

on September 12.³¹ There ensued a final review, which produced minor amendments and culminated in the signing of the engrossed Constitution on Monday, September 17.

C. The Judiciary Article

1. A Federal Judicial Power

On the first day of substantive debate (May 30), the Committee of the Whole accepted Randolph's resolution "that a national government ought to be established consisting of a supreme Legislative, Judiciary, and Executive".³² Again on June 4, Madison records in his notes, the first clause of Randolph's ninth resolution—"Resolved that a national Judiciary be established"—passed unanimously.³³ Without discussion or further question, the delegates thereby agreed to a substantial innovation in American experience. The new states had tried to settle border disputes by the device of *ad hoc* tribunals.³⁴ In addition, Congress had possessed the power to "appoint" state courts for the trial of "piracies and felonies on the high seas",³⁵ and it had even established a distinctively national court to handle appeals in cases of capture.³⁶ But what was now proposed was much

³¹ 2 Farrand, note 1, *supra*, at 590-603.

³² Connecticut alone opposed, with New York divided. 1 *id.* 30-32.

³³ Madison's Journal 108 (Scott ed. 1895). See also 1 Farrand, note 1, *supra*, at 104.

³⁴ The Articles of Confederation provided a cumbersome machinery for resolving disputes between states, under which the disputing states selected seven judges by joint consent, any five of whom constituted a quorum. If judges could not be agreed upon, Congress was to select three candidates from each state, and the court would be arrived at by alternate striking of names. The judgment of the court was to be final. Articles of Confederation, Art. IX.

The only case ever decided under this provision involved a dispute between Connecticut and Pennsylvania over territory on the banks of the Susquehanna River. In 1775, prior to the enactment of the Articles, a special committee of Congress was appointed, which recommended the terms of an armistice that should govern until the dispute could be settled. When a court was appointed in 1782, by joint consent, it sat for forty-two days in Trenton, New Jersey, then rendered a unanimous judgment against Connecticut. Although Connecticut acquiesced, individual Connecticut settlers were unwilling to cede their lands, and uncertainty persisted. Carson, *The Supreme Court of the United States* 67-74 (1891).

³⁵ Articles of Confederation, Art. IX. Congress exercised the power by providing for trial of such offenses by designated state judges in 1781. See Carson, note 34, *supra*, at 42-43. In all such cases an appeal was to lie to Congress, or such person or persons as Congress should appoint. All the states but New York complied, and even New York ultimately appears to have come into partial compliance. See *id.* at 45.

³⁶ The first appeal from a state tribunal came up in August of 1776, and Congress appointed a special committee to hear it. The practice of appointing special committees continued until January, 1777, when a five-member Standing Committee was established. At length, however, in January, 1780, Congress resolved "that a Court be established for trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of 3 Judges appointed and commissioned by Congress * * *." See *id.* at 41-64.

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

more than a specialized tribunal. It was a national judicial power joined with executive and legislative powers as part of a national government.

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

2. The Tribunals Exercising the Power

Having agreed to the establishment of a national judiciary, the Convention proceeded swiftly to vote that the judicial branch should "consist of one supreme tribunal, and of one or more inferior tribunals."³⁷ The vote of June 4, reiterated on June 5, reflected an uncontroversial agreement, never to be reconsidered, that there should be one Supreme Court.³⁸ The decision concerning inferior federal courts proved less stable.³⁹

On June 5, after an inconclusive discussion about where the power to appoint inferior tribunals should lie, Rutledge moved to reconsider the provision for their establishment at all. He urged that "the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system".⁴⁰ Sherman, supporting him, dwelled on the expense of an additional set of courts.⁴¹

Madison strongly opposed the motion. He argued that "unless inferior federal tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree".⁴² Besides, he maintained, "an appeal would not in many cases be a remedy." "What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative

Nonetheless, "some 118 cases were disposed of by the congressional committees and the Court of Appeals, and the idea became well fixed that admiralty and maritime cases pertained to federal jurisdiction". Hockett, *The Constitutional History of the United States* 157 (1939).

³⁷ 1 Farrand, note 1, *supra*, at 104-05 (June 4), 119 (June 5).

³⁸ All the plans submitted to the Convention provided for a Supreme Court. See *id.* 21, 244, 292; 2 *id.* 432; 3 *id.* 600.

³⁹ Although the Randolph and Pinckney plans called for mandatory establishment of inferior federal courts, the Paterson plan did not provide for any such courts at all. Hamilton's plan empowered Congress to create them if it so chose. John Blair's plan provided only for lower courts of admiralty. See 3 *id.* 593-94 (Randolph); *id.* 600 (Pinckney); *id.* 612 (Paterson); *id.* 618 (Hamilton); 2 *id.* 432 (Blair).

⁴⁰ 1 Farrand, note 1, *supra*, at 124.

⁴¹ *Id.* 125.

⁴² *Id.* 124.

authority, was essential."⁴³ Wilson and Dickinson spoke in the same vein, with the former emphasizing the special need for an admiralty jurisdiction.⁴⁴

Despite these appeals, Rutledge's motion to strike out "inferior tribunals" carried, five states to four with two divided.⁴⁵ This, however, was not the end of the matter. Picking up on a suggestion by Dickinson, Wilson and Madison moved a compromise resolution, which provided that "the National Legislature [should] be empowered" to "institute"—the verb recorded in Madison's notes⁴⁶—or "appoint"—the word in the *Convention Journal*⁴⁷ and another set of contemporary notes⁴⁸—"inferior tribunals". According to Madison, he and Wilson "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them".⁴⁹

Pierce Butler objected even to this compromise proposal: "The people will not bear such innovations. The States will revolt at such encroachments." Despite this protest, "the Madisonian Compromise", as it has come to be called, was agreed to, eight states to two with one divided.⁵⁰

Opposition to a system of inferior federal courts was renewed when the report of the Committee of the Whole came before the Convention on July 18. But it was milder, with Sherman saying that he "was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest". This time the vote accepting the compromise was unanimous,⁵¹ and the decision stood without further question.⁵² The Committee of Detail reported a draft prescribing that the judicial power "shall be vested in one Supreme Court and in such inferior Courts as shall, when necessary, from time to time, be

⁴³ *Id.*

⁴⁴ *Id.* 124 (Wilson), 125 (Dickinson).

⁴⁵ *Id.* 125.

⁴⁶ *Id.*

⁴⁷ *Id.* 118.

⁴⁸ *Id.* 127 (Yates).

⁴⁹ *Id.* 125.

⁵⁰ *Id.* 124–25 (June 5). Professor Collins sees a puzzle in the sequence of the Convention's actions on June 4–5: Why, within so short a span, did the Convention swing from unanimous approval of constitutionally mandated lower federal courts, to preclusion of lower federal courts altogether, to approval of a compromise apparently authorizing Congress to "appoint" or "establish" lower federal courts? See Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wisc.L.Rev. 35, 116–19. During the interval between the vote to approve mandatory federal courts and adoption of Rutledge's motion to reconsider, the Convention voted to delete the provision of the Randolph Plan that the national judiciary should be elected by the national legislature and to leave open for the time being the question of judicial selection. Emphasizing this background, Collins speculates that Rutledge's motion to reconsider may have been motivated by the intervening debate on the selection of the federal judiciary; if the power did not lie with the legislature, the Convention might have considered it too dangerous to be vested elsewhere.

A related suggestion ascribes significance to the contested wording of Madison's and Wilson's compromise resolution: if the congressional power was one to "appoint" inferior tribunals, this formulation may hark back to the practice under the Articles of Confederation by which Congress "appointed" existing state courts, rather than creating independent federal courts, to conduct certain forms of judicial business. See Goebel, note 1, *supra*, at 211–12. On the subsequent alteration of the language to its final form, see *infra*.

⁵¹ 2 Farrand, note 1, *supra*, at 45–46 (July 18).

⁵² In the debate on the report of the Committee of Detail, a motion, recorded only in the *Journal*, was made and seconded to give the inferior federal courts only an appellate jurisdiction over decisions of state courts, but the motion was withdrawn. *Id.* 424 (August 27).

constituted by the Legislature of the United States.”⁵³ The Committee of Style further altered the language to its current form.

3. Separation and Independence of the Judicial Power

a. Appointment of Judges

The method of appointing federal judges occasioned significant controversy. The Randolph Plan called for appointment by the legislature, but Madison objected that many legislators would be incompetent to assess judicial qualifications and proposed appointment by the “less numerous & more select” Senate.⁵⁴ The Committee of the Whole agreed to Madison’s suggested amendment on June 13. The Convention adhered to this decision on July 21, when it rejected another proposal by Madison, who now feared that senatorial appointment would confer too much power on the states, and instead urged appointment by the national executive, with or without the approval of the Senate.⁵⁵ In the closing days the issue was reopened yet again and finally resolved, as part of a general settlement on appointments, in favor of appointment by the executive with the advice and consent of the Senate.⁵⁶

b. Tenure and Salary

The provisions protecting the tenure and salary of judges received almost complete assent.⁵⁷ There was minor controversy over whether to prevent the temptation of pay increases. The Committee of the Whole first accepted language barring increase as well as diminution in salary during tenure in office,⁵⁸ but the prohibition against increases was rejected in the subsequent debate in the Convention and again in the debate on the report of the Committee of Detail.⁵⁹ Rejection rested largely on the practical ground that the cost of living might rise.

⁵³ *Id.* 186. According to Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw.U.L.Rev.* 191 (2007), a full understanding of the significance of the report of the Committee of Detail requires attention not only to the judiciary article, but also to the provision of Article I, § 8, cl. 9 authorizing Congress “[t]o constitute Tribunals inferior to the supreme Court.” Pfander maintains that when Articles I and III are read in conjunction, the import of the report of the Committee of Detail was that “Congress could proceed either by appointing state courts to serve as tribunals under Article I (as Sherman hoped), or by creating new federal courts under Article III (as Madison hoped).” Insofar as Congress fails to vest federal courts with jurisdiction to rule on federal claims, Pfander maintains, state courts should be regarded as having been constituted as “Tribunals inferior to the supreme Court.” For critical discussion of this thesis, see pp. 321 n.27, 389–390 n.8, *infra*.

⁵⁴ 1 Farrand, note 1, *supra*, at 233 (June 13).

⁵⁵ The first proposal for appointment by the President with the concurrence of the Senate was made by Hamilton on June 5. Motions for executive appointment alone, or executive appointment subject to Senate approval, were defeated on several occasions thereafter. See *id.* 128, 224, 232–33; 2 *id.* 80–83; Warren, note 1, *supra*, at 327–29.

⁵⁶ Appointment by the Senate was retained in the draft reported by the Committee of Detail. 2 Farrand, note 1, *supra*, at 132, 155, 169, 183. The final compromise was worked out between August 25 and September 7. See *id.* 498, 538–40; Warren, note 1, *supra*, at 639–42. For Hamilton’s comments on the matter, see *The Federalist*, Nos. 76, 77.

⁵⁷ All four of the principal plans provided that the judges should hold office during good behavior, and the Randolph, Pinckney, and Paterson plans forbade either a decrease or an increase in salary during continuance in office.

⁵⁸ 1 Farrand, note 1, *supra*, at 121.

⁵⁹ 2 *id.* 44–45, 429–30; Warren, note 1, *supra*, at 532–34. See also Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 *UCLA L.Rev.* 308, 311–18 (1976).

The lone assault on the principle of tenure during good behavior occurred in the debate on the report of the Committee of Detail, when Dickinson of Delaware, seconded by Gerry and Sherman, moved that the judges "may be removed by the Executive on the application by the Senate and House of Representatives". The motion drew strong opposition, however, and only Connecticut ultimately supported it.⁶⁰

c. Extra-Judicial Functions

Randolph's eighth resolution proposed to create a council of revision composed of "the Executive and a convenient number of the National Judiciary" with authority, first, "to examine every act of the National Legislature before it shall operate", and, second, to review every negative exercised by the National Legislature upon an act of a state legislature, pursuant to a power proposed in the sixth resolution, before it "shall be final". The dissent of the council was to "amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [blank] of the members of each branch".⁶¹

In an early vote of 8-2, the Committee of the Whole rejected this plan to mingle executive and judicial functions, and substituted a purely executive veto of national legislation.⁶² Madison and Wilson renewed the proposal for a council of revision on three subsequent occasions, but the Convention defeated it each time.⁶³

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

"Mr. Gerry doubts whether the Judiciary ought to form a part of [the council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too

⁶⁰ 2 Farrand, note 1, *supra*, at 428-29; Warren, note 1, *supra*, at 532. For an extensive analysis of the problems of tenure and removal in the Constitution, see Berger, *Impeachment: The Constitutional Problems* (1973). Prakash & Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006), challenges the traditional assumption that Article III permits the removal of a judge only by impeachment. The authors argue that Article III should be read, in light of established English and colonial practice, to embody standards of "good Behaviour" under which various public and private officers could be removed from office pursuant to the judgment of an ordinary court. According to them, the "good Behaviour" standard is "more general and less severe" than that of "high Crimes and Misdemeanors". *But see* Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 Yale L.J. 139 (2006) (defending the traditional position by arguing that the interpretation urged by Prakash & Smith is not linguistically necessary, is incompatible with the commitment to strong judicial independence reflected in the overall constitutional structure, and finds little support in post-ratification evidence); Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007) (arguing that the Constitution's provision for a judicial tenure in office rules out any removal mechanism not specified by the Constitution).

⁶¹ 1 Farrand, note 1, *supra*, at 21.

⁶² *Id.* 97-104, 108-110 (June 4).

⁶³ The Committee of the Whole adhered to the rejection, eight votes to three, on June 6. *Id.* 138-140 (June 6). The Convention did likewise in the later debate on the report of the Committee of the Whole, this time by four votes to three with two states divided. 2 *id.* 73-80 (July 21). Madison and Wilson made their final attempt in the debate on the report of the Committee of Detail, but their proposal, which this time took a somewhat different form, again failed. *Id.* 298 (August 15).

with general approbation. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.”

King added “that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation”.⁶⁴

The last important reference to extra-judicial functions occurred near the close of the Convention, when Dr. Johnson moved to extend the judicial power to cases arising under the Constitution of the United States, as well as under its laws and treaties.⁶⁵ Madison, responding, “doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.” Madison’s concern notwithstanding, “The motion of Doctr. Johnson was agreed to [without opposition]: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.”⁶⁶

4. The Power to Declare Statutes Unconstitutional

At no time did the Constitutional Convention systematically discuss the availability or scope of judicial review, but the subject drew recurrent mention in debates over related issues. As in Madison’s comment on Dr. Johnson’s motion, the existence of a power of judicial review appears to have been taken for granted by most if not all delegates.⁶⁷ The point became perhaps most explicit in a debate over the proposed congressional negative of state laws, during which the existence of a power in the federal courts to invalidate unconstitutional state laws was common ground. The crux of the controversy was whether this was a sufficient safeguard.⁶⁸ Resolution came through acceptance of Luther Martin’s proposal of the Supremacy Clause,

⁶⁴ 1 *id.* 97–98, 109 (June 4).

⁶⁵ The Convention permitted two other plans for using judges non-judicially to die without coming to votes. The first was a suggestion advanced by Ellsworth and elaborated by Gouverneur Morris to make the Chief Justice a member of the projected Privy Council of the President. See Warren, note 1, *supra*, at 643–50. The second was a proposal by Charles Pinckney that “Each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions”. 2 Farrand, note 1, *supra*, at 340–41 (August 20). Pinckney’s proposal went to the Committee of Detail, but was never reported out.

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

⁶⁷ Berger, *Congress v. The Supreme Court* (1969), marshals the supporting evidence. Snowiss, *Judicial Review and the Law of the Constitution* 40 (1990), which deals much more broadly with shifting historical understandings concerning the Constitution’s nature and judicial enforceability, concludes that “[t]here was more support than opposition for judicial authority over legislation in the convention, and this was probably an accurate reflection of the strength of the contending sides outside the convention.” For historical discussions on the origins of judicial review prior to the Convention, see Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2005); Smith, *Appeals to the Privy Council from the American Plantations* (1950); and Wood, note 3, *supra*, at 453–63.

⁶⁸ Wilson summarized the proponents’ case: “The power of self-defence had been urged as necessary for the State Governments—It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed.” 2 Farrand, note 1, *supra*, at 391 (August 23).

which strengthened the judicial check by express statement of the parallel power and responsibility of state judges.⁶⁹

The existence of a judicial safeguard against unconstitutional federal laws was similarly recognized on both sides in the debates over the proposal for a council of revision of acts of the national legislature. Gerry's statement presupposing a power of judicial review, already quoted, was substantially echoed at least eight times.⁷⁰

The only note of challenge came in the fourth and last debate on the proposal when Mercer, a recently arrived delegate, speaking in support of the alternative plan of judicial participation in the veto, said that he "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void". Dickinson then observed that he was impressed with Mr. Mercer's remark and "thought no such power ought to exist" but "he was at the same time at a loss what expedient to substitute". Gouverneur Morris at once said that he could not agree that the judiciary "should be bound to say that a direct violation of the Constitution was law", and there the discussion ended.⁷¹

Meanwhile, the final version of the Supremacy Clause had been approved. The Convention's matter-of-course approval of the express grant of jurisdiction in cases arising under the Constitution gives further indication that some form of judicial review was contemplated.⁷²

There was no exchange of views, even indirectly, concerning appropriate judicial methodology in constitutional interpretation.⁷³

⁶⁹ The proposal of a legislative negative, first advanced and vigorously supported throughout by Madison, was embodied in Randolph's sixth resolution, which authorized a negative only of state laws "contravening in the opinion of the National Legislature the articles of Union". 1 *id.* 21. In this form it was initially approved by the Committee of the Whole on May 31 without debate or dissent. *Id.* 54. The plan was first discussed on June 8, when the Committee rejected Charles Pinckney's motion to extend the negative to "all laws which they shd. judge to be improper". *Id.* 171. Rumblings of opposition then appeared and culminated in a debate in the Convention of July 17, when the plan was rejected. 2 *id.* 21-22.

Madison, in support, urged that states "can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legisre, or be set aside by the National Tribunals". Sherman and Gouverneur Morris, in opposition, relied upon the courts to set aside unconstitutional laws, with Sherman saying that the proposal "involves a wrong principle, to wit, that a law of a State contrary to the articles of the Union, would if not negated, be valid and operative". None doubted the judicial power. When the negative was defeated, Luther Martin at once proposed the first version of the Supremacy Clause, "which was agreed to" without opposition. *Id.* 27-29. See also *id.* 390-91. For a discussion of the relationship between the Supremacy Clause, Madison's "federal negative," and the controversial pre-Revolution practice of Parliamentary nullification of legislation by the colonies, see LaCroix, *The Ideological Origins of American Federalism* (2010).

⁷⁰ See Rufus King, 1 Farrand, note 1, *supra*, at 109 (June 4); Wilson, 2 *id.* 73 (July 21); Madison, *id.* 74 (July 21), 92-93 (July 23); Martin, *id.* 76 (July 21); Mason, *id.* 78 (July 21); Pinckney, *id.* 298 (August 15); G. Morris, *id.* 299 (August 15). See also Williamson, *id.* 376 (August 22). Cf. Snowiss, note 67, *supra*, at 39-40: "It was not always clear, however, whether speakers endorsing judicial review were supporting a general power over legislation or one limited to defense of the courts' constitutional sphere. Gerry's observation was immediately preceded by the remark that the judiciary 'will have a sufficient check against encroachments on their own department * * *'."

⁷¹ 2 Farrand, note 1, *supra*, at 298-99 (August 15).

⁷² See text at note 66, *supra*.

⁷³ Several prominent scholars have argued that it was widely understood during the 1780s and 1790s that judicial nullification should occur only in cases of plain unconstitutionality. See, e.g., Snowiss, note 67, *supra*, at 13-44; Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum.L.Rev.* 215, 240 (2000); Wood, *The Origin of Judicial*

5. The Scope of Jurisdiction

As initially formulated, the Randolph Plan contemplated apparently mandatory federal jurisdiction of “all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony”.⁷⁴ When the Committee of the Whole first discussed this subject on June 12 and 13, however, Randolph concluded that it was “the business of a subcommittee to detail” the jurisdiction. He “therefore moved to obliterate such parts of the resolve so as only to establish the principle, to wit, that the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony”. The Committee agreed to this proposal by unanimous vote.⁷⁵

In considering the report of the Committee of the Whole on July 18, the Convention again confined itself to general principle. But “several criticisms having been made on the definition [of jurisdiction]; it was proposed by Mr. Madison so to alter as to read thus—‘that the jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.’ which was agreed to [without opposition].”⁷⁶

With only this general direction, the Committee of Detail took the lead in defining the categories to which the federal judicial power would extend. The nine heads of federal jurisdiction that eventually emerged in Article III, § 2 can be grouped in various ways. Thematically, for example, the jurisdictional categories appear to contemplate federal judicial power to promote four central purposes: (i) to protect and enforce federal authority (jurisdiction of federal question cases and cases to which the United States is a party); (ii) to resolve disputes relating to foreign affairs (jurisdiction of suits affecting foreign envoys, admiralty cases, cases arising under treaties, and suits involving foreign nations); (iii) to provide an interstate umpire (suits between states or involving their conflicting land grants); and (iv) to furnish an impartial tribunal where state court bias was feared (party-based cases involving citizens of different states, a state and a non-citizen, or an alien).

On the face of the text, however, a linguistically striking divide exists between the first three and the last six jurisdictional categories. For the first three categories, which are defined mostly if not exclusively by subject

Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L.Rev. 787, 798–99 (1999). Larry Kramer has also argued, separately, that many in the founding generation subscribed to a “departmental” theory of constitutional interpretation, under which each branch of government would decide for itself how to construe the Constitution in discharging its responsibilities. See Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004). According to the departmental theory, disputes among the branches would need to be resolved politically, with ultimate responsibility residing in “the people themselves”.

⁷⁴ 1 Farrand, note 1, *supra*, at 22. All of the plans respecting the judiciary that were put before the Convention specified various definite heads of federal jurisdiction.

⁷⁵ *Id.* 238 (June 13, Yates’ notes). See also *id.* 220 (June 12), 223–24, 232 (June 13).

⁷⁶ 2 *id.* 46 (July 18).

matter,⁷⁷ Article III, § 2 provides that the judicial power shall extend to "all Cases". By contrast, in the last six categories, which are defined primarily by reference to the status of the parties, the "all" disappears, and the judicial power is extended to "Controversies", not "Cases".

The shift in language seems sufficiently sharp to require explanation. Yet no recorded discussion occurred in the Committee of the Whole or on the floor of the Convention.⁷⁸ Partly as a result, whether the change of language marks a distinction of constitutional intent—especially with reference to Congress' power over the jurisdiction of the federal courts—is much controverted and will be explored more fully in later Chapters.⁷⁹

Regardless of its intended significance, the linguistic division provides a useful framework for examining the scope of federal jurisdiction authorized, if not required, by Article III.

a. Jurisdiction Based Primarily on Subject Matter: The First Three Headings

(i) **Cases Arising Under the Constitution, Laws, and Treaties of the United States.** Faithful to the vote of July 18, the Committee of Detail placed at the head of its list of subjects of jurisdiction "all cases arising under laws passed by the Legislature of the United States".⁸⁰ Except for the change in wording by the Committee of Style, this provision was accepted and incorporated into the Constitution without further question or discussion.⁸¹

But the provision for jurisdiction of cases "arising under [federal] laws" was not left standing alone. As already noted, in a general discussion of the judiciary article as crafted by the Committee of Style, Dr. Johnson moved to insert an express provision for jurisdiction of cases under "this Constitution", and the motion carried without opposition.⁸² Immediately thereafter, according to Madison's notes, Rutledge moved to extend the jurisdictional category to encompass cases involving "treaties made or which shall be

⁷⁷ The jurisdiction for the first and third of these categories, involving "all Cases *** arising under" the Constitution, laws, and treaties of the United States and "all Cases of admiralty and maritime Jurisdiction", is based unequivocally on subject matter. By contrast, the second category of "all Cases affecting Ambassadors, other public Ministers and Consuls" arguably straddles the distinction between subject-matter-based and party-based jurisdiction.

⁷⁸ *But cf.* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L.Rev. 205, 242-45 (1985) (arguing that documents used in drafting by the Committee of Detail, coupled with the Convention's specific reinsertion of the word "all" in the clause setting out the Supreme Court's appellate jurisdiction, after it had been omitted by the Committee of Style, reflect deliberate advertence to this point and an intention to make federal jurisdiction mandatory in the first three jurisdictional categories).

⁷⁹ For discussion of the possible significance of the distinction for Congress' power to define and limit federal jurisdiction in the various categories of cases, see Chap. IV, Sec. 1, *infra*.

⁸⁰ 2 Farrand, note 1, *supra*, at 186 (August 6). The clause had antecedents, partial or complete, in all of the judiciary plans: Randolph: cases "which respect the collection of the National revenue", 1 *id.* 22; Pinckney: "all cases arising under the laws of the United States", 3 *id.* 600; Paterson: all cases "which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue", 1 *id.* 244; Hamilton: "all causes in which the revenues of the general Government *** are concerned", with power in the legislature "to institute Courts in each State for the determination of all matters of general concern", *id.* 292; Blair: "all cases in law and equity arising under *** the laws of the United States", 2 *id.* 432.

⁸¹ 2 *id.* 600 (committee report), 628 (September 15, entire Article approved).

⁸² See note 66, *supra*, and accompanying text. Among the plans presented to the Convention, only the Blair plan had included such a provision. 2 Farrand, note 1, *supra*, at 432.

made" under the authority of the United States. The vote to adopt the motion was again unanimous.⁸³

(ii) Cases Affecting Ambassadors, Other Public Ministers, or Consuls. Under the Articles of Confederation, the United States could give no assurance of legal protection to the representatives of foreign countries living in the United States. "The Convention was convinced that if foreign officials were either to seek justice at law or be subjected to its penalties, it should be at the hand of the national government."⁸⁴ The present clause was reported out of the Committee of Detail and passed without dispute, and, again without dispute, was included in the Supreme Court's original jurisdiction.⁸⁵

(iii) Admiralty and Maritime Cases. The inclusion of admiralty and maritime jurisdiction in the report of the Committee of Detail went unchallenged.⁸⁶ The principal commerce of the period was, of course, maritime; and as Wilson pointed out on the floor, it was in the admiralty jurisdiction that disputes with foreigners were most likely to arise.⁸⁷ In addition, maritime law had been administered by British vice-admiralty rather than colonial courts before the war,⁸⁸ and state courts had therefore not been accustomed to exercising general maritime jurisdiction. Following the break with England, some states established courts with general admiralty jurisdiction, but others did not.⁸⁹ Moreover, experience during the Revolution with state court adjudication of prize cases had shown the need for a federal tribunal.⁹⁰

⁸³ 2 Farrand, note 1, *supra*, at 431 (August 27). This amendment could easily be viewed as implementing the Convention's earlier determination that federal judicial power should extend to "questions which involve the national peace and harmony". In his early proposal to settle the scope of jurisdiction in terms of general principle, Randolph made clear that this language was intended to include questions of "the security of foreigners where treaties are in their favor". 1 *id.* 238 (June 13). Nevertheless, the Committee of Detail omitted any express reference to treaties, perhaps because of the provisions giving jurisdiction when foreigners were parties.

By all indications, the Convention regarded federal judicial power to enforce treaties as possessing vital importance. All the other plans except Pinckney's contemplated a similar jurisdiction. Paterson: appellate jurisdiction where construction of a treaty was involved, 1 *id.* 244; Hamilton: where "citizens of foreign nations are concerned", *id.* 292; Blair: cases arising under a treaty, 2 *id.* 432. In addition, the Convention at one time had extended the proposed negative on state laws, upon motion by Benjamin Franklin, to include laws contravening "any treaties subsisting under the authority of the Union". 1 *id.* 54 (May 31).

⁸⁴ Frank, *Historical Bases of the Federal Judicial System*, 13 *Law & Contemp. Prob.* 3, 14 (1948). All the plans contemplated such a jurisdiction. The Paterson plan gave the Supreme Court appellate jurisdiction in cases "touching the rights of ambassadors", as well as in cases "in which foreigners may be interested". 1 Farrand, note 1, *supra*, at 244. The Pinckney plan gave the Court original jurisdiction in cases "affecting Ambassadors & other public Ministers". 3 *id.* 600. The Blair plan added consuls, in substantially the language of the present grant. 2 *id.* 432. The Randolph and Hamilton plans provided generally for jurisdiction where foreigners were concerned. 1 *id.* 22, 292.

⁸⁵ 2 Farrand, note 1, *supra*, at 186, 431.

⁸⁶ *Id.* 186. See The Federalist No. 80 (Hamilton): "The most bigoted idolizers of state authority, have not thus far shown a disposition to deny the National Judiciary the cognizance of maritime causes".

⁸⁷ 1 Farrand, note 1, *supra*, at 124 (June 5).

⁸⁸ See Benedict on Admiralty § 61 (7th ed. rev. 2007).

⁸⁹ See *id.* at §§ 83-89.

⁹⁰ See note 36, *supra*.

b. Jurisdiction Based on Party Status: The Remaining Categories

(i) **United States a Party.** Under the Articles of Confederation, the United States had to go into state courts for enforcement of its laws and collection of its claims.⁹¹ Of the five plans before the Convention, however, only Blair's included a general grant of jurisdiction in cases to which the United States was a party.⁹² Possibly the clause was omitted in the others, and in the initial report of the Committee of Detail, because the problem was thought to be addressed through jurisdiction in cases arising under various federal laws. But responding to a motion by Charles Pinckney, the committee later specially recommended, on August 22, that jurisdiction be given in controversies "between the United States and an individual State or the United States and an individual person".⁹³ The provision as it stands was inserted on the floor on August 27, on a motion by Madison and G. Morris apparently intended to reflect this recommendation. Soon after, on the same day, it was moved that "in cases in which the United States shall be a party the jurisdiction shall be original or appellate as the Legislature may direct", but the motion failed,⁹⁴ with the result that the jurisdiction of the Supreme Court was made appellate only.

(ii) **Two or More States.** Border disputes had plagued the new states.⁹⁵ In a speech introducing his resolutions, Governor Randolph said: "Are we not on the eve of war, which is only prevented by the hopes from the convention?"⁹⁶ Though not specifically mentioned, a jurisdiction in controversies between states could be viewed as implicit in Randolph's "national peace and harmony" provision.

The Committee of Detail's report qualified its proposed grant of jurisdiction to the Supreme Court in "controversies between two or more States" with an exception for "such as shall regard Territory or Jurisdiction". For these disputes, the Committee retained an analogue to the cumbersome machinery of the Articles of Confederation, which the Senate was charged with implementing.⁹⁷ On the floor, in the debate on the legislative articles,

⁹¹ Thus, even treason against the United States had to be tried in state courts under state law. In 1781, Congress recommended that the state legislatures pass laws punishing infractions of the law of nations, and erect courts or clothe existing courts with authority to decide what constituted such an offense. Where an official of the United States Post Office was guilty of misdemeanor in office, Congress could only prescribe penalties and let the Postmaster General bring an action in debt in a state court to recover them. In settling accounts of the military and in recovering debts from individuals, Congress recommended that the state legislatures pass laws empowering Congress' agents to bring such actions in state courts. Carson, note 34, *supra*, at 83-86.

⁹² 2 Farrand, note 1, *supra*, at 432. One version of the Paterson plan included a resolution that "provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual State respecting territory". 3 *id.* 611.

⁹³ 2 *id.* 367 (August 22). This report was distributed to the members, *id.* 376, but seems not to have been acted upon. For Pinckney's earlier motion, see *id.* 342 (August 20).

⁹⁴ *Id.* 424-25, 430.

⁹⁵ See note 34, *supra*.

⁹⁶ 1 Farrand, note 1, *supra*, at 26 (May 29). This view was by no means singular. When the Convention was close to complete impasse, Gerry appealed to the members to keep trying. Without a Union, "We should be without an Umpire to decide controversies and must be at the mercy of events". *Id.* 515 (July 2). Sherman listed a national power to prevent internal disputes and resorts to force as one of the four basic objects of a Union. *Id.* 133 (June 6).

⁹⁷ See the proposed Art. IX, Sec. 3, 2 Farrand, note 1, *supra*, at 183-84. The provision seems to have originated in Randolph's draft in the Committee of Detail. *Id.* 144.

Rutledge moved to strike these provisions, saying that they were “necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established”. Some expressed doubts whether the judiciary was appropriate, since “the Judges might be connected with the States being parties”. But the motion to strike carried eight states to two, with only North Carolina and Georgia dissenting.⁹⁸

(iii) A State and Citizens of Another State. The grant of jurisdiction in controversies between a state and citizens of another state had no specific forerunner in any of the five plans before the Convention.⁹⁹ The clause first appears in a marginal note in Rutledge’s handwriting on Randolph’s draft for the Committee of Detail,¹⁰⁰ and it was reported out by that committee in its present form.¹⁰¹ No discussion occurred, though concern about prejudice seems the only possible explanation.

(iv) Citizens of Different States. The grant of diversity jurisdiction aroused bitter opposition in the ratification debates, and the controversy has continued intermittently ever since.¹⁰² Strangely, the clause passed without question in the Convention, and thus without clarification of its purposes.

Randolph’s initial plan provided for jurisdiction in “cases in which foreigners or citizens of other States applying to such jurisdictions may be interested”,¹⁰³ in contrast with Paterson’s, Hamilton’s, and Blair’s, which protected only foreigners, and Pinckney’s, which had no provision against bias. When the Committee of the Whole first considered Randolph’s proposal on June 12, it voted to give jurisdiction in “cases in which foreigners or citizens of two distinct States of the Union” may be interested.¹⁰⁴ This specification was submerged in the more general votes of principle on June 13 and July 18. But it reappeared in its present form in the report of the Committee of Detail, and the Convention accepted it without challenge on August 27.¹⁰⁵

(v) Citizens of the Same State, Claiming Lands Under Grants of Different States. The Committee of Detail proposed the same mode of settling these controversies as for controversies over territory or jurisdiction between the states themselves, and both proposals were stricken by the same vote.¹⁰⁶ Sherman’s motion to insert the present provision during the later debate passed unanimously.¹⁰⁷

(vi) States, or Citizens Thereof, and Foreign States, Citizens or Subjects. All the plans except Pinckney’s provided for jurisdiction where

⁹⁸ *Id.* 400–01 (August 24).

⁹⁹ Randolph’s original resolution would have given jurisdiction to inferior federal courts in “cases in which foreigners or citizens of other States applying to such jurisdictions may be interested”. 1 *id.* 22. But this provision would not have guarded against the possibility of antagonism when a state was suing in the courts of another state. Moreover, if Hamilton was right in *The Federalist*, No. 81, that the Convention did not contemplate that a state could be sued by a citizen of another state without its consent (at least on causes of action not based on federal law), it would have been of no assistance to an out-of-state citizen as plaintiff.

¹⁰⁰ 2 Farrand, note 1, *supra*, at 147.

¹⁰¹ *Id.* 186.

¹⁰² The problem is more fully treated in Chap. XIII, *infra*.

¹⁰³ See note 99, *supra*.

¹⁰⁴ 2 Farrand, note 1, *supra*, at 431–32.

¹⁰⁵ 1 *id.* 22.

¹⁰⁶ See note 98, *supra*, and accompanying text.

¹⁰⁷ 2 Farrand, note 1, *supra*, at 431–32 (August 27).

foreigners were interested,¹⁰⁸ and the need for a grant going beyond cases involving treaties and foreign representatives seems to have aroused no dispute. The clause came out of the Committee of Detail in its present form.¹⁰⁹

6. Jurisdiction of the Supreme Court

a. Original Jurisdiction

The Randolph plan, which required the establishment of lower federal courts, made no provision for an original jurisdiction of the Supreme Court, but all the other plans did.¹¹⁰ In the Committee of Detail, one draft of the Constitution in Randolph's handwriting gave the Supreme Court original jurisdiction in cases of impeachment and such other cases as the legislature might prescribe.¹¹¹ A later draft in Wilson's handwriting, and the draft submitted to the Convention, provided for original jurisdiction in cases of impeachment, in cases affecting ambassadors and other public ministers and consuls, and in cases in which a state was a party. This grant, however, was subject to a general power in the legislature to assign this jurisdiction, except for a trial of the President, to inferior federal courts.¹¹² The provision for impeachments and the legislative power of assignment were stricken on the floor.¹¹³

b. Appellate Jurisdiction

The decisions as to the scope of the Supreme Court's original jurisdiction settled that the balance of its jurisdiction should be appellate.¹¹⁴

The important provision that the appellate jurisdiction should be subject to exceptions and regulations by Congress appeared in none of the plans.¹¹⁵ It emerged for the first time in the report of the Committee of Detail and, remarkably, provoked no discussion on the floor of the Convention at the time of its acceptance. There are few clues even to the thinking of the Committee of Detail.¹¹⁶

Discussions on the floor of the Convention do speak, however, to another question that would later occasion bitter political controversy. In debates about whether lower federal courts should be constitutionally mandatory or

¹⁰⁸ See note 83, *supra*.

¹⁰⁹ 2 Farrand, note 1, *supra*, at 186.

¹¹⁰ Paterson's plan, contemplating primarily an appellate jurisdiction from state courts, provided for original jurisdiction in cases of impeachment. *Id.* 244. Pinckney's gave original jurisdiction in impeachment and in cases affecting ambassadors and other public ministers, see 3 *id.* 600; Hamilton's, in cases of captures, see 1 *id.* 292; and Blair's, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, and suits between persons claiming lands under grants of different states", see 2 *id.* 432.

¹¹¹ 2 *id.* 147.

¹¹² *Id.* 173, 186-87.

¹¹³ See *id.* 423-24, 430-31 (August 27).

¹¹⁴ 1 *id.* 243-44; 2 *id.* 433.

¹¹⁵ All the plans appear to have made the appellate jurisdiction a constitutional requirement, and Blair's even went to the point of prescribing a constitutional jurisdictional amount.

¹¹⁶ The Exceptions Clause is foreshadowed in Randolph's draft for the committee and then appears in a later draft in Wilson's handwriting in substantially the form in which the committee reported it. 2 Farrand, note 1, *supra*, at 147, 173, 186. For an argument that the clause has its origins in the legal system of Scotland—where Wilson was born and educated—see Pfander & Birk, *Article III and the Scottish Judiciary*, 124 *Harv.L.Rev.* 1613, 1671-84 (2011).

prohibited, it was universally assumed that the Supreme Court would have jurisdiction to review the decisions of state courts on matters of federal concern.¹¹⁷ Indeed, it was the staunchest partisans of state authority who most insistently urged the appropriateness of this method of protecting federal interests.

The provision that the jurisdiction should extend to both law and fact was added on the floor of the Convention.¹¹⁸ G. Morris asked if the appellate jurisdiction extended to matters of fact as well as law, and Wilson said he thought that was the intention of the Committee of Detail. Dickinson then moved to add the words "both as to law and fact", and his motion passed unanimously.¹¹⁹

The phrase "and fact" opened the Constitution to the charge that the Supreme Court was authorized to re-examine jury verdicts.¹²⁰ The charge was made even as to criminal cases, where the right of trial by jury was guaranteed, but more especially as to civil cases, where it was not.¹²¹ The protests bore fruit in the Seventh Amendment, which not only established the right of trial by jury in civil cases, but also provided that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

D. The Ratification Debates and Proposals for Amendment

The judiciary article, which had aroused only relatively minor disagreement in the Convention, became a center of controversy in the ratification debates. The conventions of six of the initially ratifying states suggested amendments, and all of these but South Carolina wanted changes in Article III.¹²² Indeed, no fewer than 19 of the 103 amendments proposed

¹¹⁷ See text accompanying notes 39–53, *supra*.

¹¹⁸ Paterson's plan included a similar provision. 1 Farrand, note 1, *supra*, at 243. Blair's plan gave jurisdiction as to law only, except in cases of equity and admiralty. 2 *id.* 433. But the point was not touched on in the report of the Committee of Detail.

¹¹⁹ 2 *id.* 431 (August 27).

¹²⁰ According to Ritz, *Rewriting the History of the Judiciary Act of 1789*, at 6 (Holt & LaRue eds. 1990), for the framing generation "there was no clear distinction between the *functions* of an 'appellate' court and a 'trial' court", since appellate courts routinely retried entire cases. "Distinctness and hierarchy did not characterize the [then familiar] court structures, and 'superior' usually meant only that a reviewing court had more judges sitting on it." *Id.*

¹²¹ Of the five plans, only Blair's referred to trial by jury. While contemplating the trial of crimes in state courts, it required the use of juries. Blair's plan said nothing of civil cases. 2 Farrand, note 1, *supra*, at 433.

The provision in Article III for trial of crimes by jury first appears in a draft for the Committee of Detail in Wilson's handwriting, *id.* 173, and was included in the Committee's report. *Id.* 187. It was amended in the Convention to provide for the venue of trial for crimes not committed in any state and approved unanimously on August 28. *Id.* 438.

On September 12, while the report of the Committee of Style was being printed, Mr. Williamson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it". Gorham said it was impossible "to discriminate equity cases from those in which juries are proper", and added that the "Representatives of the people may be safely trusted in this matter". Gerry supported Williamson. Mason said he saw the difficulty of specifying jury cases, but, broadening the discussion, said that a bill of rights "would give great quiet to the people"; and Gerry and Mason moved that a committee be appointed to prepare such a bill. Sherman thought the state bills of rights sufficient, and repeated Gorham's points about juries. The Convention voted down the motion unanimously. *Id.* 587–88.

¹²² Rhode Island's belated convention in 1790 also proposed amendments to Article III. Ames, *Proposed Amendments to the Constitution, 1789–1889*, at 310 (1897).

by these six states related to the judiciary or judicial proceedings.¹²³ According to Charles Warren, "The principal Amendments which were regarded as necessary, relative to the Judiciary, were (a) an express provision guaranteeing jury trials in civil as well as criminal cases; (b) the confinement of appellate power to questions of law, and not of fact; (c) the elimination of any Federal Courts of first instance, or, at all events, the restriction of such original Federal jurisdiction to a Supreme Court with very limited original jurisdiction; (d) the elimination of all jurisdiction based on diverse citizenship and status as a foreigner."¹²⁴

Ames lists 173 amendments proposed in the first session of the first Congress, although this figure includes many repetitions. Of the total, 48 were primarily concerned with courts and court proceedings; most had to do with trial by jury and various rights of defendants in criminal proceedings.¹²⁵ The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments respond to the central concerns. The House approved a proposal to exclude appeals to the Supreme Court "where the value in controversy shall not amount to one thousand dollars", but it failed in the Senate.¹²⁶

NOTE ON THE ORGANIZATION AND DEVELOPMENT OF THE FEDERAL JUDICIAL SYSTEM

A. The First Judiciary Act

The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system and, within limits established by the Constitution, of defining its jurisdiction. The job was daunting. Among other things, the controversies that had flared during the ratification debates made it clear that the definition of federal jurisdiction was freighted with political ramifications.

The Judiciary Act of 1789,¹ the twentieth statute enacted by the first Congress, responded to multiple pressures.² The Act is of interest today

For a comprehensive and illuminating examination of the ratification debates, see Maier, *Ratification: The People Debate The Constitution, 1787-1788* (2010). Older but still useful works on the ratification process, and especially on the character of anti-federalist opinion, include Main, *The Anti-Federalists: Critics of the Constitution, 1781-1788* (1961); Mason, *The States Rights Debate: Antifederalism and the Constitution* (1964); Kenyon, *The Anti-Federalists* (1966); Rutland, *The Ordeal of the Constitution: The Anti-Federalists and the Ratification Struggle of 1787-1788* (1966); Goebel, note 1, *supra*, at 251-91; Storing, *The Complete Anti-Federalist* (1981); and Wood, note 3, *supra*. On the debate over the judiciary during the ratification process, see Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U.Pa.L.Rev. 741, 797-829 (1984).

¹²³ Ames, note 122, *supra*, at 307-10.

¹²⁴ Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, 56 (1923).

¹²⁵ Ames, note 122, *supra*, at 310-21 (Nos. 135-38, 140, 142-43, 169-76, 183-86, 188-89, 213-14, 221-24, 226-27, 254-55, 258, 292-94, 297).

¹²⁶ Ames, note 122, *supra*, at 316 (No. 225, drawn from Nos. 141, 181, 182); *Senate Journal*, p. 130.

¹ Act of Sept. 24, 1789, 1 Stat. 73.

² On the 1789 Act, see, e.g., Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 457-508 (1971); Ritz, *Rewriting the History of the Judiciary Act of 1789* (Holt & LaRue eds. 1990); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U.Pa.L.Rev. 1499 (1990); Holt, "To Establish Justice": Politics, the

INTRODUCTORY NOTE ON MARBURY V. MADISON

Typically, one thinks of the case that follows—*Marbury v. Madison*—as establishing conclusively the federal courts' authority to invalidate Acts of Congress as unconstitutional. It did that, to be sure. But Chief Justice Marshall's opinion for the Court also grappled with another question that we take as a given today: judicial authority to judge the legality of actions by the officer of a coordinate branch and to direct that officer to comply with federal law. In wrestling with both issues—judicial review and *mandamus*—the Court in *Marbury* necessarily articulated a vision of the role of the federal judiciary in our system of separation of powers. Perhaps because of *Marbury's* canonical status, scholars today offer competing views of what vision the Court, in fact, articulated. As you read the case, try to identify theory of judicial power on which the Court justifies its role in assessing the legality of both statutes and executive action.

Marbury v. Madison

5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).
On Petition for Mandamus.

■ * * * [T]he following opinion of the Court was delivered by the CHIEF JUSTICE:

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

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

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

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

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

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

The first object of inquiry is,

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

His right originates in an act of congress passed in February 1801, concerning the district of Columbia. [The statute authorizes the appointment of justices of the peace, "to continue in office for five years."]

* * * In order to determine whether [Marbury] is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues

him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

[The Court then discussed the constitutional and statutory provisions governing the appointment of Officers of the United States. As relevant here, the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States." Under Article 2, § 3, the President "shall commission all the officers of the United States." Finally, the statute establishing the Department of State provided that the Secretary of State must affix the seal of the United States to "all civil commissions" after the President signed them.]

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. * * * The signature is a warrant for [the Secretary of State's] affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature. * * *

[The Court then rejected the argument] that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. * * * The appointment is the sole act of the President * * *. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry. * * * If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. * * *

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

This brings us to the second enquiry; which is,

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

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

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

[In concluding that our jurisprudence did not merit that "obloquy," the Court first found that Marbury's case was not "one of *damnum absque injuria*; a loss without an injury."] This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia * * * has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct concerning which the injured individual has no remedy.

That there be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

* * * [T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act * * *. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. * * *

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

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

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

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

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

3d. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2d. The power of this court.

1st. The nature of the writ.

* * * [T]o render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

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

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

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

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

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of

issuing a *mandamus* is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

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

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

Whether it can issue from this court.

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

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

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

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

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

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

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

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

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

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

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

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

The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the

constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

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

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

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

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

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

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

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

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

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact

what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

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

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

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

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

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

This is too extravagant to be maintained.

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

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

It is declared, that "no tax or duty shall be laid on articles exported from any state." Suppose, a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered

in such a case? ought the judges to close their eyes on the constitution, and only see the law?

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

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

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

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

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

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

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

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

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

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

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

The rule must be discharged.

NOTE ON MARBURY V. MADISON

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

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

While Marbury's suit was pending in the Supreme Court, the newly installed Republicans worked on a number of fronts to frustrate the outgoing Federalists' designs for the federal judiciary. Congress repealed the Circuit Court Act of 1801 and abolished the sixteen judgeships that it had created. By statute, Congress also abolished the Supreme Court's previously scheduled June and December Terms and provided that there be only one Term, in February. As a result, the Supreme Court did not meet at all in 1802. Having received Marbury's petition in December 1801, it could not hear his case until February 1803. Even more menacingly, the Jeffersonians embarked on a program of judicial impeachments. Early in 1802, the House voted articles of impeachment against the Federalist district judge John Pickering of New Hampshire, who apparently was burdened by mental infirmity and an alcohol problem. On the day after Pickering's conviction by the Senate in March 1804, the House impeached Supreme Court Justice Samuel Chase. The case against Chase failed in the Senate. Had it succeeded, the impeachment of John Marshall was widely expected to follow.

¹ For contrasting views of Marshall's opinion, compare Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1 (1969), with Haggard, *Marbury v. Madison: A Concurring/Dissenting Opinion*, 10 J. Law & Pol. 543 (1994). For additional historical background, see Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (2005); Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002); Haskins & Johnson, *Foundations of Power: John Marshall, 1801-15* (1981); Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971); McCloskey, *The American Supreme Court* 36-44 (1960).

In this charged political climate, it seems doubtful, at least, that James Madison, Thomas Jefferson's Secretary of State, would have obeyed a judicial order to deliver Marbury's commission as a justice of the peace. Might this consideration have influenced Marshall's decision of the case?² In light of his involvement in the events leading up to the case, should Marshall have recused himself?

(2) **A Political Masterstroke?** The Marbury opinion is widely regarded as a political masterstroke. Marshall seized the occasion to uphold the institution of judicial review,³ but he did so in the course of reaching a judgment that his political opponents could neither defy nor protest.⁴

Is it ironic if Marbury, which authorizes the courts to hold some issues outside the bounds of permissible political decisionmaking, was itself a political decision? See generally Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Calif.L.Rev. 1 (2003). Does the answer depend on sorting out various possible senses of "political" and determining in which sense, if any, Marbury should be so characterized?

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

The jurisdictional analysis proceeds in two steps. First, Marshall concludes that section 13 of the 1789 Judiciary Act—which authorized the

² Commentators have overwhelmingly thought that Marshall's decision was motivated by political considerations. See Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Revisory Powers*, 101 Colum.L.Rev. 1515, 1515–18 (2001) (summarizing views and collecting citations). Among the corroborating evidence is the Court's decision the week after Marbury in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), declining to consider the constitutionality of the Repeal Act of 1802, which abolished the sixteen circuit court judgeships created by the Circuit Court Act of 1801. See, e.g., Alfange, *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup.Ct.Rev. 329, 362–68, 409–10 (treating *Stuart v. Laird* as strongly probative of the Court's awareness of the political sensitivity of its situation and its willingness to shape its decisions accordingly). See also Ackerman, note 1, *supra*, at 163–98 (discussing the relationship between the Marbury and Stuart decisions). For the contrary view that Marshall's Marbury opinion was essentially innocent of political motivation, see Clinton, *Marbury v. Madison and Judicial Review* 79–138 (1989).

³ The issue, however, was "by no means new", according to Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U.Chi.L.Rev. 646, 655–56 (1982): "The Supreme Court itself had measured a state law against a state constitution in *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), and had struck down another under the Supremacy Clause in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); in both cases the power of judicial review was expressly affirmed. Even acts of Congress had been struck down by federal circuit courts [as in *Hayburn's Case*, p. 82, *infra*], and the Supreme Court, while purporting to reserve the question of its power to do so, had reviewed the constitutionality of a federal statute in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). Justice James Iredell had explicitly asserted this power both in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and Chase had acknowledged it in *Cooper*. * * * Yet though Marshall's principal arguments echoed those of Hamilton [in *Federalist No. 78*], he made no mention of any of this material, writing as if the question had never arisen before." In a detailed study of early case law, Treanor, *Judicial Review Before Marbury*, 58 Stan.L.Rev. 455 (2005), concludes that judicial review was exercised by state and federal courts in more than thirty cases before Marbury. On the understanding of the Convention, see Chap. I, pp. 11–12, *supra*. See also Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 Va.L.Rev. 1111, 1114–15 (2001) (observing that judicial review "became far less controversial" during the period between the Convention and the decision in Marbury).

⁴ For a detailed critical review of Marshall's opinion, culminating in the conclusion that "[j]ust about everything in Marbury is wrong", see Paulsen, *Marbury's Wrongness*, 20 Const.Comm. 343, 343 (2003).

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”, 1 Stat. 73, 81—confers original Supreme Court jurisdiction in actions for mandamus. Some believe that Marshall misread Section 13. Professor Amar, for example, argues that “the mandamus clause is best read as simply giving the Court remedial authority—for both original and appellate cases after jurisdiction * * * has been independently established”. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U.Chi.L.Rev. 443, 456 (1989). See also Van Alstyne, note 1, *supra*, at 15. In contrast, Professor Pfander contends that “supreme” courts traditionally possessed a supervisory authority over lower courts and governmental officers, exercised through writs of mandamus and prohibition, and that against this background “section 13 appears to confer precisely the sort of freestanding power on the Court that Marshall attributed to it in *Marbury*”. Pfander, note 2, *supra*, at 1535. Should the Court have adopted Amar’s construction under the principle favoring interpretations that render statutes constitutional?⁵

Second, Marshall finds that the second paragraph of Article III, § 2 restricts the permissible scope of the Supreme Court’s original jurisdiction to cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” According to Van Alstyne, *supra* note 1, at 31, this clause “readily supports the interpretation that the Court’s original jurisdiction may not be reduced by Congress, but that it may be supplemented”. Cf. Amar, *supra*, at 469–76 (arguing that the Court’s original jurisdiction was limited partly to spare parties from the burden of traveling to the seat of government to litigate their disputes). For further discussion of the Supreme Court’s original jurisdiction, see Chap. III, *infra*.⁶

(4) *Marbury’s Arguments for Judicial Review.* Consider the arguments Marshall offers to support the power of judicial review and whether those arguments are persuasive.

A common criticism is developed in Bickel, *The Least Dangerous Branch* 2–14 (1962). Everyone accepted the proposition that the Constitution was binding on the national government. Dispute centered on the quite separate proposition that the courts were authorized to enforce their interpretations of the Constitution against the conflicting interpretations of Congress and the President. Marshall’s arguments prove the first, undisputed proposition.

⁵ For discussion of that principle, see pp. 79–81, *infra*.

⁶ With the Supreme Court lacking jurisdiction in *Marbury v. Madison*, would any other court have had jurisdiction to entertain *Marbury’s* claim? A state court could not have issued mandamus relief against a federal official, see *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), and the 1789 Judiciary Act failed to vest the lower federal courts with mandamus jurisdiction, see *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). In *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court held that the Circuit Court for the District of Columbia, which had been established by a special act, was uniquely authorized to issue writs of mandamus in original actions against federal officials. Based on *Kendall*, Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 Const.Comment. 607 (2002), concludes unequivocally that the Circuit Court would have had jurisdiction had *Marbury* chosen to file there. Professor Bloch further speculates that *Marbury* may have deliberately bypassed the Circuit Court in order to permit John Marshall to issue the precise rulings about Supreme Court jurisdiction and judicial review for which *Marbury v. Madison* is famous. Compare Fallon, Paragraph (2), *supra*, at 52 n. 271 (2003) (finding it “highly doubtful that the [Supreme] Court, in the politically charged atmosphere of 1803, would have upheld the authority of the D.C. courts to order mandamus relief for William *Marbury* against James Madison”).

but furnish no support for the second. In sum, Marshall's arguments beg the only question really in issue.

In support of this criticism, note that there are issues on which, without further inquiry, courts accept a formally correct determination of the legislative or executive branches—*e.g.*, a statement that a certain statute has in fact been enacted in accordance with the prescribed procedure or an executive determination that a certain government is the established government of a country. See Sec. 6, *infra* (discussing “political questions”). Would it not be possible for courts, in all cases, similarly to accept the determination of Congress and the President (or in the case of a veto, of a super majority of Congress) that a statute is duly authorized by the Constitution?

On the other hand, does Congress in voting to enact a bill, or the President in approving it, typically make or purport to make such a determination? With respect to the validity of the statute as applied in particular situations, how could they?⁷

(5) Judicial Supremacy in Historical Perspective. Conventional wisdom now treats the federal judiciary as “supreme in the exposition of the law of the Constitution” and traces that premise back to Marbury itself. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). See also, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *United States v. Nixon*, 418 U.S. 683, 703 (1974). Recent historical studies, however, have suggested that the present conventional wisdom may reflect an ahistorical understanding of Marbury and of the intellectual and legal context that preceded it. Some historians contend, in particular, that the founding generation initially distinguished between fundamental or constitutional law (embodying the basic terms of the social compact) and ordinary law (interpreted and enforced by courts through ordinary means). See, *e.g.*, Snowiss, *Judicial Review and the Law of the Constitution* 13–89 (1990); Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L.Rev. 787, 796–99 (1999). Under this conception of judicial review, moreover, courts and commentators of the time apparently thought it proper for courts to invalidate legislation on constitutional grounds only in cases of such relatively clear legislative or executive overreaching that little or no “interpretation” was required.⁸ According to Snowiss, “Marshall’s key innovations [to that set of understandings] did not come in Marbury,” in which he said little about *how* the Constitution should be interpreted, but in opinions of the 1810s and 1820s in which he subjected the Constitution to “rules of statutory interpretation” and “transformed explicit fundamental

⁷ For an attempt to “provide a clear and persuasive derivation of Marbury’s conclusion from the constitutional text”, see Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va.L.Rev. 333 (1998). See also Prakash & Yoo, *The Origins of Judicial Review*, 70 U.Chi.L.Rev. 887 (2003) (arguing that the Constitution’s text, structure, and history all support the practice of judicial review).

⁸ With respect to the circumstances under which courts would hold statutes unconstitutional, see also Alfange, note 2, *supra*, at 342–49 (noting the expectation of the founding generation that judicial invalidation of statutes would occur only in cases of clear mistake); Casto, *James Iredell and the American Origins of Judicial Review*, 27 Conn.L.Rev. 329, 341–48 (1995) (same); Klarman, note 3, *supra*, at 1120–21.

law, different in kind from ordinary law, into supreme written law, different only in degree" and enforceable by the courts in all cases.⁹

In a similar vein, former Dean Larry Kramer argues that when viewed in proper historical context, *Marbury* represented the application of an earlier, modest understanding of judicial review rather than a bold articulation of the idea of judicial supremacy. See Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 93–127 (2004). Kramer notes that judicial review arose against a backdrop of popular constitutionalism—the notion, inherited from British constitutional theory, that ultimate responsibility for the enforcement of constitutional law lay with the community through political action, protest, and even revolution. From this starting point, Kramer maintains that many early Americans embraced a “departmental” theory of judicial review under which Congress and the President, no less than the judiciary, had an obligation to decide for themselves how the duties imposed by the Constitution constrained their authority. On that view, the interpretations by one branch—such as the judiciary—did not necessarily bind the others; ultimately, “the people themselves” would have to resolve conflicts among the branches about the Constitution’s meaning through popular action.¹⁰ Kramer contends that *Marbury*, properly understood, is consistent with departmentalism rather than the judicial supremacy with which many now associate it.

These historical accounts, of course, have not gone unchallenged.¹¹ But even if historians such as Snowiss, Wood, and Kramer are correct in their understanding of *Marbury* and its historical context, is the modern conception of *Marbury* too well entrenched to reconsider?¹²

⁹ For a more traditional account of the development of judicial review, in which the distinction between fundamental and ordinary law is not emphasized, see Corwin, *The Establishment of Judicial Review*, 9 Mich.L.Rev. 102–25, 283–316 (1910–11).

¹⁰ For a sweeping historical account of both the Court’s role as a catalyst of political debate and the influence of public opinion on the development of constitutional doctrine, see Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009).

¹¹ For recent interventions, see, e.g., Hamburger, *Law and Judicial Duty* (2008) (arguing that what we now think of as judicial review was merely an aspect of a more general common law judicial duty to decide in accordance with the law of the land and to respect the hierarchical character of law by treating inferior law as void when it conflicted with superior law); Bilder, *The Corporate Origins of Judicial Review*, 116 Yale.L.J. 502 (2006) (arguing that judicial review originated in the common law practice of invalidating corporate charters that were “repugnant” to the law of nations and that the seamless adaptation of that practice to the context of judicial review leaves us little useful founding-era evidence about questions such as “departmentalism” or the standard of review in constitutional cases); Treanor, note 3, *supra*, at 458 (arguing that in pre-*Marbury* cases, “the standard of review varied with subject matter” and that courts were especially aggressive in rebuffing threats to judicial power and in invalidating state statutes).

¹² See, e.g., White, *The Constitutional Journey of Marbury v. Madison*, 89 Va.L.Rev. 1463 (2003) (tracing historically evolving interpretations of *Marbury*); Whittington & Rinderle, *Making a Mountain out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 Hastings Const.L.Q. 823 (2012) (arguing that while courts and commentators cited *Marbury* for various purposes in the nineteenth century, the case attained its status as the cornerstone of judicial review nearer the turn of the twentieth century).

NOTE ON *MARBURY V. MADISON* AND THE FUNCTION OF ADJUDICATION

(1) **Marbury and Judicial Power:** Marbury is often quoted for the observation that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” But how far does the law declaration power extend? Imagine that Marbury, although wishing to take office as justice of the peace, had no interest in litigating Madison’s refusal to deliver his commission. Given the tenor of Chief Justice Marshall’s opinion, could a concerned citizen of the District of Columbia have brought suit to establish that Madison acted unlawfully and to compel him to deliver Marbury’s commission (assuming that Congress had vested appropriate jurisdiction in a federal court)? What if it were instead a concerned citizen living in Boston who—like many others—felt aggrieved that Madison, as an officer of the United States, had failed to comply with the law? Should it matter whether Congress explicitly authorized such suits?

(2) **Dispute Resolution Model.** Chief Justice Marshall’s opinion in Marbury treats the law declaration power as incidental to the resolution of a concrete dispute occasioned by Marbury’s claim to a “private right” to take possession of the office. Marshall emphasizes this recurrent theme, moreover, in ways that seem obviously calculated to make two aspects of his decision more palatable: first, the assertion of judicial authority to grant affirmative relief against a senior political officer of the executive branch; and, second, the claimed authority to invalidate an Act of Congress. The Court, in Marshall’s view, had the authority to impose in those ways on the coordinate branches because doing so was an unavoidable consequence of its obligations to adjudicate Marbury’s claim of right.

In response to the charge that the relief requested against Secretary of State Madison would “intrude into the cabinet, and * * * intermeddle with the prerogatives of the executive,” Marshall parried that “[t]he province of the court is, solely, to decide on the rights of individuals.” While the Court could “never” resolve “political” questions that the Constitution or laws assigned to the executive’s “discretion,” the fact that Madison occupied public office did not “exempt[] him from being sued in the ordinary mode of proceeding”. On this view, the suit did not rest upon the notion that the Court’s special function was to bring public officials into conformity with the rule of law. On the contrary, the Court granted the requested relief to vindicate Marbury’s private right, just as it could if the defendant had been a private citizen.

Marshall’s discussion of the authority to engage in judicial review similarly assumed that the Court had no choice but to interpret and apply the Constitution when presented with a proper case requiring decision. Hence, in deeming it “emphatically the province and duty of the judicial department to say what the law is”, Marshall took pains to elaborate in the very next sentence that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”

This “dispute resolution” model—under which the Court treats its law declaration power as incidental to its responsibility to resolve concrete disputes—recurs in several related aspects of the Court’s justiciability case law. First, to avoid intrusion upon the prerogatives of the other branches, leading cases affirm that courts should eschew any role as a general overseer of government conduct; that is, the federal judiciary’s function is not to

vindicate abstract interests in the government's compliance with the rule of law. See, e.g., *FEC v. Akins*, 524 U.S. 11, 23–24 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992). Second, justiciable “cases” should be restricted to disputes in which a defendant's violation of a legal duty has caused a distinct and palpable injury to a concrete, legally protected interest of the plaintiff. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975). These themes are taken up in detail in Sections 3, 4, and 5 of this Chapter.

(3) Law Declaration Model. In the past half century, a competing account of the courts has found considerable support in the commentary and also, albeit less than completely, in several aspects of the law of justiciability. Rather than treating law declaration as an incidental function of resolving concrete claims of individual right, the “law declaration” account of the judicial function presupposes that federal courts (and especially the Supreme Court) have a special function of enforcing the rule of law, independent of the task of resolving concrete disputes over individual rights.¹ This approach questions the importance of requiring that the plaintiff have a personal stake in the outcome of a lawsuit; in its purest form, it would permit any citizen to bring a “public action” to challenge allegedly unlawful government conduct. Under this view, the judiciary should be recognized not as a mere settler of disputes, but rather as an institution with a distinctive capacity to declare and explicate norms that transcend individual controversies.²

At least three historical phenomena have contributed to the emergence of the law declaration model. First, the vast increase in the modern administrative state has created diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms. At the same time, a need has arisen for judicial control of administrative power.³ Encouraged by statutes authorizing judicial review of administrative action, leading administrative law decisions gradually departed from the dispute resolution model and accorded “standing” to persons asserting interests not protected at common law in order to represent the “public interest” in statutory enforcement. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). For further discussion, see pp. 145–146, *infra*.

Second, the substantive expansion of constitutional rights, especially under the Warren Court in the 1960s, has broadened the conception of

¹ Support for the law declaration approach, particularly in constitutional adjudication, is found by some commentators in *Marbury* itself. See, e.g., Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363 (1973); Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 *Calif.L.Rev.* 1 (2003).

² For a range of commentary elaborating aspects of this approach, see, e.g., Vining, *Legal Identity: The Coming of Age of Public Law* (1978); Bandes, *The Idea of a Case*, 42 *Stan.L.Rev.* 227 (1990); Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv.L.Rev.* 1281 (1976); Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 *Harv.L.Rev.* 4 (1982); Dworkin, *Taking Rights Seriously* 131–49 (1977); Fiss, *Foreword: The Forms of Justice*, 93 *Harv.L.Rev.* 1 (1979); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U.Pa.L.Rev.* 1033 (1968); Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *Notre Dame L.Rev.* 447 (1994); Sunstein, *Standing and the Privatization of Public Law*, 88 *Colum.L.Rev.* 1432 (1988); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 *Cornell L.Rev.* 633 (1977).

³ See generally Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 *Harv.L.Rev.* 1265, 1282–84 (1961); Stewart, *The Reformation of American Administrative Law*, 88 *Harv.L.Rev.* 1667, 1674–81 (1975).

legally cognizable interests. For example, the widely shared interests of voters in challenging a malapportioned legislative district, see *Baker v. Carr*, 369 U.S. 186 (1962), p. 250, *infra*, or of public school pupils in challenging school prayer, see *School Dist. v. Schempp*, 374 U.S. 203 (1963), differ markedly from the liberty and economic interests recognized at common law.

Third, one contemporary notion of constitutional rights treats them not merely as shields against governmental coercion, but as swords authorizing the award of affirmative relief to redress injury to constitutionally protected interests. That understanding, the origins of which can be traced in part to the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), p. 922, *infra*, also finds expression in the institutional reform litigation following *Brown v. Board of Education*, 347 U.S. 483 (1954). After the recognition of such rights as those to school desegregation, courts inevitably found themselves awarding remedies of a kind difficult to square with at least some of the premises of the private rights or dispute resolution model.

(4) **Overlap of the Approaches.** No two stylized and oversimplified models can capture the full historical or functional complexity of the role of the federal judiciary. School desegregation cases, for example, have their origin in individual grievances that seemingly require the reshaping of institutions. But such cases resolve questions about the structure of legal and social institutions that far transcend the context of any individual's claimed deprivation of private right. The devices of the class action, like other techniques for broadening the scope of litigation, frequently also meld the two functional models, and many of the tensions about the proper role of the courts have been felt in the resulting cases and doctrines.⁴

The distinction between the dispute resolution and law declaration models blurs, moreover, because the law declaration model, sensibly construed, cannot be understood to license judicial review at the behest of any would-be litigant on the basis of any hypothesized set of facts or indeed no facts whatsoever. For there to be a constitutionally justiciable case under the public rights approach, at least "the functional requisites of effective adjudication" must be satisfied. See Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U.L.Rev. 1, 51 (1984). These requisites cannot be reduced to a determinate list, but involve such considerations as: (a) the importance of a concrete set of facts to permit the accurate formulation of the legal issue to be decided and the limits of the ruling ultimately issued and (b) adversary presentation as an aid to the accurate determination of factual and legal issues. In the end, disputes about the comparative merits of the competing models are not so much about the appropriate formula for deciding cases as about the basic attitude toward the proper role of the federal judiciary.

(5) **The Supreme Court and the Models.** The Supreme Court has never explicitly rejected the dispute resolution model. Indeed, its formal pronouncements have been consistently to the contrary. There are, however,

⁴ For further discussion of such complex litigation, compare, e.g., Fuller, *The Forms and Limits of Adjudication*, 92 Harv.L.Rev. 353 (1978) (arguing that adjudication is not well adapted to resolve "polycentric" disputes, which he claims have too many interdependent aspects to yield to rational, properly judicial solution), with Sabel & Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv.L.Rev. 1015, 1019 (2004) (arguing that institutional reform remedies have become more successful as they have moved from "from command-and-control injunctive regulation toward experimentalist intervention" that combines "more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability").

some holdings that may be seen as reflecting, though not in explicit terms, a shift in conception of the judicial role. See, e.g., the developments discussed in the *Note on Mootness in Class Actions*, p. 208, *infra*, and in the *Note on the Scope of the Issue in First Amendment Cases and Related Problems Involving "Facial Challenges"*, p. 177, *infra*. See also Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv.L.Rev. 1731, 1779-1800 (1991) (citing, *inter alia*, harmless error practice, the practice of providing alternative grounds for decision, and the exception to mootness doctrine for cases "capable of repetition, yet evading review" in support of the conclusion that "there exists a substantial body of case law, rising almost to the level of a general tradition, in which adjudication * * * functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes").

In a bolder argument, Professor Monaghan maintains that the Supreme Court now substantially embraces the law declaration model as the dominant approach to its own jurisdiction. First, in addition to noting some of the examples cited in the previous paragraph, Professor Monaghan argues that the Court's special rules governing review of official immunity decisions (see pp. 1051-1054, *infra*) and its qualification of the statutory "final judgment" rule of 28 U.S.C. § 1257 (see pp. 546-558, *infra*) show that the Court will often find a way around jurisdictional constraints that would otherwise limit its ability to review important propositions of law. Second, he catalogues a broad array of "agenda control" devices—making limited grants of certiorari, reformulating questions presented, injecting new questions into cases, appointing amici to defend positions abandoned by the litigants, and strategically accepting or rejecting party stipulations, waivers, or concessions. Based on these phenomena, he concludes that the Court has defined "its current place in our constitutional order" in a way that establishes "a 'final say' default position." Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665 (2012). To the extent that these innovations deviate from the assumptions about justiciability that govern the lower courts, does the Court have an obligation to specify some basis in the text or history of Article III for treating its own jurisdiction differently? Do the practices identified by Professor Monaghan raise concerns about judicial self-aggrandizement? Cf. Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 Sup. Ct. Rev. 357, 361 (discussing "cognitive pressures that cause judges to press judicial prerogatives to implausible extremes").⁵

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

⁵ For contrasting views on whether the federal courts should have discretion to reframe the issues by the parties, compare Frost, *The Limits of Advocacy*, 59 Duke L.J. 447 (2009) (arguing that such judicial discretion avoids potential distortions of law by the parties), with Lawson, *Stipulating the Law*, 109 Mich.L.Rev. 1191 (2011) (arguing that allowing the parties to structure the case promotes judicial restraint and minimalism).

given, than to usurp that which is not given. The one or the other would be treason to the constitution".

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

Beyond the "principled discretion" defended by Professor Shapiro, is there a further judicial power to decline to exercise jurisdiction on a more ad hoc basis, for what might loosely be termed "prudential" reasons?⁶

According to Fallon, note 1, *supra*, at 16-20, a prudential tradition in constitutional adjudication can be traced back to Marbury itself: "In Marbury, the Court reached the only prudent conclusion: It could not, indeed must not, issue a quixotic order to Madison to deliver Marbury's commission." Moreover, Fallon writes, "[e]ven if the face of prudence is typically one of judicial self-abnegation, there may be occasions when prudence counsels an otherwise constitutionally dubious assertion of judicial power. In Marbury itself, for example, the Court arguably invented a non-existent statutory jurisdiction in order to be able to hold * * * that Congress had overstepped constitutional bounds" and thereby to establish what the Justices believed to be a functionally desirable tradition of judicial review. For a classic defense of judicial "prudence" in deciding jurisdictional questions, see Bickel, *The Least Dangerous Branch* (1962).

(7) Marbury and Constitutional Avoidance. Is the power of judicial review so fraught that federal courts should exercise it only when truly necessary to resolve the case before it? The so-called doctrine of constitutional avoidance holds that it is. See, *e.g.*, *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.") (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)).

The nearly canonical citation for the avoidance doctrine is Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936).⁷ Although his famous opinion included among the avoidance devices a number of the justiciability doctrines discussed

⁶ For further discussion, see Paragraph (7), p. 78 n. 8, *infra*.

⁷ The majority opinion in *Ashwander* considered on the merits and rejected a constitutional challenge to the existence and authority of the Tennessee Valley Authority. Concurring, Justice Brandeis argued that the Court should have avoided the constitutional issues, principally on equitable grounds.

below (doctrines we now think of as the prohibition of feigned cases and the requirements of ripeness and standing),⁸ Justice Brandeis also identified several avoidance devices that the Court had applied "to cases confessedly within its own jurisdiction". First, Brandeis noted that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885)). Second, he emphasized that federal courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Third, and perhaps most important in modern terms, he invoked avoidance in matters of statutory interpretation: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). How closely do these principles follow from the approach to constitutional adjudication articulated by Chief Justice Marshall in *Marbury*?

(a) Breadth of Decision. The principle that the Court should not "formulate a rule of constitutional law broader than is required by the precise facts" necessarily includes a judgmental element, involving the appropriate specification of the applicable rule of decision. What rationale supports this principle? Would it *always* be sound practice for the Court to decide cases on the narrowest possible grounds?⁹

(b) Last Resort Rule. The principle that the Court should avoid ruling on constitutional issues "if there is also present some other ground on which the case may be disposed of" has been termed the "last resort" rule. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C.L.Rev. 1003, 1004 (1994). This rule continues to be much invoked when a party claiming relief on federal constitutional grounds also asserts a right to relief under a federal statute or regulations or on state law grounds. See, e.g., Department of

⁸ Although such doctrines of justiciability might sometimes result in the avoidance of constitutional questions, those doctrines are not framed to serve that purpose directly. Could they legitimately be adapted to such ends? In his famous "passive virtues" argument, Professor Bickel suggests that the Court might properly rely, at times, on a result-oriented approach to justiciability as a way to achieve avoidance. Bickel, Paragraph (6), *supra*, at 127 (1969). According to Bickel, this technique of constitutional avoidance is necessary to reconcile the Court's role as the ultimate enforcer of constitutional "principle" with competing demands of "prudence" and expediency that counsel the Court sometimes to avoid constitutional decisions that aroused political constituencies would be unwilling to accept. In contrast, Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum.L.Rev. 1 (1964), argues that Bickel's proposed approach tends "to blur the fact that jurisdiction under our system is rooted in Article III, that it is not a domain solely within the Court's keeping." He adds that in cases within the Court's jurisdiction, proper avoidance techniques "are devices which go to the choice of the ground of decision of a case, not devices which avoid decision on the merits, not devices which 'decline to exercise' the jurisdiction to decide."

⁹ Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999), argues that a minimalist approach to judicial decision making tends "to make judicial errors less frequent and (above all) less damaging" and to maximize the space for the operation of political democracy. Sunstein acknowledges, however, that sometimes broad clear rules are necessary or at least desirable to avoid chilling the exercise of constitutional freedoms and to facilitate advance planning.

Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); United States v. Locke, 471 U.S. 84, 93 (1985).

In some contexts, however, the Court has taken a different approach, one that is more consistent with the law declaration model. See, e.g., United States v. Leon, 468 U.S. 897, 925–26 (1984) (determining first whether a search violated the Fourth Amendment and then asking whether reasonable reliance on a warrant would negate the remedy of the exclusionary rule despite the unconstitutional search). Consider, in particular, the Court's approach to the "qualified immunity" doctrine, which provides that governmental officials who are sued in their personal capacities typically are immune from suits for money damages under federal law unless they violated "clearly established" federal rights. See generally Chap. IX, Sec. 3, *infra*. In ruling on qualified immunity defenses, the Court has stated that lower courts have discretion to decide initially whether the plaintiff has stated a valid constitutional claim and then to determine whether the plaintiff's rights were clearly established for purposes of qualified immunity. See Pearson v. Callahan, 555 U.S. 223 (2009) pp. 1052–1053, *infra*. Although acknowledging circumstances that would warrant addressing those issues in the opposite order (for example, "cases in which it is plain that the constitutional right is not clearly established but far from obvious whether there is in fact such a right"), the Court noted that deciding the underlying constitutional question first may "promote[] the development of constitutional precedent", which "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." Is there a general constitutional interest in achieving judicial articulation of legal norms that may outweigh the interest in avoiding "unnecessary" decisions of constitutional law? In light of the exceptions to the "last resort" rule, would it be fair to say that whether to apply the rule is simply a policy question, to be decided on a case-by-case basis? See Kloppenberg, *supra*.¹⁰

(c) **The Canon of Avoidance.** Among the avoidance rules offered by Justice Brandeis, the most important and controversial is the last: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." In tracing the history of this principle, commentators have noted a slide from what might be termed an "unconstitutionality" to a "doubts" canon of statutory interpretation. Nagle, *Delaware & Hudson Revisited*, 72 Notre Dame L.Rev. 1495, 1495–97 (1997). See also Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L.Rev. 831 (2001); Vermeule, *Saving Constructions*, 85 Geo.L.J. 1945 (1997). Under the unconstitutionality approach, which was commonly practiced during the nineteenth century, the courts adopted an alternative interpretation only after first deciding that the preferred interpretation would render the statute unconstitutional. See Nagle, *supra*. Modern avoidance, which can be traced back to United States v. Delaware & Hudson Co., 213 U.S. 366, 407–08 (1909), rejects the unconstitutionality approach on the ground that the former practice still required an

¹⁰ See also Katyal, *Judges as Advicegivers*, 50 Stan.L.Rev. 1709 (1998); Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 Stan.L.Rev. 1825 (1998); Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C.L.Rev. 847 (2005); Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 Geo. Mason L.Rev. 53 (2008).

unnecessary constitutional ruling. Instead, the Court now holds that “where an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

How closely is the modern canon tied to Marbury’s premises that judicial review is justified because (and, thus, presumably only when) necessary to resolve a case? The Court has suggested that, in the interest of judicial restraint, the modern canon seeks “to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections.” *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). A second prominent rationale rests on an empirical assumption that the canon respects Congress’ presumed intent not “to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 466 (1989). A third rationale argues that the modern avoidance canon represents a “resistance norm” disfavoring interpretations of statutes that press close to the border of actual unconstitutionality. See Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex.L.Rev.* 1549, 1585 (2000). See also Eskridge & Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand.L.Rev.* 593 (1992) (presenting a related justification); Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Enactment Costs*, 118 *Yale L.J.* 2 (2008) (same); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv.L.Rev.* 405, 468–69 (1989) (same).¹¹

Although the Court has stated that the modern avoidance canon “has so long been applied by this Court that it is beyond debate,” *Edward J. DeBartolo Corp.*, *supra*, the canon has in fact become the subject of growing debate and criticism. Some have argued that the doctrine contradicts, rather than implements, principles of judicial restraint. First, Professor Schauer has maintained that “it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.” Schauer, *Ashwander Revisited*, 1995 *Sup.Ct.Rev.* 71, 74. Accordingly, Schauer concludes that the canon permits judges to use disingenuous interpretations of statutes “to substitute their judgment for that of Congress” without assuming responsibility for rendering a constitutional holding.¹² Second, because the modern avoidance

¹¹ The avoidance canon sometimes overlaps with other precepts of statutory interpretation, including “clear statement” rules under which the Court will not read federal statutes to preclude all judicial review of administrative action, see Chap. IV, pp. 329–330, *infra*, or to impose duties or liabilities on the states, see Chap. IX, p. 959, *infra*, in the absence of clear statutory statements mandating that effect. For contrasting views on the legitimacy of clear statement rules generally, compare, e.g., Manning, *Clear Statement Rules and the Constitution*, 110 *Colum.L.Rev.* 339 (2010) (arguing that clear statement rules impermissibly abstract constitutional values from the limits placed upon them by the constitutional text), with Sunstein, *Nondelegation Canons*, 67 *U.Chi.L.Rev.* 315 (2000) (suggesting that such canons merely require Congress to take responsibility for decisions that push against accepted constitutional values).

¹² Jerry Mashaw suggests that the strategic misconstruction of a statute may intrude upon legislative supremacy more severely than would the decision to strike down an unconstitutional statute. See Mashaw, *Greed, Chaos, and Governance: Using Public Choice To Improve Public*

canon is triggered by mere constitutional doubt rather than a finding of actual unconstitutionality, its effect is “to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made ‘penumbra’ that has much the same prohibitory effect as * * * [the already extravagantly interpreted] Constitution itself.” Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U.Chi.L.Rev. 800, 816 (1983). Third, when the Court practices avoidance in reviewing an agency’s interpretation of its own organic act, see, e.g., *Edward J. DeBartolo Corp., supra*, the Court’s reliance on the canon may devalue the executive’s own responsibility to determine the constitutionality of action that it undertakes pursuant to authority delegated by Congress. See *Kelley, supra*.

The Court has frequently emphasized that the canon is “not a license for the judiciary to rewrite language enacted by the legislature,” *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (internal quotations omitted), and that in no case should a court “press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” *United States v. Locke*, 471 U.S. 84, 96 (1985) (internal quotations omitted). But does that premise correspond to the reality of the cases? Compare *Ullman v. United States*, 350 US 422, 433 (1956) (emphasizing that “the Court has stated that words may be strained ‘in the candid service of avoiding a serious constitutional doubt’ ”).

2. ISSUES OF PARTIES, THE REQUIREMENT OF FINALITY, AND THE PROHIBITION AGAINST FEIGNED AND COLLUSIVE SUITS

INTRODUCTORY NOTE

Helping to define the appropriate scope of an Article II “case” or “controversy” are a set of technical requirements that include the Court’s insistence that federal courts have the capacity to enter final judgments and its prohibition against the parties’ colluding to invoke federal jurisdiction, not to resolve a genuine dispute but to secure a judicial ruling on a subject of interest to one or more of the litigants. As you read the following materials, ask yourself how readily one can derive these doctrines from the standard constitutional materials and how readily one can subject the doctrines to principled limits.

Law 105 (1997). According to *Mashaw*, if the Court invalidates a statute, that course of action returns matters to the pre-statutory status quo. To fill the policy vacuum created by such a judicial ruling, the legislature must go back to the drawing board in a process that requires the House, the Senate, and the President to bargain afresh. If, however, the Court relies on avoidance to misread a statute, the resultant misinterpretation will remain in place if any one of those three actors prefers it to the likely outcome of corrective legislation.