Washington and Hamilton, made him a dedicated nationalist and supporter of a strong central government.

This case arose out of the party turmoil of the 1790s, and was part of the first peaceful exchange of government power between two parties in our national history. After the debacle of the 1800 elections, the Federalists tried to assure themselves control of one branch of the national government. In the Judiciary Act of 1801 and the Organic Act for the District of Columbia, the Federalists created more district courts and also justices of the peace for the District. All would need to be staffed with reliable judges and clerks, who would presumably all be good Federalists. Outgoing President John Adams and Secretary of State John Marshall

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worked late into the night to nominate, get approved, and sign commissions for all of these jobs. In the end, some of the "Midnight Appointments" were not delivered by Marshall, and were still in his old office when the new secretary of state [James Madison] moved in. Thomas Jefferson and his party were furious about these appointments, considering them an attempt to get around the decision of the American electorate, and Jefferson also saw them as a personal attack on himself. He ordered Madison not to deliver the commissions, and William Marbury sued in the Supreme Court to have his delivered, asking for a writ of *mandamus.*

Read the decision carefully. Why did Marshall rule against granting Marbury his writ? In the eyes of the court, did Marbury deserve his commission? How is Jefferson's administration pictured in this opinion? You can imagine how frustrating this decision was for Jefferson. Can you criticize the Supreme Court for refusing to accept a jurisdiction and power not granted it in the Constitution?

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

1. The first object of inquiry is—Has the applicant a right to the commission he demands? Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.
2. This brings us to the secondary inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection... .  The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right... .  It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he his a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.
3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on— 1st. The nature of the writ applied for; and 2d. The power of this court. 1st. The nature of the writ. Blackstone, in the 3d volume of his Commentaries, page 110, defines a *mandamus* to be "a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified... ."

This, then, is a plain case for a *mandamus,* either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court?

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties

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which its words purport to confer and assign.

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

In the distribution of this power, it is declared, that "supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested... .

The 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. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

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

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

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

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

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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, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

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

The constitution declares 'that no bill of attainder or *ex post facto* law shall be passed.' If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

'No person,' says the constitution, 'shall be convicted of treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court.' Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as––––, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

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

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void;