

INSTITUTIONAL AUTHORITY

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STRUCTURING THE FEDERAL SYSTEM

ONE OF THE FIRST things everyone learns in an American government course is that two concepts undergird the U.S. constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second concept is the notion of checks and balances: each branch of government imposes limits on the primary functions of the others. The Supreme Court may interpret laws, but Congress can introduce legislation to override the Court's interpretation. If Congress takes action, then the president has the option of vetoing the proposed law. If that happens, Congress must decide whether to override the president's veto. Seen in this way, the rule of checks and balances inherent in the system of separation of powers suggests that policy in the United States comes not from the separate actions of the branches of government but from the interaction among them.

A full understanding of the basics of institutional powers and constraints therefore requires a consideration of three important subjects. First, we must investigate the separation of powers system and why the framers adopted it; we take up this subject in the following pages. Second, because of the unique role the judiciary plays in the American government system, we need to understand how the Court has interpreted its own powers (located in Article III of the Constitution) and the constraints on those powers, as well as the powers of Congress (Article I) and the president (Article II). We consider these matters in Chapters 2, 3, and 4. Finally, throughout U.S. history the various institutions sometimes have taken on roles other than those ascribed to them in the Constitution (such as when the executive exerts legislative powers); and sometimes

the Constitution provides each branch with significant and potentially overlapping powers (such as the power to conduct a war). Chapter 5 takes up these important topics by exploring interbranch relations.

ORIGINS OF THE SEPARATION OF POWERS/CHECKS AND BALANCES SYSTEM

Even a casual comparison of the Articles of Confederation and the U.S. Constitution reveals major differences in the way the two documents structured the national government. Under the articles, the powers of government were concentrated in the legislature—a unicameral Congress in which the states had equal voting powers (see *Figure I-1*). There was no executive or judicial branch separate and independent from the legislature. Issues of separation of powers and checks and balances were not particularly relevant to the articles, largely because the national government had almost no power to abuse. The states were capable of checking anything the central government proposed, and they provided whatever restraints the newly independent nation needed.

The government under the Articles of Confederation failed at least in part because it lacked sufficient power and authority to cope with the problems of the day. The requirements for amending the document were so restrictive that fundamental change within the articles proved impossible. When the Constitutional Convention met in Philadelphia in 1787, the delegates soon concluded that the articles had to be scrapped and replaced with a charter that would provide more effective power for the national government. The country had experienced conditions of economic decline, crippling taxation policies, interstate

barriers to commerce, and isolated but alarming insurrections among the lower economic classes. The framers saw a newly structured national government as the only method of dealing with the problems besetting the nation in the aftermath of the Revolution.

But allocating significant power to the national government was not without its risks. Many of the framers feared the creation of a federal power capable of dominating the states and abusing individual liberties. It was apparent to all that the new government would have to be structured in a way that would minimize the potential for abuse and excess. The concept of the separation of powers and its twin, the idea of checks and balances, appealed to the framers as the best way to accomplish these necessary restraints.

The idea of separated powers was not new to the framers. They had been introduced to it by the political philosophy of the day and by their own political experiences. The theories of James Harrington and Charles de Montesquieu were particularly influential in this respect. Harrington (1611–1677) was an English political philosopher whose emphasis on the importance of property found a sympathetic audience among the former colonists. His primary work, *The Commonwealth of Oceana*, published in 1656, was a widely read description of a model government. Incorporated into Harrington's ideal state was the notion that government powers ought to be divided into three parts. A Senate made up of the intellectual elite would propose laws; the people, guided by the Senate's wisdom, would enact the laws; and a magistrate would execute the laws. This system, Harrington argued, would impose an important balance that would maintain a stable government and protect property rights.

Harrington's concept of a separation of powers was less well developed than that later proposed by the French political theorist Montesquieu (1689–1755). Many scholars consider his *Spirit of the Laws* (published as *De l'Esprit des Loix* in 1748), which was widely circulated during the last half of the eighteenth century, to be the classic treatise on the separation of powers philosophy. Montesquieu was concerned about government abuse of liberty. In his estimation, liberty could not long prevail if too much power accrued to a single ruler or a single branch of government. He warned, "When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty. . . . Again, there is no liberty if the judicial power be not separated from the legislative and executive." Although Montesquieu's message was directed to

the citizens of his own country, he found a more receptive audience in the United States.

The influence of these political thinkers was reinforced by the framers' political experiences. Many settlers came to the New World to escape the abuses of European governments. George III's treatment of the colonies taught them that executives were not to be trusted with too much power. The colonists also feared an independent and powerful judiciary, especially one not answerable to the people. The framers undoubtedly had more confidence in the legislature, but they knew it too had the potential of exceeding its proper bounds. The English experience during the reign of Oliver Cromwell was lesson enough that muting the power of the king did not necessarily lead to the elimination of government abuse. What the framers sought was balance, a system in which each branch of government would be strong enough to keep excessive power from flowing into the hands of any other single branch. This necessary balance, as John Adams pointed out in his *Defence of the Constitutions of Government of the United States of America* (1787–1788), would also have the advantage of keeping the power-hungry aristocracy in check and preventing the majority from taking rights away from the minority.

SEPARATION OF POWERS AND THE CONSTITUTION

The debates at the Constitutional Convention and the various plans the delegates considered all focused on the issue of dividing government power among the three branches as well as between the national government and the states. A general fear of a concentration of power permeated all the discussions. James Madison noted, "The truth is, all men having power ought to be distrusted to a certain degree." Separated powers turned out to be the framers' solution to the difficult problem of expanding government power and at the same time reducing the probability of abuse.

Although the term *separation of powers* is nowhere to be found in the document, the Constitution plainly adopts the central principles of the theory. A reading of the first lines of each of the first three articles—known as the vesting clauses—makes this point clearly:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. [Article I]

The executive Power shall be vested in a President of the United States of America. [Article II]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. [Article III]

In the scheme of government incorporated into the Constitution, the legislative, executive, and judicial powers resided in separate branches of government. Unless otherwise specified in the document, each branch presumably was limited to the function granted to it, and that function could not be exercised by either of the other two branches.

In addition to the separation of powers, which reserves certain functions for specific branches, the framers placed into the Constitution explicit checks on the exercise of those powers. As a consequence, each branch of government imposes limits on the primary functions of the others. A few examples illustrate this point:

- Congress has the power to pass legislation, but the president may veto the bills passed by Congress.
- The president may veto bills passed by Congress, but the legislature may override the president's veto.
- The president may make treaties with foreign powers, but the Senate must vote its approval of those treaties.
- The president is commander in chief of the army and navy, but Congress must pass legislation to raise armies, regulate the military, and declare war.
- The president may nominate federal judges, but the Senate must confirm them.
- The judiciary may interpret the law and even strike down laws as being in violation of the Constitution—a power the Court asserted for itself—but Congress may pass new legislation or propose constitutional amendments.
- Congress may pass laws, but the executive must enforce them.

The framers also structured the branches so that the criteria and procedures for selecting the officials of the institutions differed, as did their tenures. Consequently,

the branches all have slightly different sources of political power.

In the original version of the Constitution, these differences were even more pronounced than they are today. Back then the two houses of Congress were politically dependent on different selection processes. Members of the House were, as they are today, directly elected by the people, and the seats were apportioned among the states on the basis of population. With terms of only two years, the representatives were required to go back to the people for review on a frequent and regular basis. Senators, in contrast, were, and still are, representatives of whole states, with each state, regardless of size, having two members in that chamber. But state legislatures originally selected their senators, a system that was not changed until 1913, when the Seventeenth Amendment, which imposed popular election of senators, was ratified. The six-year, staggered terms of senators were intended to make the upper house less immediately responsive to the volatile nature of public opinion.

The Constitution dictated that the president be selected by the Electoral College, a group of “electors” chosen by the people or their representatives who would exercise judgment in casting their ballots among presidential candidates. Although the electors over time have ceased to perform any truly independent selection function,¹ presidential selection remains a step away from direct popular election. The president's four-year term places the office squarely between the tenures conferred on representatives and senators. The original Constitution placed no limit on the number of terms a president could serve, but a two-term limit was observed by tradition until 1940 and was then imposed by constitutional amendment in 1951.

Differing altogether from the other two branches is the judiciary, which was assigned the least democratic selection system. The people have no direct role in the selection or retention of federal judges. Instead, the president nominates individuals for the federal bench, and the Senate confirms or rejects them. Once in office, federal judges serve for life, removable against their will only through impeachment. The intent of the framers was to make the judiciary independent. To do so, they

¹Today most states have various mechanisms to ensure that their electors vote for the presidential candidate chosen by the citizens of their state. In some states, “faithless electors” can be removed from their position or even fined. In *Chiafalo v. Washington* (2020), the Court held that states may enforce laws that ensure electors vote for the candidate selected by the state's voters.

created a system in which judges would not depend on the mood of the masses or on a single appointing power. Furthermore, judges would be accountable only to their own philosophies and consciences, with no periodic review or reassessment required.

Through a division of powers, an imposition of checks, and a variation in selection and tenure requirements, the framers hoped to achieve the balanced government they desired. It is not a government designed for quick policy making. Neither is it democratic in the extreme; after all, only the House of Representatives was chosen by the people. Still, they thought this structure would be the greatest protection against abuses of power and government violations of personal liberties and property rights. Many delegates to the Constitutional Convention considered this system of separation of powers a more effective method of protecting civil liberties than the formal pronouncements of a bill of rights.

Political observers tend to think that the framers' invention has worked reasonably well. Through the years, the relative strengths of the branches have fluctuated. At certain times, such as immediately after the Civil War, the judiciary has been exceptionally weak. At other times, the judiciary has been criticized as being too powerful, such as when it repeatedly blocked New Deal legislation in the 1930s or when it expanded the rights of the criminally accused during the Warren Court era. The executive also has led the other branches in political power. Beginning with the tenure of Franklin D. Roosevelt and extending into the 1970s, references were often made to the "imperial presidency." But when one branch gains too much power and abuses occur, as in the case of Richard Nixon and the Watergate crisis, the system tends to reimpose the balance sought by the framers.

Nevertheless, debates continue over how best to approach the separation of powers system from a constitutional law perspective. In many of the cases that follow, especially those in Chapter 5, you will see justices vacillate between formalist and functionalist approaches. Formalism emphasizes a basic idea behind the system: that the Constitution creates clear boundaries between and among the branches of government by bestowing a primary power on each. Under this school of thought, federal judges and justices should not allow deviations from this plan unless the text of the Constitution permits them. Functionalism, in contrast, rejects strict divisions among the branches and emphasizes instead a more fluid system—one of shared rather than separated powers. On this account, as long as actions by Congress or the president do not result in the accumulation of too much

power in any one branch, the federal courts should be flexible, enabling—not discouraging—experimentation.

CONTEMPORARY THINKING ON THE CONSTITUTIONAL SCHEME

The long-standing debate between functionalism and formalism is largely a normative debate; that is, it centers on how best to interpret the Constitution. As you read the cases to come and consider the logic behind the separation of powers doctrine, you may also want to take into account two contemporary approaches for understanding relationships among the three branches of government.

First are accounts of how the separation of powers system works when the U.S. Supreme Court interprets the Constitution. Because the Court possesses the power of judicial review—the power to review acts of government to determine their compatibility with the Constitution²—it would seem that it could determine the meaning of the Constitution without thinking much about the preferences of the other branches. But this is not necessarily so. The other branches possess various powers through which they can modify constitutional decisions or invoke various mechanisms to sanction the Court (see Chapter 2). As a result, if the justices hope to issue decisions that the other branches will respect and with which they will comply, they often consider the preferences of those other branches.³

And that point brings us to the second approach, one that emphasizes the "Constitution outside the Court." According to this account, the idea that only judges and justices interpret the Constitution not only is naive but also belies history. This at least was the argument Walter F. Murphy advanced more than thirty years ago when he asked, "Who shall interpret the Constitution?" His answer? Naturally, the courts, but not only the courts. The president, Congress, and even the people can also

²See Chapter 2, especially *Marbury v. Madison* (1803).

³See Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2011); Lee Epstein, Jack Knight, and Andrew Martin, "The Supreme Court as a Strategic National Policy Maker," *Emory Law Journal* 50 (2001): 583–612; Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369–398; and Jeffrey A. Segal, Chad Westerland, and Stefanie A. Lindquist, "Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model," *American Journal of Political Science* 55 (2011): 89–104.

lay claim to playing a role in constitutional interpretation. Indeed, to Murphy, that there is “no ultimate constitutional interpreter” is simply “a fact of American political life.”⁴ By way of example, Murphy points out that presidents of the stature of Thomas Jefferson, Andrew Jackson, and Abraham Lincoln were not willing to concede that they or Congress were obligated to accept the Supreme Court’s constitutional interpretation as legally binding.

To say that contemporary scholars have rallied around Murphy’s thinking is to seriously understate the case. Beginning in the 1990s, a multitude of volumes considered how Congress and the president are involved in constitutional interpretation.⁵ And that work continues today.

⁴Walter F. Murphy, “Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,” *The Review of Politics* 48 (1986): 401–423.

⁵See, for example, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago, IL: University of Chicago Press, 2005); and J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, NC: Duke University Press, 2004).

Different as they may be, both approaches to the separation of powers system stress the role of all three branches of government in constitutional interpretation. The first emphasizes possible constraints on the Court imposed by the president and Congress. The second underscores that it is not only the Court that interprets the Constitution; the other institutions also can take and have taken on that task. As we explore the constitutional separation of powers/checks and balances system, keep in mind these contemporary accounts. Although our focus is on the Court’s interpretation of various constitutional provisions, you will have a chance to consider the functions of the legislative and executive branches as well. You also will have ample opportunity to think about the extent to which the justices’ perceptions of Congress and the president influence their decisions. In the coming pages we examine the significant political and legal clashes among the executive, legislative, and judicial branches, focusing on how the justices of the Supreme Court have interpreted and applied the Constitution to settle disputes. Throughout these constitutional controversies, what takes center stage are fundamental issues of institutional powers and the constraints placed on those powers.

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THE JUDICIARY

BETWEEN 1932 AND 1983 Congress attached legislative veto provisions to more than two hundred laws. Although these provisions took different forms, they usually authorized one house of Congress to invalidate a decision of the executive branch. One provision in the Immigration and Nationality Act gave the U.S. attorney general power to suspend the deportation of noncitizens, but Congress reserved the authority to veto any such suspension by a majority vote in either house. In *Immigration and Naturalization Service v. Chadha* (1983) (excerpted in Chapter 5), the U.S. Supreme Court held that this device violated specific clauses as well as general principles contained in the U.S. Constitution. In doing so, as Justice Byron White wrote in his dissent, the Court sounded the “death knell” for the legislative veto.¹

In many ways, the Court’s action was less than startling. For over two centuries federal courts have exerted the power of judicial review—that is, the power to review acts of government to determine their compatibility with the U.S. Constitution and to invalidate them if they are incompatible. And even though the Constitution does not explicitly give them such power, the courts’ authority to do so has been challenged only occasionally. Today we take for granted the notion that federal courts may review government actions and strike them down if they violate constitutional mandates.

Nevertheless, when courts exert this power, as the U.S. Supreme Court did in *Chadha*, they provoke controversy. Look at it from this perspective: Congress, composed of officials we *elect*, passed these legislative veto provisions, which were then rendered invalid by a Supreme Court of *unelected* justices. Such an occurrence

strikes some people as quite odd, perhaps even anti-democratic. Why should we Americans allow a branch of government over which we have no electoral control to review and nullify the actions of the government officials we elect to represent us?

The alleged antidemocratic nature of judicial review is just one of many controversies surrounding the practice. In this chapter, we review others—both in theory and in practice. First, however, we explore Article III of the U.S. Constitution and the Judiciary Act of 1789, which serve as foundations of judicial power. Understanding both is crucial because the cases in this chapter explore the parameters of the judiciary’s authority. Next, we turn to the development of judicial review in the United States.

Judicial review is the primary weapon available to the federal courts, the check they have on other branches of government. Because this power can be awesome in scope, many observers tend to emphasize it to the neglect of factors that constrain its use, as well as other checks on the power of the Court. In the second and third parts of this chapter, we explore the limits on judicial power.

ESTABLISHMENT OF THE FEDERAL JUDICIARY

The federal judicial system is built on a foundation created by Article III of the U.S. Constitution and the Judiciary Act of 1789. In this section, we consider both, with an emphasis on their content and the debates they provoked. Note, in particular, the degree to which the major controversies reflect more general concerns about federalism. Designing and fine-tuning the U.S. system of government required many compromises over the

¹It is worth noting that White’s statement is true in theory but only partially true in practice for the reasons we explain later in the chapter.

balance of power between the federal government and the states, and Article III and the Judiciary Act are no exceptions.

Article III

The framers of the Constitution spent days upon days debating the contents of Article I (the legislature) and Article II (the executive), but they had comparatively little trouble drafting Article III. Indeed, it caused the least controversy of any major constitutional provision. Why? One reason is that the states and Great Britain had well-entrenched court systems, and the founders had firsthand knowledge of the workings of courts—knowledge they lacked about the other political institutions they were establishing. Second, thirty-four of the fifty-five delegates to the Constitutional Convention were lawyers or had some training in the law. They held a common vision of the *general* role courts should play in the new polity.²

Alexander Hamilton expressed that vision in *Federalist* No. 78, one of a series of papers designed to generate support for the ratification of the Constitution. Hamilton specifically referred to the judiciary as the “least dangerous branch” of government; he (and virtually all of the founders) saw the courts as legal, not political, bodies. He wrote, “If [judges] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” To that end, the framers agreed on the need for judicial independence. They accomplished this goal by allowing judges to “hold their offices DURING GOOD BEHAVIOUR”—that is, giving them life tenure.

This is not to say that Congress lacked the power to remove federal judges from office; the Constitution provides for a two-step removal process: impeachment by a majority of the House and conviction (removal) by two-thirds of the Senate.³ It is rather to say that the

framers gave federal judges a good deal more job security by allowing them to keep their jobs for life and not subjecting them to periodic public checks through the electoral process. The framers also concurred on the need to block Congress from reducing a federal judge’s compensation during terms of continuous service. The compensation clause, located in Article III, implies judicial independence: the framers hoped to prevent members of the legislature upset with court decisions from punishing judges by cutting their pay.

Federal judges continue to enjoy these protections, but many state court judges do not. In only three states do judges hold their jobs for life (Massachusetts, New Hampshire, and Rhode Island), but two of three have mandatory retirement ages (Rhode Island is the exception). In the remaining states, judges must periodically face the electorate. In some states the voters decide whether to retain judges; in other states judges must be elected (or reelected), just as any other officials are. Either way, the practice of retaining or reelecting judges has raised interesting constitutional questions. In *Caperton v. A. T. Massey Coal Co.* (2009), for example, the Court considered whether a judge should recuse himself from a case because he had received substantial campaign contributions from a person with an interest in the outcome. The majority held that when there is a “serious risk of actual bias”—as it seemed in *Caperton*—failure to recuse amounts to a violation of the due process clause, which requires a “fair trial in a fair tribunal.”

That the framers settled on life tenure for federal judges, and not some form of electoral or legislative check, and more generally shared a fundamental view of the role of the federal judiciary does not mean that they agreed on all the specifics. For example, although they agreed that federal judges would serve for “good behavior,” the delegates debated how the judges would get their jobs—that is, who appoints them. The Virginia Plan, which served as the basis for many of the proposals debated at the convention, suggested that Congress should appoint these judges. Some of the delegates backed this idea, while others proposed that the Senate should make the appointments. Benjamin Franklin argued that perhaps lawyers should decide who would sit on the courts. After all, Franklin quipped, the lawyers would select “the ablest of the profession in order to get rid of him, and share his practice among themselves.”⁴

²See Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, MN: Thomson/West, 2005), 65.

³And, in fact, as we’ll see in the case of *United States v. Nixon* (1974) (excerpted in Chapter 4), Congress has removed federal judges though never a Supreme Court justice. The closest it came was in 1804 when the House impeached Justice Samuel P. Chase, but the Senate acquitted him the next year. Also worth noting: the constitutional procedure for impeaching and removing federal judges is the same procedure used to impeach and remove the President, Vice President, and all civil Officers of the United States.” (Article II, Section 4).

⁴Quoted in Farber and Sherry, *A History of the American Constitution*, 70.

At the end of the day, the delegates decided that the appointment power should be given to the president, with the “advice and consent” of the Senate. Accordingly, the power to appoint federal judges is located in Article II, which lists the powers of the president. The Senate, however, has read the “advice and consent” phrase to mean that it must approve the president’s nominees by a majority vote. And it has taken its part in the process quite seriously, rejecting 13 of the 163 nominations to the Supreme Court over the past two centuries—a greater number (proportionally speaking) than any other group of presidential appointees requiring senatorial approval (see Table 2-1).⁵

Other debates at the constitutional convention centered on the structure of the American legal system. The delegates agreed that there would be at least one federal court, the Supreme Court of the United States, but disagreed over the establishment of federal tribunals inferior to the Supreme Court. The Virginia Plan suggested that Congress should establish lower federal courts. Delegates who favored a strong national government agreed with this plan, with some wanting to insert language in Article III to create such courts.

But delegates favoring states’ rights over those of the national government vehemently objected to the creation of any federal tribunals other than the U.S. Supreme Court. As one delegate put it, “The people will not bear such an innovation. The states will revolt at such encroachments.”⁶ Instead of creating new federal courts, they proposed that the existing state courts should hear cases in the first instance, with an allowance for appeals to the U.S. Supreme Court. “This dispute,” as Justice Hugo Black wrote in 1970, “resulted in compromise. One ‘supreme Court’ was created by the Constitution, and Congress was given the power to create other federal courts.”⁷ The first sentence of Article III—the vesting clause—reflects this compromise:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

⁵For data on all nominations, see Lee Epstein et al., *Supreme Court Compendium*, 7th ed. (Thousand Oaks, CA: CQ Press, 2021), Table 4-15.

⁶Pierce Butler of South Carolina, quoted in Farber and Sherry, *A History of the American Constitution*, 70.

⁷*Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers* (1970).

In other words, Article III does not establish a system of lower federal courts; rather, it gives Congress the option of doing so.

Did the framers anticipate that Congress would take advantage of this language and create lower federal courts? The answer is likely yes because much of Article III—specifically Section 2, the longest part—defines the jurisdiction of federal courts that did not yet exist (or at least the jurisdiction that Congress could give them).⁸ In Section 2, the framers outlined two types of jurisdiction that the federal courts might exercise: over cases involving certain subjects or over cases brought by certain parties (see Box 2-1).

As Box 2-1 also indicates, Section 2 contains separate language on the authority of the U.S. Supreme Court, providing for original and appellate jurisdiction, both of which come into play in the cases we excerpt in this chapter.

However detailed Article III is on matters of jurisdiction, it is silent on a very important question: whether the federal courts were to exercise the power of judicial review, which, recall, is the power to review acts of government to determine their compatibility with the U.S. Constitution and to invalidate them if they are incompatible. It is not that the framers didn’t consider some system for reviewing and invalidating government acts; they did. Several times over the course of the convention, they took up James Madison’s proposal for the creation of a

⁸The traditional and still dominant view of Section 2 of Article III is that Congress is neither required to create federal courts nor required to provide such courts with the full range of jurisdiction over the cases listed in Section 2. See, for example, *Sheldon v. Sill* (1850), in which the Supreme Court wrote, “It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress.” But “because the Constitution did not do this, the Court concluded that Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction other than that which the statute confers.” Linda Mullenix, Martin H. Redish, and Georgene Vairo, *Understanding the Federal Courts and Jurisdiction* (New York: Matthew Bender, 1998), 7. Still, in *Martin v. Hunter’s Lessee* (1816), excerpted later in this chapter, Justice Joseph Story questioned the extent of Congress’s discretion over the jurisdiction of the lower federal courts: “The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation.” Story’s view has not been widely adopted, but see Akil Amar, “A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,” *Boston University Law Review* 65 (1985): 205–274. See also our discussion of the Court’s jurisdiction in this chapter.

Table 2-1 Presidential Nominees to the Supreme Court Rejected by the Senate

President	Nominee	Date of Nomination by President	Date of Rejection	Vote	Reasons
Washington	John Rutledge	July 1, 1795	Dec. 15, 1795	10–14	Candidate's political views; mental health questions raised
Madison	Alexander Wolcott	Feb. 4, 1811	Feb. 13, 1811	9–24	Candidate's performance as a customs collector
Tyler	John C. Spencer	Jan. 9, 1844	Jan. 31, 1844	21–26	Partisan politics
Polk	George W. Woodward	Dec. 23, 1845	Jan. 22, 1846	20–29	Questions about candidate's political views
Buchanan	Jeremiah S. Black	Feb. 5, 1861	Feb. 21, 1861	25–26	Partisan politics; candidate's political views
Grant	Ebenezer R. Hoar	Dec. 15, 1869	Feb. 3, 1870	24–33	Candidate's political views
Cleveland	William B. Hornblower	Sept. 19, 1893	Jan. 15, 1894	24–30	Opposition from home state senator
Cleveland	Wheeler H. Peckham	Jan. 22, 1894	Feb. 16, 1894	32–41	Opposition from home state senator
Hoover	John J. Parker	Mar. 21, 1930	May 7, 1930	39–41	Questions about candidate's views toward civil rights and labor unions
Johnson	Abe Fortas	June 26, 1968	October 4, 1968	45–43 (cloture motion rejected)	Ethical issues; the candidate's political views; charges of cronyism
Nixon	Clement Haynsworth Jr.	Aug. 18, 1969	Nov. 21, 1969	45–55	Ethical issues; opposition from labor and civil rights groups
Nixon	G. Harrold Carswell	Jan. 19, 1970	Apr. 8, 1970	45–51	Undistinguished judicial record; opposition from civil rights groups
Reagan	Robert H. Bork	July 1, 1987	Oct. 23, 1987	42–58	Candidate's political views; opposition from the liberal interest group community

Sources: David Savage, *CQ's Guide to the U.S. Supreme Court*, 4th ed. (Washington, DC: CQ Press, 2004); Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 7th ed. (Thousand Oaks, CA: CQ Press, 2021), Table 4-15.

Notes: The Senate rejected a motion to proceed on Jeremiah Black and it rejected a cloture motion on Abe Fortas when he was nominated to be Chief Justice. We count both as rejections. Also note: This table includes only nominees rejected, with a vote, by the Senate. It excludes the twenty-four nominations that were transmitted to the Senate but ultimately withdrawn, tabled, postponed, or not acted on. (Of the twenty-four, six were later confirmed).

BOX 2-1

Jurisdiction of the Federal Courts as Defined in Article III

Jurisdiction of the Lower Federal Courts

Subjects falling under their authority:

- Cases involving the U.S. Constitution, federal laws, and treaties
- Cases affecting ambassadors, public ministers, and consuls
- Cases of admiralty and maritime jurisdiction

Parties falling under their authority:

- United States
- Controversies between two or more states
- Controversies between a state and citizens of another state^a
- Controversies between citizens of different states

- Controversies between citizens of the same state claiming lands under grants of different states
- Controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects

Jurisdiction of the Supreme Court

Original jurisdiction:

- Cases affecting ambassadors, public ministers, and consuls
- Cases to which a state is a party

Appellate jurisdiction:

- Cases falling under the jurisdiction of the lower federal courts, “with such Exceptions, and under such Regulations as the Congress shall make.”

^aIn 1795 this was modified by the Eleventh Amendment, which removed from federal jurisdiction those cases in which a state is sued by the citizens of another state.

council of revision, made up of Supreme Court justices and the president, with the power to veto legislative acts. But each time the proposal came up, the delegates voted to defeat it. In *Marbury v. Madison* (1803), the first case we excerpt in this chapter, Chief Justice John Marshall in essence articulated such veto power for the Court. Those who take a dim view of Marshall’s decision occasionally point to the delegates’ rejection of the council of revision as proof that Marshall skirted the framers’ intent.

Judiciary Act of 1789

Although Section 2 of Article III suggests that the framers likely anticipated the creation of lower federal courts, recall that Article III itself did not establish any courts other than the U.S. Supreme Court. It was left up to Congress to create (or not) additional federal courts. Dominated by Federalists, the First Congress did just

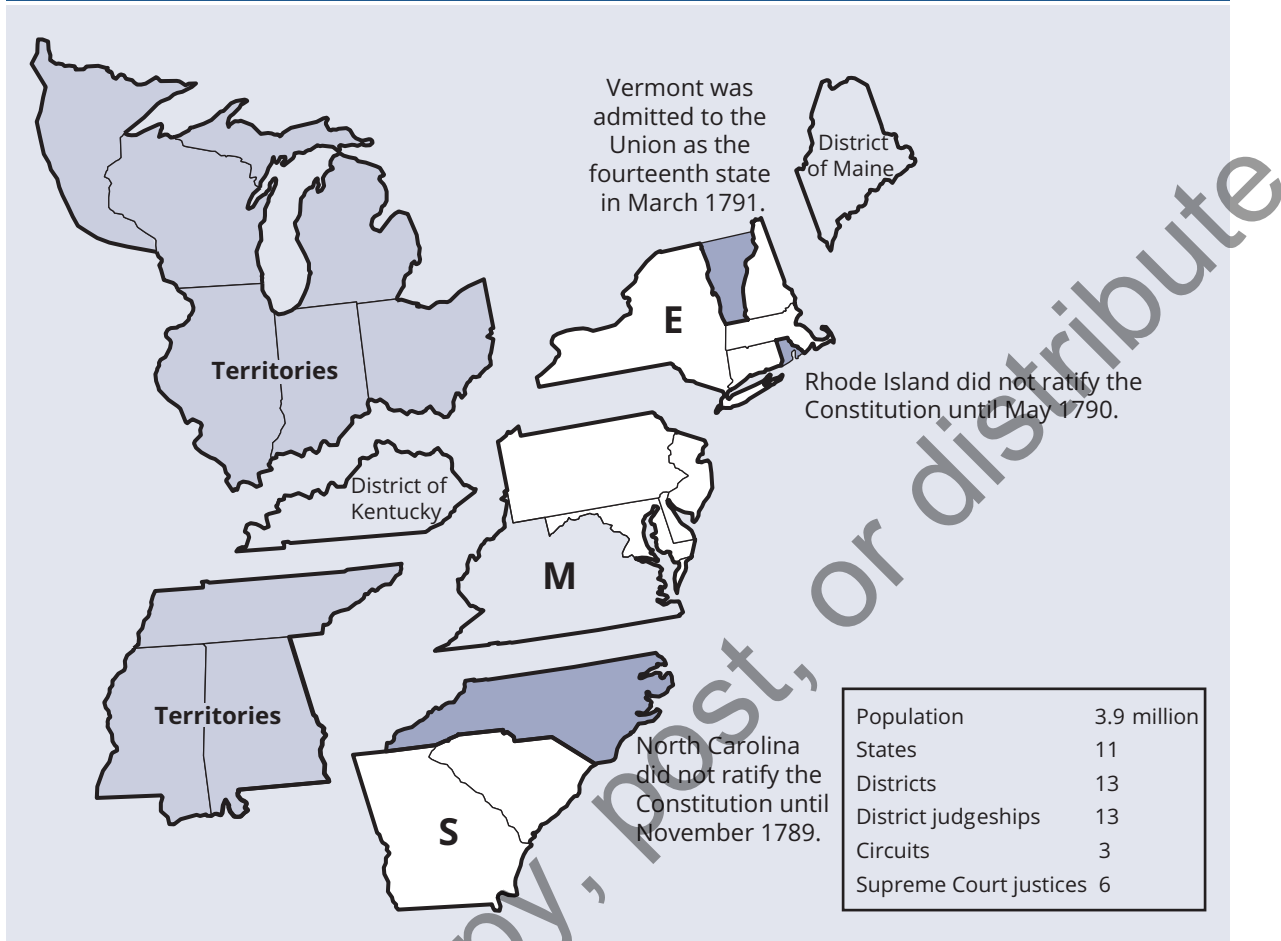
that in the Judiciary Act of 1789, giving some “flesh” to the “skeleton” that was Article III.⁹

The Judiciary Act of 1789 is a long and relatively complex law that, at its core, had two purposes. First, it sought to establish a federal court structure, which it accomplished by providing for the Supreme Court and circuit and district courts. Under the law, the Supreme Court was to have one chief justice and five associate justices. That the Court initially had six members illustrates an important point: Congress, not the U.S. Constitution, determines the number of justices on the Supreme Court. That number has been nine since 1869.

As Figure 2-1 shows, the act also created thirteen district courts. Each of the eleven states that had ratified

⁹Russell R. Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Washington, DC: Federal Judicial Center, 1989), 2.

Figure 2-1 The Federal Court System under the Judiciary Act of 1789



Source: Russell R. Wheeler and Cynthia Harrison, *Creating the Federal Judicial System*, 3rd ed. (Washington, DC: Federal Judicial Center, 2005), 5.

Note: The Judiciary Act of 1789 created thirteen districts and placed eleven of them in three circuits: the Eastern (E), Middle (M), and Southern (S). Each district had a district court, which was a trial court with a single district judge and primarily admiralty jurisdiction. A circuit court also met in each district of the circuit and was composed of the district judge and two Supreme Court justices. The circuit courts exercised primarily diversity and criminal jurisdiction and heard appeals from the district courts in some cases. The districts of Maine and Kentucky (parts of the states of Massachusetts and Virginia, respectively) were part of no circuit; their district courts exercised both district and circuit court jurisdiction.

the Constitution received a court, with separate tribunals created for Maine and Kentucky, which were then parts of Massachusetts and Virginia, respectively. District courts, then as now, were presided over by one judge. Finally, the 1789 act created three circuit courts, which were quite extraordinary in composition. Congress grouped the district courts—except those for Kentucky and Maine—geographically into the Eastern, Middle, and Southern Circuits and put one district court judge

and two Supreme Court justices in charge of each. In other words, three judges would hear cases in the circuit courts. Today, the progeny of the circuits—the U.S. court of appeals—courts continue to hear cases in panels of three. However, these courts now have their own permanent judges, making regular participation by district court judges and Supreme Court justices unnecessary.

A second goal of the Judiciary Act was to specify the jurisdiction of the federal courts. Section 2 of Article III

speaks broadly about the authority of federal courts, potentially giving them jurisdiction over cases involving particular parties or subjects or, in the case of the Supreme Court, original and appellate jurisdiction (*see Box 2-1*). The Judiciary Act provided more specific information, defining the parameters of authority for each of the newly established courts and for the U.S. Supreme Court. The district courts were to serve as trial courts, hearing cases involving admiralty issues, forfeitures and penalties, and petty federal crimes, as well as minor U.S. civil cases. Congress recognized that some of these courts would be busier than others and fixed judicial salaries accordingly. Delaware judges received only \$800 per year for their services, while their counterparts in South Carolina, a coastal state that would generate many admiralty disputes, earned \$1,800.¹⁰

As for the three circuit courts, they too were trial courts with jurisdiction over cases involving citizens from different states and major federal criminal and civil cases. Congress also gave them limited appellate authority to hear major civil and admiralty disputes coming out of the district courts. (Today's courts of appeals are no longer trials courts but, as their names suggests, are appellate courts that hear appeals from the district courts.)

Finally, the 1789 act contained several provisions concerning the jurisdiction of the U.S. Supreme Court. Section 13 reiterated the Court's authority over suits in the first instance (its original jurisdiction) and gave the justices appellate jurisdiction over major civil disputes, those involving more than \$2,000, which was a good deal of money back then. Section 13 also spoke about the Court's authority to issue writs of mandamus, which command a public official to carry out a particular act or duty: "The Supreme Court . . . shall have the power 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." This matter may seem trivial, but, as we shall see, this particular provision formed the centerpiece of *Marbury v. Madison*.

Another part of the act, Section 25, authorized the Supreme Court to review certain kinds of cases coming out of the states. Specifically, the Court could now hear appeals from the highest state courts if those tribunals upheld state laws against claims that the laws violated the Constitution or denied claims based on the U.S. Constitution, federal laws, or treaties. This section

moved to the fore in *Martin v. Hunter's Lessee*, which we take up later in the chapter.

At first glance, the components of the 1789 act—its establishment of a federal court system and of rules governing that system—appear to favor the Federalists' position. Recall that Anti-Federalist delegates at the Constitutional Convention did not want the document even to mention lower federal tribunals, much less give Congress the authority to establish them. The 1789 act did that and more: it gave the Supreme Court the power to review state supreme court cases—surely an Anti-Federalist's worst nightmare! But it would be a mistake to believe that the act did not consider the position taken by states' rights advocates. For example, the 1789 act used state lines as the boundaries for the district and circuit courts, even though the boundaries could have been defined in other ways.¹¹ That Congress tied the boundaries to the states may have been a concession to the Anti-Federalists, who wanted the judges of the federal courts to feel they were part of the legal and political cultures of the states.

Whichever side won or lost, passage of the 1789 Judiciary Act was a defining moment in American legal history. It established the first federal court system, one that is strikingly similar to that in effect today. And, as we have suggested, it paved the way for two landmark constitutional cases—*Marbury v. Madison* and *Martin v. Hunter's Lessee*—both of which centered on judicial review, the major power of the federal judiciary.

JUDICIAL REVIEW

Judicial review is a powerful tool of federal courts and there is some evidence that the framers intended courts to have it, but, as we noted earlier, it is not mentioned in the Constitution. Yet, even before ratification of the Constitution, courts in seven states, in at least eight cases, held that a state law violated a state constitution (or some other fundamental charter).¹² So, too, early in U.S. history, federal courts claimed it for themselves. In *Hylton v. United States* (1796), Daniel Hylton challenged the constitutionality of a 1793 federal tax on carriages. According to Hylton, the act violated the constitutional

¹⁰*Ibid.*, 6.

¹¹As Wheeler and Harrison note, "The creators of the federal judiciary might have established separate judicial administrative divisions that would ensure roughly equal allocation of workload and would be subject to realignment to maintain the allocation" (*ibid.*).

¹²Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *University of Chicago Law Review* 70 (2003): 887–982.

mandate that direct taxes must be apportioned on the basis of population (i.e., the percentage of revenue generated by taxpayers in a state needs to equal that state's share of the U.S. population). With only three justices participating, the Court upheld the act. But even by considering the challenge, the Court in effect reviewed the constitutionality of an act of Congress.

Not until 1803, however, would the Court invoke judicial review to strike down legislation it deemed incompatible with the U.S. Constitution. That decision came in the landmark case *Marbury v. Madison*. How does Chief Justice Marshall justify the Court's power to strike down legislation in light of the failure of the newly framed Constitution to provide it?

Marbury v. Madison

5 U.S. (1 Cranch) 137 (1803)

<http://caselaw.findlaw.com/us-supreme-court/5/137.html>

Vote: 4 (Chase, Marshall, Paterson, Washington)

0

OPINION OF THE COURT: *Marshall*

NOT PARTICIPATING: *Cushing, Moore*

FACTS:

When voting in the presidential election of 1800 was over, it was apparent that Federalist president John Adams had lost after a long and bitter campaign, but it was not known who had won.¹³ The Electoral College voting resulted in a tie between the Republican candidate, Thomas Jefferson, and his running mate, Aaron Burr, and the election had to be settled in the House of Representatives. In February 1801 the House elected Jefferson. This meant that the Federalists no longer controlled the presidency; they also lost their majority in Congress. Prior to the election, the Federalists controlled more than 56 percent of the 106 seats in the House and nearly 70 percent of the 32 seats in the Senate. After the election, those percentages declined to 35 percent and 44 percent, respectively.¹⁴

¹³For analyses of the events surrounding *Marbury*, see Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy," *Law and Society Review* 30 (1996): 87–120; and Dean Alfange Jr., "*Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom," *Supreme Court Review* (1994): 329–446.

¹⁴Data are from the House and Senate websites: <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> and <http://www.senate.gov/history/partydiv.htm>.

With these losses in the elected branches, the Federalists took steps to maintain control of the third branch of government, the judiciary. The lame-duck Congress enacted the Circuit Court Act of 1801, which created six new circuit courts and several district courts to accommodate the new states of Kentucky, Tennessee, and Vermont. These new courts required judges and support staff such as attorneys, marshals, and clerks. During the last six months of his term in office Adams made more than two hundred nominations, with sixteen judgeships (called the "midnight appointments" because of the rush to complete them before Adams's term expired) approved by the Senate during his last two weeks in office.

An even more important opportunity had arisen in December 1800, when the third chief justice of the United States, Federalist Oliver Ellsworth, resigned so that Adams—not Jefferson—could name his replacement. Adams first offered the post to John Jay, who had served as the first chief justice before leaving the Court to take the then-more-prestigious office of governor of New York. When Jay refused, Adams turned to his secretary of state, John Marshall, an ardent Federalist. The Senate confirmed Marshall in January 1801, but he also continued to serve as secretary of state.

In addition, the Federalist Congress passed the Organic Act of 1801, which authorized Adams to appoint forty-two justices of the peace for the District of Columbia. It was this seemingly innocuous law that set the stage for the dramatic case of *Marbury v. Madison*. In the confusion of the Adams administration's last days in office, Marshall, the outgoing secretary of state, failed to deliver some of these commissions. When the new administration came into office, James Madison, the new secretary of state, acting under orders from Jefferson, refused to deliver at least five commissions.¹⁵ Indeed, some years later, Jefferson explained the situation in this way:

I found the commissions on the table of the Department of State, on my entrance into office, and I forbade their delivery. Whatever is in the Executive offices is certainly deemed to be in the hands of the President, and in this case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State.¹⁶

As a result, in 1801 William Marbury and three others who were denied their commissions decided to sue to get their jobs. But

¹⁵Historical accounts differ, but it seems that Jefferson decreased the number of Adams's appointments to justice of the peace positions to thirty from forty-two. Twenty-five of these thirty appointees received their commissions, but five, including William Marbury, did not. See Francis N. Stites, *John Marshall* (Boston: Little, Brown, 1981), 84.

¹⁶Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, 1922), 244.

instead of starting their case in a lower court, they went straight to the Supreme Court and asked it to issue a writ of mandamus ordering Madison to deliver the commissions. Marbury thought he could take his case to the Court because Section 13 of the 1789 Judiciary Act gives the Court the power to issue writs of mandamus to anyone holding federal office. The relevant passage of Section 13 reads as follows:

The Supreme Court shall . . . have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specifically provided for; and shall have power to issue . . . 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.

To be sure, to the extent that Section 13 gives the Supreme Court the power to issue writs of mandamus, it aligns with Marbury's interpretation. However, Marbury also interpreted Section 13 as allowing the Court to hear his case under its original jurisdiction—meaning he did not need to initiate his case in a lower court before appealing to the Supreme Court.

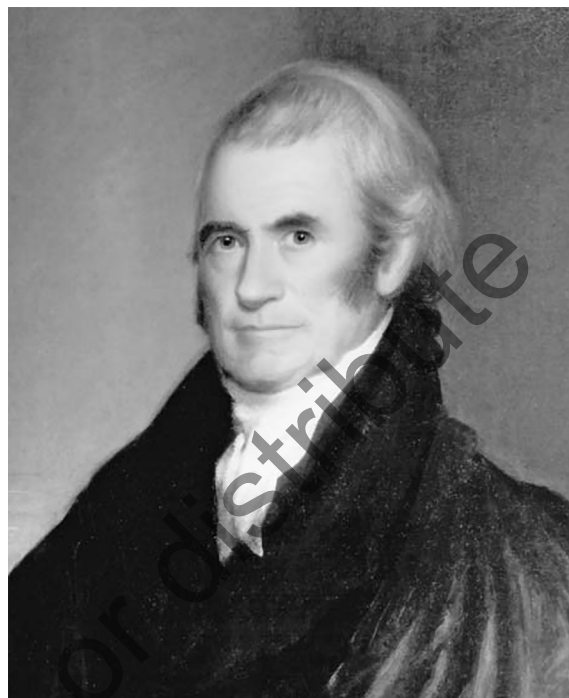
As a result of Marbury's interpretation questions looming large in his case are whether Congress, in Section 13, indeed gave the Court the power of mandamus on its original jurisdiction as Marbury believed, and if so, whether the Constitution permitted Congress to do so.

In this volatile political climate, Marshall, now serving as chief justice, was perhaps in the most tenuous position of all. On one hand, he had been a supporter of the Federalist Party, which now looked to him to "scold" the Jefferson administration. On the other, Marshall wanted to avoid a confrontation between the Jefferson administration and the Supreme Court, which not only seemed imminent but also could end in disaster for the Court and the struggling nation. In fact, Jefferson and his party were so annoyed with the Court for agreeing to hear the *Marbury* dispute that they began to consider impeaching Federalist judges—with two justices (Samuel Chase and Marshall himself) high on their lists. Note, too, the year in which the Court handed down the decision in *Marbury*. The case was not decided until two years after Marbury filed suit because Congress and the Jefferson administration had abolished the 1802 term of the Court.

ARGUMENTS:

For the applicant, William Marbury:

- After the president has signed a commission for an office, it comes to the secretary of state. Nothing remains to be



John Marshall

done except for the secretary to perform those ministerial (administrative) acts that the law imposes upon him. His duty is to seal, record, and deliver the commission. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

- Congress has expressly given the Supreme Court the power of issuing writs of mandamus.
- Congress can confer original jurisdiction in cases other than those mentioned in the Constitution. The Supreme Court has entertained jurisdiction on mandamus in several cases—*United States v. Lawrence*, 3 U.S. 42 (1795), for example. In this case and in others, the power of the Court to issue writs of mandamus was taken for granted in the arguments of counsel on both sides. It appears there has been a legislative construction of the Constitution upon this point, and a judicial practice under it, since the formation of the government.

For James Madison, secretary of state:

(Madison and Jefferson intentionally did not appear in court, to emphasize their position that the proceedings had no legitimacy. So it seems that Madison was unrepresented and no argument was made in his behalf.)



William Marbury



James Madison

**THE FOLLOWING OPINION OF THE COURT WAS
DELIVERED BY THE CHIEF JUSTICE.**

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?

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

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

The first object of enquiry is,

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

In order to determine whether he 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. . . .

It is . . . decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State . . .

The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

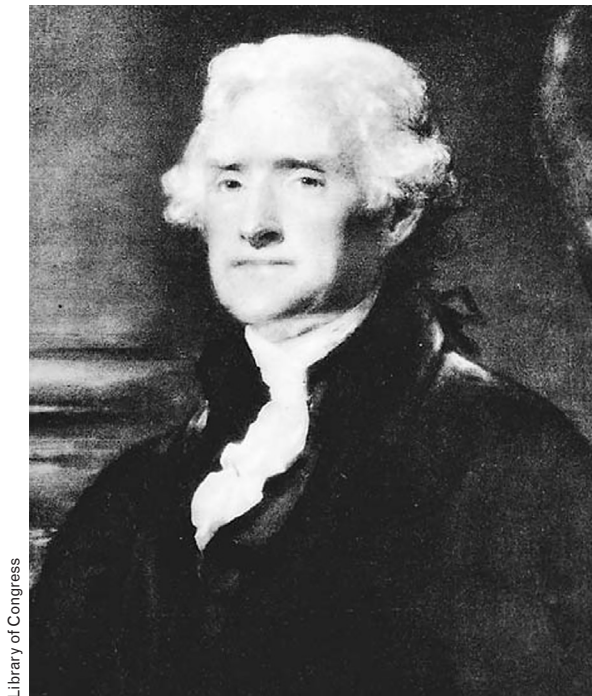
Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

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

This brings us to the second enquiry; which is,

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

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives



Library of Congress

Thomas Jefferson

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 . . .

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 own 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 a right to resort to the laws of his country for a remedy. . . .

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on — 1st. The nature of the writ applied for, and, 2dly. The power of this court.

1st. The nature of the writ. . . .

1. The nature of the writ . . . This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice.” . . . These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed . . .

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. . . .

It is not [then] 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 . . . it is not perceived on what ground the Courts of the country are further excused from the duty of giving judgment that right to 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 of 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 has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

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 enquire 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 recognise certain principles, supposed to have been long and well established, to decide it.

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

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

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

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts,

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

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

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

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

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

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

Scholars differ about Marshall’s opinion in *Marbury*, but supporters and critics alike acknowledge Marshall’s shrewdness. As the great legal scholar Edward S. Corwin wrote,

Regarded merely as a judicial decision, the decision of *Marbury v. Madison* must be considered as most extraordinary, but regarded as a political pamphlet designed to irritate an enemy [Jefferson] to the very limit of endurance, it must be regarded a huge success.¹⁷

To see Corwin’s point, we only have to think about the way the chief justice dealt with a most delicate political situation. By ruling against *Marbury*—who never did receive his judicial appointment (see Box 2-2)—Marshall avoided a potentially devastating clash with Jefferson. But, by exerting the power of judicial review, Marshall sent the president a clear signal that the Court would be a major player in the American government. Other scholars, however, point out that judicial review emerged not because of some brilliant strategic move by Marshall in the face of intense political opposition, but because it was politically viable at the time. According to these scholars, Jefferson favored the establishment of judicial review

¹⁷Edward S. Corwin, “The Establishment of Judicial Review—II,” *Michigan Law Review* 9 (1911): 292.

BOX 2-2

Aftermath . . . *Marbury v. Madison*

FROM MEAGER beginnings, William Marbury gained political and economic influence in his home state of Maryland and became a strong supporter of John Adams and the Federalist Party. Unlike others of his day who rose in wealth through agriculture or trade, Marbury's path to prominence was banking and finance. At age thirty-eight he saw his appointment to be a justice of the peace as a public validation of his rising economic status and social prestige. Marbury never received his judicial position; instead, he returned to his financial activities, ultimately becoming the president of a bank in Georgetown. He died in 1835, the same year as Chief Justice John Marshall.

Other participants in the famous decision played major roles in the early history of our nation. Thomas Jefferson, who refused to honor Marbury's appointment, served two terms as chief executive, leaving office in 1809

as one of the nation's most revered presidents. James Madison, the secretary of state who carried out Jefferson's order depriving Marbury of his judgeship, became the nation's fourth president, serving from 1809 to 1817. Following the *Marbury* decision, Chief Justice Marshall led the Court for an additional thirty-two years. His tenure was marked with fundamental rulings expanding the power of the judiciary and enhancing the position of the federal government relative to the states. He is rightfully regarded as history's most influential chief justice.

Although the *Marbury* decision established the power of judicial review, it is ironic that the Marshall Court never again used its authority to strike down a piece of congressional legislation. In fact, it was not until *Scott v. Sandford* (1857), more than two decades after Marshall's death, that the Court once again invalidated a congressional statute.

Sources: John A. Garraty, "The Case of the Missing Commissions," in *Quarrels That Have Shaped the Constitution*, rev. ed., ed. John A. Garraty (New York: Harper & Row, 1987); and David F. Forte, "Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace," *Catholic University Law Review* 45 (1996): 349–402.

and Marshall realized this. So Marshall simply took the rational course of action: deny Marbury his commission (which Jefferson desired) and articulate judicial review (a move that Jefferson also approved).

Either way, the decision helped to establish Marshall's reputation as perhaps the greatest justice in Supreme Court history. *Marbury* was just the first in a long line of seminal Marshall decisions, including two you will have a chance to read later in the book, *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824). Most important here, *Marbury* asserted the Court's authority to review and strike down government actions that were incompatible with the Constitution. In Marshall's view, such authority, while not explicit in the Constitution, was clearly embraced by the document. Was he correct? His opinion makes a plausible argument, but some judges and scholars have suggested otherwise. We review their assertions soon but first we consider the U.S. Supreme Court's power to review state court decisions and, by extension, actions taken by state governments.

Judicial Review of State Court Decisions

In *Marbury* the Court addressed only the power to review acts of the federal government. Could the Court also exert judicial review over the states? Section 25 of the Judiciary Act of 1789 suggested that it could. Recall from our discussion of the act that Congress authorized the Court to review appeals from the highest state courts, if those tribunals upheld state laws against challenges of unconstitutionality or denied claims based on the U.S. Constitution, federal laws, or treaties. But the mere existence of this statute did not necessarily mean that either state courts or the Supreme Court would follow it. After all, in *Marbury* the justices told Congress that it could not interpret Article III to expand the original jurisdiction of the Supreme Court—if that is, in fact, what Congress did. Would they say the same thing about Section 25, that Congress improperly read Article III to authorize the Court to review certain kinds of state court decisions?



Although he never received his commission as a justice of the peace, William Marbury remained an affluent businessman. He lived in this home on what is today M Street in the Georgetown neighborhood of Washington, D.C. It currently serves as the Embassy of Ukraine.

Also to be considered was the potentially hostile reaction from the states, which in the 1780s and 1790s zealously guarded their power from federal encroachment. Even if the Court were to take advantage of its ability to review state court decisions, it was more than likely that they would disregard its rulings. Keep these issues in mind as you read *Martin v. Hunter's Lessee*, in which the Court sustained its power to review state court decisions that met the requirements of Section 25 (those upholding a state law against challenges of unconstitutionality or denying a claim based on the U.S. Constitution, federal laws, or treaties).

Martin v. Hunter's Lessee

14 U.S. (1 Wheat) 304 (1816)

<https://caselaw.findlaw.com/us-supreme-court/14/304.html>

Vote: 6 (Duvall, Johnson, Livingston, Story, Todd, Washington)
0

OPINION OF THE COURT: Story

CONCURRING OPINION: Johnson

NOT PARTICIPATING: Marshall

FACTS:

Before the Revolutionary War, Lord Fairfax, a British loyalist, inherited a large tract of land in Virginia. When the war broke out, Fairfax,

too old and frail to make the journey back to England, remained in Virginia. He died there in 1781 and left the property to his nephew, Denny Martin, a British subject residing in England, with the stipulation that Martin change his name to Fairfax.

The inheritance was complicated by a 1781 Virginia law that specified that no “enemy” could inherit land in the state. Virginia confiscated Fairfax’s (also known as Martin’s) property and began proceedings to sell it, including a plot to David Hunter.¹⁸ Although Hunter was a real grantee, “he was a mere instrument of the state; the state managed the litigation completely.” Because he believed he had rightfully inherited the land, Martin also began to sell off tracts—among the purchasers were John Marshall and his brother—resulting in a suit contesting title.

A lower Virginia state court upheld Martin’s claim, but the highest court in Virginia reversed. When the case, *Fairfax’s Devisee v. Hunter’s Lessee* (1813), was appealed to the U.S. Supreme Court, only four justices heard it; Chief Justice Marshall recused himself due to the potential conflict of interest. In a 3–1 decision, the Court upheld Fairfax’s claim, finding that the Virginia statute was unconstitutional because it conflicted with the 1783 Treaty of Paris, in which Congress promised to recommend to the states that they restore confiscated property to loyalists.

The U.S. Supreme Court ordered the Virginia Supreme Court to carry out its ruling. In response, the Virginia court, which did not consider itself subordinate to the Supreme Court, held hearings to determine whether it should comply. Eventually, it not only declined to follow the order but also struck down Section 25 of the Judiciary Act of 1789 as unconstitutional. The Virginia Supreme Court’s decision was then appealed to the U.S. Supreme Court in the case of *Martin v. Hunter’s Lessee*. Here the justices considered the question of whether Congress could give them appellate jurisdiction over certain state court decisions, as it had done in Section 25.

ARGUMENTS:

For Denny Martin, heir at law and devisee of Fairfax:

- The uniform practice since the Constitution was adopted confirms the jurisdiction of the Court. The letters of Publius show that it was agreed, by both its friends and foes, that judicial power extends to this class of cases.
- This government is not a mere confederacy, like the old continental confederation. In its legislative, executive, and judicial authorities, it is a national government. Its judicial authority is analogous to its legislative: it alone has the

¹⁸William Winslow Crosskey, *Politics and the Constitution in the History of the United States*, vol. 2 (Chicago, IL: University of Chicago Press, 1953), 788–789.

power of making treaties; those treaties are declared to be the law of the land; and the judiciary of the United States is exclusively vested with the power of construing them.

- The state judiciaries are essentially incompetent to pronounce what is the law, not in the limited sphere of their territorial jurisdiction but throughout the Union and the world.

For Hunter's Lessee:

- Under the Constitution, in which power was given to the federal government by the states, the U.S. Supreme Court can only review decisions of the lower federal courts.
- If the Supreme Court can exercise appellate jurisdiction over state courts, the sovereignty and independence of the states will be materially impaired.
- State court judges are men of integrity who take an oath to support the U.S. Constitution. They can be trusted to interpret it authoritatively.

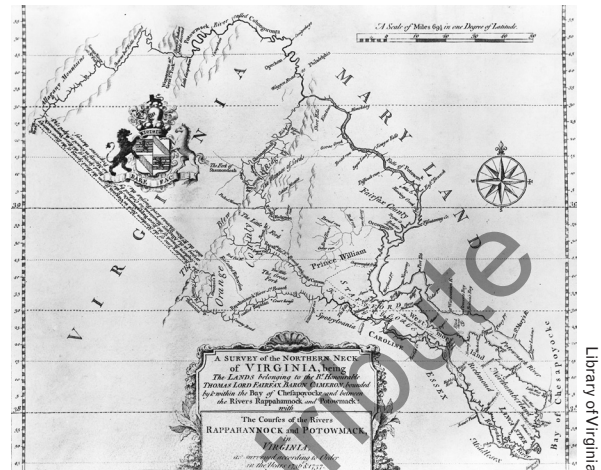
STORY, J., DELIVERED THE OPINION OF THE COURT.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations . . .

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." . . . The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have reasonable construction, according to the import of its terms



Martin v. Hunter's Lessee (1816) involved land in Virginia that the state had confiscated from a loyalist during the Revolutionary War. Justice Story wrote the landmark opinion establishing the Supreme Court's authority to reverse state court decisions involving federal laws or constitutional rights.

. . . The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to . . . the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. . . .

[B]y the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all

cases," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends . . .

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the constitution, laws, and treaties of the United States, or to *all* cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some*, cases . . .

[It] is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might, but would, arise in the State courts in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It is obvious that this obligation is imperative upon the State judges. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws and treaties of the United States—"the supreme law of the land."

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States; which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts . . . ; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and

the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. . . . The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other coordinate departments of state sovereignty. . . .

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts . . . because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity. . . . Admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . .

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in

different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils. . . .

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases . . . is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one. . . .

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed. . . .

With these words, the justices may have believed that the question was settled,¹⁹ but *Martin* hardly ended state challenges to the Court's authority to "interfere" in their business. These challenges come in different forms—as reactions to *Brown v. Board of Education* (1954) attest.²⁰ In the wake of that decision, which told states that they could not maintain segregated public schools,

¹⁹Even after *Martin*, Virginia continued its assaults on the authority of the Supreme Court to review state actions. The issue was not settled until the case of *Cohens v. Virginia* (1821). The Cohen brothers were tried and convicted in Virginia for selling tickets for the District of Columbia lottery, a lottery that was authorized by an act of Congress but not by Virginia law. When the Cohens alleged that the federal law superseded the Virginia statute, the Supreme Court was again compelled to review a Virginia court's interpretation of a congressional act. Writing for a unanimous Court, Chief Justice Marshall reinforced the constitutionality of Section 25 of the Judiciary Act, holding that the Supreme Court could exercise jurisdiction over a federal question raised on appeal by citizens against their own states.

²⁰The examples to follow come from Gerald N. Rosenberg, *The Hollow Hope* (Chicago, IL: University of Chicago Press, 1991); Richard Kluger, *Simple Justice* (New York: Knopf, 1975); and Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact*, 2nd ed. (Washington, DC: CQ Press, 1999).

state officials made public statements in direct defiance of the Court,²¹ and Southern state legislatures passed 136 laws and state constitutional amendments aimed at preserving segregation. In 1957 Arkansas governor Orval Faubus had members of the National Guard stand at the entrance of Little Rock Central High School to prevent black students from entering. He and other state officials claimed that they were not bound by *Brown*. This incident led to *Cooper v. Aaron* (1958), in which the justices took the opportunity to reaffirm their commitment to Marshall's words in *Marbury*: "It is emphatically the province and the duty of the judicial department to say what the law is."

The Debates over Judicial Review

The reactions to *Brown* were extreme; the typical Supreme Court decision invalidating a federal, state, or local law does not elicit such blatant defiance. But even when they do, there is little talk of taking away the Court's power to exert judicial review over national (*Marbury*) and state actions (*Martin*). Put another way, although specific decisions have met fierce resistance, the Court's role as a principal, but certainly not always *final*,²² constitutional interpreter is now so firmly established that a Court decision can precipitate the resignation of a president, as it did in *United States v. Nixon* (1974) (excerpted in Chapter 4) or the election of a president, as it did in *Bush v. Gore*.²³ With the stroke of a pen, the Court can declare hundreds of federal statutory provisions unconstitutional, as it did in *Immigration and Naturalization Service v.*

²¹Examples include Alabama governor George Wallace's often-cited declaration, "I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever," and Mississippi senator James Eastland's claim that the South "will not abide by or obey this legislative decision by a political court."

²²We emphasize the word *final* because the extent to which the Court has or *should have* the last word in constitutional interpretation is a matter of considerable debate, especially when it comes to federal laws. Compare, for example, Larry D. Kramer, "Foreword: We the Court," *Harvard Law Review* 115 (2001): 4–168; and Prakash and Yoo, "The Origins of Judicial Review." Along similar lines, debates ensue over whether the Court has or should have a monopoly on constitutional interpretation. We discuss these below, under the heading "Judicial Supremacy."

²³At issue in *Bush v. Gore* (2000) were contested votes cast in Florida in the 2000 presidential election, which pitted Al Gore against George W. Bush. A majority of the Court voted to stop the Florida recount, virtually ensuring that George W. Bush would become the next president.

Chadha (1983) (excerpted in Chapter 5), or invalidate almost every law in the country regulating abortion, as it did in *Roe v. Wade* (1973).²⁴

But what these and other momentous decisions did not do, and perhaps could not do, was put an end to the controversies surrounding judicial review. Some of the complaints regarding *Marbury* emerged while Marshall was still on the bench. Jefferson, for one, griped about the decision until his last days. In an 1823 letter he wrote,

This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. . . . [In *Marbury v. Madison*] the Court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other court having the jurisdiction, what they should do if *Marbury* should apply to them. Besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? . . . Yet this case of *Marbury and Madison* is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an obiter dissertation of the Chief Justice [our italics].²⁵

Strong words from one of our nation's most revered presidents!

But Jefferson was not the last to complain about Marshall's opinion. Some critics have picked apart specific aspects of the ruling, as Jefferson did. He argued that once Marshall ruled that the Court did not have jurisdiction to hear the case, he should have dismissed it. Another criticism of Marshall's opinion is that Section 13 of the 1789 Judiciary Act—which *Marbury* held unconstitutional—did not actually expand the Supreme Court's original jurisdiction; it simply permitted the Court to hear mandamus cases on its appellate jurisdiction.

²⁴In 2022, in *Dobbs v. Jackson Women's Health Organization*, the Court overruled *Roe*, once again allowing the states to regulate abortion.

²⁵Andrew A. Lipscomb, ed., *The Writings of Thomas Jefferson*, vol. 15 (Washington, DC: Thomas Jefferson Memorial Association, 1905), 447–448.

If this is so, then Marshall “had nothing to declare unconstitutional!”²⁶

Other debates center on the Court's holding, in particular, on what legal scholar Alexander Bickel called the “countermajoritarian difficulty”: given our nation's fundamental commitment to a representative form of government, why should we allow a group of unelected officials to override the wishes of the people, as expressed by their elected officials?²⁷

In other words, even though most Americans accept the fact that courts have the power of judicial review, many legal analysts still argue over whether they should. Let us consider some of the theoretical debates surrounding judicial review, debates that fall into six categories: originalism, judicial self-restraint, democratic checks on the Court, judicial supremacy, public opinion, and protection of minority rights.²⁸ Table 2-2 outlines each; in what follows we describe them in more detail.

Originalism

Perhaps the oldest—and yet still ongoing—debate concerns whether the Constitution's framers (or ratifiers, or Americans more generally) intended for the federal courts to exercise judicial review (or understood that they would). Some historical evidence suggests an affirmative response. Most important is that the framers had knowledge of judicial review. Although Marshall often is credited with its first full enunciation, the concept probably originated much earlier in England in *Dr. Bonham's Case* (1610). At issue was an act of Parliament that enabled physicians of the London College to authorize medical licenses and to punish persons practicing medicine without one. Convicted of violating the act, Dr. Bonham appealed his case to England's high court, the King's Bench. Writing for the court, Lord Chief Justice Sir Edward Coke struck down the act, noting in dicta, “It appears in our books, that in many cases, the

²⁶Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 24. A counterargument is that people of the day must have considered Section 13 as expanding the Court's original jurisdiction, or else why would *Marbury* have brought his suit directly to the Supreme Court?

²⁷Alexander Bickel, *The Least Dangerous Branch of Government* (New York: Bobbs-Merrill, 1962).

²⁸These categories, with the exception of judicial supremacy, follow from David Adamany, “The Supreme Court,” in *The American Courts: A Critical Assessment*, ed. John B. Gates and Charles A. Johnson (Washington, DC: CQ Press, 1991).

Table 2-2 Major Controversies over Judicial Review		
Controversy	Examples Supporting Judicial Review	Examples of Opposing Judicial Review
<i>Originalism</i> (with emphasis on the framers' intent): Did the framers intend the federal courts to exercise judicial review?	The framers knew of and implicitly accepted judicial review. Historians have established that more than half of the delegates to the Constitutional Convention approved of it.	The framers rejected the proposed Council of Revision, which would have enabled Supreme Court justices and the president to veto legislative acts.
<i>Judicial Restraint</i> : Should unelected federal judges defer to the elected institutions of government?	The government needs an umpire who will act neutrally and fairly in interpreting the Constitution.	Unelected judges should defer to the wishes of elected officials, who represent the best interests of the people and who can be removed from office when they do not.
<i>Democratic Checks</i> : Are there sufficient checks on the federal courts to prevent them from using judicial review in a way repugnant to the best interests of the people?	Acting in different combinations, Congress, the president, and the states can, for example, ratify a constitutional amendment to overturn a decision, change the size of the Supreme Court, or remove its appellate jurisdiction.	The problem with these checks, some analysts say, is that they are rarely invoked; for example, constitutional amendments have overturned only five Supreme Court decisions.
<i>Public Opinion</i> : Are Supreme Court decisions, in particular, in line with public opinion?	Because the Court's decisions are usually in harmony with public opinion, Americans need not fear that the Court will usurp its power because the justices do not exercise its power in a counter-majoritarian fashion.	In some especially important decisions, the majority opinion is well out of line with public opinion, such as its prohibition on prayer in school and its overruling of <i>Roe v. Wade</i> (1973).
<i>Role of Courts in a Democratic Society</i> : Do the federal courts need the power of judicial review to protect minority interests?	A key role of the federal courts is to protect minority rights against tyranny by the majority. Because legislatures and executives are popularly elected, they reflect the interests of the majority. So it is necessary for the one branch of government that lacks any electoral connection to have the power of judicial review.	Courts have not always used judicial review to protect minorities. For example, in <i>Students for Fair Admissions v. Harvard</i> (2023), the justices struck down diversity programs designed to help people of color.

Source: With the exception of judicial self-restraint, we adopt this framework from David Adamany, "The Supreme Court," in *The American Courts: A Critical Assessment*, ed. John B. Gates and Charles A. Johnson (Washington, DC: CQ Press, 1991). The text provides more detail on the evidence in support of and opposing each controversy.

common law will control acts of Parliament, and sometimes adjudge them to be utterly void." Coke's resounding declaration of the authority of the court to void parliamentary acts came at a critical point in British history. At a time when King James I was claiming enormous authority, the court, in an otherwise trivial case, took the opportunity to assert its power.

By the early 1700s the concept of judicial review had fallen out of favor in England. Coke's writings,

however, had a profound impact on the development of the American legal system, as best illustrated by the *Writs of Assistance Case* (1761), involving the legality of sweeping search warrants issued by the British Parliament in the name of the king. Arguing against such writs, James Otis, a Boston lawyer, relied on Coke's opinion in *Bonham* as precedent for his request. Otis lost the case, but his argument was not forgotten. Between 1776 and 1787, eight of the thirteen colonies incorporated judicial

review into their constitutions, and, as we noted earlier, by 1789 seven state courts had struck down as unconstitutional acts passed by their legislatures.

This background makes the question of why the framers left judicial review out of the Constitution even more perplexing. Some historians argue that the framers omitted it because they did not want to heighten controversy over Article III by inserting judicial review, not because they opposed the practice. To the contrary, they may have implicitly accepted it. Historians have established that more than half of the delegates to the Constitutional Convention approved of judicial review, including those generally considered to be the most influential. And some law professors point out that there seem to be no writings, whether for or against ratification, suggesting that the courts would not enjoy this power. There were, however, statements in its favor. Most famously, in *The Federalist Papers* Hamilton defended the concept, arguing that one branch of government must safeguard the Constitution and that the courts would be in the best position to undertake that responsibility. The suggestion here is, “[T]hough people disagreed on much else about the Constitution, all those who addressed judicial review agreed that the Constitution authorized the judiciary to ignore unconstitutional federal statutes.”²⁹

Even with all this evidence, some commentators still argue that the framers did not intend for courts to review acts of the other branches. In support of this view, they point to the framers’ rejection of the proposed council of revision, which would have been both composed of Supreme Court justices and the president, and permitted to veto legislative acts. Others note that even though some states adopted judicial review, their courts rarely exercised the power. When they did, public outcries typically followed, indicating that support for judicial review was not widespread. Moreover, the fact that some framers were concerned about writing judicial review into the Constitution could mean they believed that opposition to it was substantial enough to threaten the chances of ratification.³⁰

What, then, can we conclude about the intent of the framers with regard to judicial review? Perhaps Edward Corwin said it best: “The people who say the framers intended it are talking nonsense, and the people who say they did not intend it are talking nonsense.”³¹

²⁹Prakash and Yoo, “The Origins of Judicial Review,” 928.

³⁰See Kramer, “Foreword.”

³¹Quoted in *ibid.*, 13.

Judicial Self-Restraint

Another controversy surrounding judicial review involves the notion of judicial self-restraint. Today, as in the past, some legal analysts and judges contend that courts should defer to the elected branches of government unless they are reasonably certain that the actions of those branches have violated the Constitution.³²

An early call for perhaps an even more extreme version of judicial self-restraint came in *Eakin v. Raub* (1825), in which John Gibson, a Pennsylvania Supreme Court justice, took issue with a seeming implication of *Marbury*: that the judiciary is the ultimate arbiter of the Constitution. Because Gibson’s opinion provides an important counterpoint to Marshall’s arguments in *Marbury*, we include here an excerpt from it. As you read it, consider whether you agree with Gibson’s version of judicial self-restraint in light of the *Marbury* opinion.

Eakin v. Raub

12 SARGENT & RAWLE 330 (PA. 1825)

John Gibson was a well-regarded judge who served on the Pennsylvania Supreme Court for thirty-seven years and nearly obtained a seat on the U.S. Supreme Court. His dissent in *Eakin v. Raub* is significant not because it came in a case of any great moment—indeed, the facts are not particularly important. It is important because, as even scholars today maintain, it provides one of the sharpest rebuttals of Marshall’s opinion in *Marbury v. Madison*.³³

GIBSON, J., DISSENTING.

I am aware, that a right to declare all unconstitutional acts void, without distinction as to either state or federal constitution, is generally held as a professional dogma; but I apprehend, rather as a matter of faith than of reason. It is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall; and if the

³²For a history of judicial self-restraint—one claiming that Supreme Court justices did but no longer adhere to it—see Richard A. Posner, “The Rise and Fall of Judicial Self-Restraint,” *California Law Review* 100 (2012): 519–556.

³³The excerpt of Gibson’s dissent comes from Melvin I. Urofsky, ed., *Documents of American Constitutional History*, vol. 1 (New York: Knopf, 1989), 183–185.

argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. . . .

The constitution is said to be a law of superior obligation; and consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; this is conceded. But it is a fallacy, to suppose, that they can come into collision *before the judiciary*.

The constitution and the *right* of the legislature to pass the act, may be in collision; but is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud preeminence? It is by no means clear, that to declare a law void, which has been enacted according to the forms prescribed in the constitution, is not a usurpation of legislative power. . . .

But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the constitution. It does so: but how far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend, that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature.

It will not be pretended, that the legislature has not, at least, an equal right with the judiciary to put a construction on the constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law; if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? The soundness of any construction which would bring one organ of the government into collision with another, is to be more than suspected; for where collision occurs, it is evident, the machine is working in a way the framers of it did not intend. . . .

But the judges are sworn to support the constitution, and are they not bound by it as the law of the land? The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the constitution, *only as far as that may be involved in his official duty*; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. . . .

But do not the judges do a *positive act* in violation of the constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas, the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests. . . .

I am of the opinion that it rests with the people, in whom full and absolute sovereign power resides to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary; as it might be expected that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage—a mode better calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and, beside, it is a postulate in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs. . . .

Twenty years after *Raub*, Gibson had a change of heart. In an 1845 opinion, he suggested that state courts should exercise judicial review over the acts of political institutions located within their jurisdictions.³⁴ But if we take *Raub* on its face, the use of judicial review belies this notion of judicial restraint for which Gibson clamors. Recall the legislative veto case described earlier in this chapter. By even considering the issue, the Court placed itself squarely in the middle of an executive-legislative dispute; when it nullified the veto, it showed little deference to the wishes of the legislature. To this argument, supporters of judicial review point to Marshall's decision in *Marbury*, Hamilton's assertion in *The Federalist Papers*,

³⁴See *ibid.*, 183.

and so forth. They suggest that the government needs an umpire who will act neutrally and fairly in interpreting the constitutional strictures.

Again, the question of which position is correct has no absolute answer, only opinion. But what we do know is that U.S. Supreme Court justices—with a few exceptions, such as Oliver Wendell Holmes and Felix Frankfurter³⁵—have not taken seriously the dictate of judicial self-restraint or, at the very least, have not let it interfere in their voting. Even those who profess a basic commitment to judicial deference have tended to allow their attitudes and values to dictate their decisions. That is, left-leaning justices tend to invalidate conservative laws, and right-leaning justices, liberal laws.³⁶

Democratic Checks

A third controversy involves what David Adamany calls democratic checks on the Court. According to one side, judicial review is defensible on the ground that the Supreme Court—while lacking an explicit electoral connection—is subject to potential checks from the elected branches. If the Court overturns government acts in a way repugnant to the best interests of the people, Congress, the president, and even the states have a number of recourses. Acting in different combinations, they can ratify a constitutional amendment to overturn a decision, change the size of the Court, or remove the Court's appellate jurisdiction.

Some scholars suggest that the elected branches do not even need to use these weapons to influence the Court's decisions: the mere fact that they possess them may be enough. In other words, if the justices care about the ultimate state of the law or their own legitimacy, they might seek to accommodate the wishes of Congress rather than face the wrath of the legislators, which could

lead to the reversal of their ruling or other forms of institutional retaliation.³⁷

It is the existence of congressional threat, not its invocation, that may affect how the Court rules in a given case. This dynamic, in the eyes of some analysts, may explain why the justices rarely strike down acts of Congress.³⁸ To see the point, consider *Mistretta v. United States* (1989), in which the Supreme Court reviewed a law that sought to minimize judicial discretion in sentencing. The law created a sentencing commission charged with creating guidelines for federal judges to follow in handing down criminal sentences. Although some lower court judges refused to adopt the guidelines, arguing that they undermined judicial independence, the Supreme Court upheld the law. It is possible that the justices upheld the law because they agreed with it ideologically, or because precedent led them to that conclusion, and so forth. But it also may be true that the justices wanted to avoid a congressional backlash and so acted in accord with legislators' wishes.

The problem with these arguments, according to some analysts, is twofold. First, explicit checks on the part of elected branches are invoked so rarely—only four amendments have overturned Court decisions, the Court's size has not been changed since 1869, and only infrequently has Congress removed the Court's appellate jurisdiction—that they do not constitute much of a threat. Second, although justices may vote in some constitutional cases in accordance with congressional preferences to avoid backlash, such cases may be the exception, not the rule. After all, some observers ask, why would the Court fear Congress when it so rarely takes action against Congress?

Judicial Supremacy

We return to some of these questions in the last section of the chapter, where we take up jurisprudential and political constraints on the exercise of judicial power. For now, let's consider debates related to democratic checks:

³⁵See Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (Norton, 2022) for a biography of Frankfurter, which emphasizes his commitment to judicial self-restraint. Epstein and Landes provide data to support this view of Frankfurter, finding that throughout his career Frankfurter was highly reluctant to strike down federal laws, regardless of whether the laws were conservative or liberal. Lee Epstein and William M. Landes, "Was There Ever Such a Thing as Judicial Self-Restraint?," *California Law Review* 100 (2012): 557–578.

³⁶See, for example, Epstein and Landes, "Was There Ever Such a Thing as Judicial Self-Restraint?"; and Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009).

³⁷See, generally, William N. Eskridge Jr., "Overriding Supreme Court Statutory Interpretation Decisions," *Yale Law Journal* 101 (1991): 331–455; and Jeffrey A. Segal, Chad Westerland, and Stefanie A. Lindquist, "Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model," *American Journal of Political Science* 55 (2011): 89–104.

³⁸According to *The Constitution Annotated* (<https://constitution.congress.gov>), in only 171 decisions (through 2021) did the Supreme Court invalidate a federal law. The number is far higher for state and local laws: 815.

controversies about the relationship between judicial review and judicial supremacy.³⁹ To some scholars, it is one thing for the Court to assert its authority to invalidate acts of government. It is quite another, they argue, for the justices to take the next step and claim they have a monopoly on constitutional interpretation or that they are the final interpreters within the federal government. Marshall seemed to come close to claiming as much in *Marbury*, when he wrote, “It is emphatically the province and duty of the judicial department to say what the law is.”

And the Court has, on occasion, echoed that sentiment ever since. This is especially true when Congress tries, by simple legislation (rather than by proposing a constitutional amendment), to overturn or otherwise revise a Court decision interpreting the Constitution. Consider *City of Boerne v. Flores* (1997), involving the constitutionality of a federal law directing the Court to adopt a particular standard of law in constitutional cases involving the free exercise clause of the First Amendment—a standard the Court had rejected. In striking down Congress’s effort at constitutional interpretation, the Court did not hesitate to cite *Marbury*’s strong language about the Court’s authoritative role:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.

Why are some scholars (along with Judge Gibson in *Eakin*) so bothered by the idea of the Court as the “ultimate” arbiter of the Constitution? One reason is that it belies history. Both the president and Congress have engaged in constitutional interpretation from the nation’s earliest days, and, according to David Currie, a leading authority on the subject, they actually performed the task better than the Supreme Court. In fact, after

examining the early congressional record, Currie concluded that the “debates sparkled with brilliant insights about the meaning of constitutional provisions.”⁴⁰ Whether legislators are engaging in interpretation when they debate the document’s meaning on the floor or in committee hearings is an interesting question. But it is certainly true that occasionally those debates, and perhaps the actions that result from them, became the last or only words on the meaning of specific constitutional provisions.

Another reason analysts take issue with the concept of judicial supremacy is this: even if the Court has the power to review the president’s and Congress’s interpretations, it does not necessarily follow that the Court should have the last word.⁴¹ *Marbury* itself offers a response to this critique: If we allow Congress to be the final arbiter of the Constitution, the document’s meaning will change as the composition of Congress changes. No longer will it be a constitution; rather, it will be simple legislation to be interpreted as each Congress sees fit. Although the same could be said about the Court—as it experiences turnover in membership, its interpretation of the Constitution may change—life-tenured justices are slower to undo their own interpretations than the electorally beholden members of Congress would be. As a result, the Court brings greater predictability to the law.

Public Opinion

A fifth debate about judicial review concerns public opinion and the Court. Those who support judicial review point to two aspects of the Court’s relationship with the public. First, they argue that Court decisions are usually in harmony with public opinion. That is, even though the

³⁹We adopt some of the material to follow from Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Courts, Judges, and Politics* (New York: McGraw-Hill, 2005), chap. 12. See also Walter F. Murphy, “Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,” *The Review of Politics* 48 (1986): 401–423.

⁴⁰David P. Currie, “Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861,” in *Congress and the Constitution*, ed. Neal Devins and Keith E. Whittington (Durham, NC: Duke University Press, 2005), 24. See also Professor Currie’s series of books on constitutional deliberation in Congress: *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago, IL: University of Chicago Press, 1997); *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago, IL: University of Chicago Press, 2001); and *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago, IL: University of Chicago Press, 2005).

⁴¹Greg Weiner, *The Political Constitution: The Case Against Judicial Supremacy* (Lawrence: University Press of Kansas, 2019). See also Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (Lawrence: University Press of Kansas, 2019), arguing that, as an empirical matter, the Court’s decisions are regularly challenged and not always final.

Court faces no real pressure to do so, it generally reaches decisions in line with the desires of the public. Perhaps the justices bend to the will of the people because their Court requires public support to remain an efficacious branch of government. Or perhaps the justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public. Prior to his appointment to the Supreme Court, Benjamin Cardozo put it this way: “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by.”⁴² Either way, Americans need not fear that the Court will usurp their power because it does not exercise its power in a counter-majoritarian fashion.

Empirical evidence, however, is mixed. On the one hand, after conducting an investigation of the relationship between public opinion and the Court, Thomas R. Marshall concluded, “[T]he evidence suggests that the modern Court has been an essentially majoritarian institution. Where clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls.”⁴³ Studies focusing on a larger sample of court decisions tend to concur: with some caveats, they find that when the “mood of the public” is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.⁴⁴

On the other hand, one of the most recent studies contends that “there is little reason the Court should respond and demonstrate that, contrary to twenty-five years of scholarship, there is no good empirical evidence suggesting it does.”⁴⁵ It is also true the Court at times has handed down decisions well out of line with public preferences, in highly salient decisions such as in its prohibition of prayer in school, its short-lived ban on the death penalty, and, more recently, its overruling of *Roe v. Wade*.

Second, even if the Court is occasionally out of sync with the public, judicial review is important: when the Court reviews and affirms government acts, it can play the role of republican schoolmaster—educating the public and conferring legitimacy on those acts. Evidence suggests, however, that the Court does not and cannot

serve this function because too few people actually know about any given Court decision, and, even if they do know, they do not necessarily shift their ideas to conform to the Court’s opinions.

Research by Charles H. Franklin and Liane Kosaki provides an interesting example of the last point.⁴⁶ They examined whether the Court’s decision in *Roe v. Wade* (1973) changed citizens’ opinions on abortion, reasoning that if the Court acted as a republican schoolmaster, the public would adopt more-liberal attitudes. Their data indicate, however, that no such change occurred. Instead, those who supported abortion rights before *Roe* became more pro-choice, while those opposed became more pro-life. In other words, the Court’s decision solidified existing views; it didn’t change them.

Protection of Minority Rights

A final controversy concerns what role the Supreme Court should play in the American system of government. Those who support judicial review assert that the Court must have this power if it is to fulfill its most important constitutional assignment: protection of minority rights. By their very nature—the fact that they are elected—legislatures and executives reflect the interests of the majority and may take action that is blatantly unconstitutional. So that the majority cannot tyrannize a minority, it is necessary for the one branch of government that lacks any electoral connection to have the power of judicial review. This is a powerful argument, the truth of which has been demonstrated many times throughout American history. For example, when the legislatures of Southern states continued to enact segregation laws, it was the U.S. Supreme Court that struck down the laws as violative of the Constitution.

This position also has its share of problems, not the least of which is that empirical evidence suggests that the Court does not always use judicial review in this manner. According to Robert Dahl, many acts struck down by the Supreme Court before the 1960s were those that harmed a “privileged class,” not marginalized groups.⁴⁷ And that

⁴²Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 168.

⁴³Thomas R. Marshall, *Public Opinion and the Supreme Court* (Boston: Unwin Hyman, 1989), 192.

⁴⁴For a review of the key studies, see Ben Johnson and Logan Strother, “The Supreme Court’s (Surprising?) Indifference to Public Opinion,” *Political Research Quarterly* 74 (2021): 18–34.

⁴⁵*Ibid.*, 18.

⁴⁶Charles H. Franklin and Liane Kosaki, “The Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion,” *American Political Science Review* 83 (1989): 751–771; see also Timothy R. Johnson and Andrew D. Martin, “The Public’s Conditional Response to Supreme Court Decisions,” *American Political Science Review* 92 (1998): 299–310.

⁴⁷Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* 6 (1957): 279–295.

continues today, at least in some areas of the law. One study found that while the Court in the 1960s interpreted the religion clauses of the First Amendment to protect non-mainstream religions from discrimination by governments, today's Court has used those clauses to protect mainstream organizations that are under threat from secular laws.⁴⁸

Judicial Review in Action

The controversies discussed earlier in this chapter are important to the extent that they place the subject of judicial review within a theoretical context for debate. But they present debates that probably never will be resolved: as one side finds support for its position, the other always seems to follow suit.

For this reason, it seems important to consider how the Court has actually exercised the power of judicial review: specifically, the number of times it has invoked the power to strike laws and the significance of those decisions. As Lawrence Baum suggests, investigation of these issues can help us achieve a better understanding of judicial review and place it in a realistic context.⁴⁹ First, how often has the Court overturned a federal, state, or local law or ordinance? At first blush, the data seem to indicate that the Court has made frequent use of the power, striking down close to fifteen hundred government acts since 1789 in nearly one thousand decisions. As Baum notes, however, those acts are but a “minute fraction” of the laws enacted at various levels of government. Since 1790, for example, Congress has passed more than sixty thousand laws, and the Court has struck down far less than 1 percent of them. Moreover, as we hinted earlier, the vast majority of laws invalidated were passed at the state or local level, not by Congress.

The more important question, then, may be that of significance: Does the Court tend to strike down important laws or relatively minor laws? Using *Scott v. Sandford* (excerpted in Chapter 6) as an illustration, some argue that the Court, in fact, often strikes important legislation. Undoubtedly, the Court's opinion in *Scott* had major consequences. By ruling that Congress could not prohibit slavery in the territories and by striking down a law, the

Missouri Compromise (which had already been repealed), the Court fed the growing divisions between the North and the South and provided a major impetus for the Civil War. The decision also tarnished the prestige of the Court and the reputation of Chief Justice Roger B. Taney.

How representative is *Scott*? Some other Court opinions striking down government acts have been almost as important: those nullifying state abortion and segregation laws, the federal child labor acts, and many pieces of New Deal legislation come to mind. But, as Baum astutely points out, not all invalidated laws are especially salient. *Monongahela Navigation Co. v. United States* (1893) is an example. Here the Court struck down, on Fifth Amendment grounds, a law concerning the amount of money the United States would pay to companies for the “purchase or condemnation of a certain lock and dam in the Monongahela River.”

Concluding Thoughts

Despite all the controversies, debates, and even data, we end where we began this section: rarely do Americans and their leaders challenge the federal courts' power of judicial review. It is so bedrock, so much a part of our system of government that it is almost as if it is written into the Constitution.

And we are no longer alone. Judicial review has taken hold in over 80 percent of countries throughout the world.⁵⁰ But, unlike the United States, these countries have written the power into their constitutions instead of leaving its establishment to chance (see Box 2-3).

Still, considering all the attention paid to judicial review both in the United States and elsewhere, it is easy to forget that the power of courts to exercise it, and their judicial authority more generally, has substantial limits. In the next sections, we consider two such limits: those that emanate from the Court's reading of Article III and those that stem more generally from the separation of powers system.

CONSTRAINTS ON JUDICIAL POWER: ARTICLE III

Article III—or the Court's interpretation of it—places three major constraints on the ability of federal tribunals

⁴⁸Lee Epstein and Eric A. Posner, “The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait,” *Supreme Court Review* 2021 (2021): 315–347.

⁴⁹Lawrence Baum, *The Supreme Court*, 14th ed. (Washington, DC: CQ Press, 2022). We adopt some of the material in this section from various editions of this book.

⁵⁰See Tom Ginsburg and Mila Versteeg, “Why Do Countries Adopt Constitutional Review?,” *Journal of Law, Economics and Organization* 30 (2014): 587.

BOX 2-3

Judicial Review in Global Perspective

JUDICIAL AUTHORITY to invalidate acts of coordinate branches of government is not unique to the United States, although it is fair to say that the prestige of the U.S. Supreme Court has provided a model and incentive for other countries. By the middle of the nineteenth century, the Judicial Committee of the British Privy Council was functioning as a kind of constitutional arbiter for colonial governments within the British Empire, but not for the United Kingdom itself. Then in the late nineteenth century Canada—and in the first years of the twentieth century, Australia—created their own systems of constitutional review.

In the nineteenth century Argentina also modeled its Corte Suprema on that of the United States and even instructed its judges to pay special attention to precedents of the American tribunal. In the twentieth century Austria, India, Ireland, and the Philippines adopted judicial review, and variations of this power can be found in Norway, Switzerland, much of Latin America, and some countries in Africa.

After World War II the three defeated Axis powers—Italy, Japan, and (West) Germany—institutionalized judicial review in their new constitutions. This development was due in part to revulsion regarding their recent experiences with unchecked political power and in part to the influence of American occupying authorities. Japan, where the constitutional document was largely drafted by Americans, follows the decentralized model of the United States: the power of constitutional review is diffused throughout the entire judicial system.¹ Any court of general jurisdiction can declare a legislative or executive act invalid.

Germany and Italy, and later Belgium, Portugal, and Spain, followed a centralized model first adopted in the Austrian constitution of 1920. Each country has a single constitutional court (although some sit in divisions or senates) that has a judicial monopoly on reviewing acts

of government for their compatibility with the constitution. These courts—quite unlike those in the American system, which requires actual cases—can review laws in the abstract, typically at the request of national officials. The most a lower court judge can do when a constitutional issue is raised is to refer the problem to the specialized constitutional court. (See Box 1-1.)

After the Berlin Wall was torn down in 1989 and the Soviet Union disintegrated soon afterward, many Eastern European republics looked to judges' interpreting constitutional texts with bills of rights to protect their newfound liberties. Most opted for centralized systems of constitutional review, establishing ordinary tribunals and a separate constitutional court. They made this choice despite familiarity with John Marshall's argument for a decentralized court system in *Marbury*; namely, all judges may face the problem of a conflict between a statute or executive order on one hand and the terms of a constitutional document on the other. If judges cannot give preference to the constitutional provision over ordinary legislation or an executive act, they violate their oath to support the constitution.

The experiences of these tribunals have varied. The German Constitutional Court is largely regarded as a success story. In its first thirty-eight years, that tribunal invalidated 292 Bund (national) and 130 Land (state) laws, provoking frequent complaints that it "judicializes" politics.² The court, however, has survived these attacks and has gone on to create a new and politically significant jurisprudence in the fields of federalism and civil liberties. The Russian Constitutional Court stood (or teetered) in stark contrast. It too began to make extensive use of judicial review to strike down government acts, but it quickly paid a steep price: in 1993 President Boris Yeltsin suspended the court's operations, and it did not resume its activities until nearly two years later.

Source: Adapted from C. Herman Pritchett, Walter F. Murphy, Lee Epstein, and Jack Knight, *Courts, Judges, and Politics* (New York: McGraw-Hill, 2005), chap. 6.

¹Walter F. Murphy and Joseph Tanenhaus, eds., *Comparative Constitutional Law* (New York: St. Martin's Press, 1977), chaps. 1–6; C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power: The Judicialization of Politics* (New York: New York University Press, 1995).

²Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997), 52.

to hear and decide cases: (1) courts must have authority to hear a case (jurisdiction), (2) the case must be appropriate for judicial resolution (justiciability), and (3) the appropriate party must bring the case (standing to sue). In what follows, we review doctrine surrounding these constraints. As you read this discussion, consider not only the Court's interpretation of its own limits but also the justifications it offers. Note, in particular, how fluid these can be: sometimes the Supreme Court has favored loose constructions of the rules; at other times it has interpreted them more strictly. What factors might explain these different tendencies? Or, to think about it another way, to what extent do these constraints limit the Court's authority?

Jurisdiction

According to Chief Justice Salmon P. Chase, "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."⁵¹ In other words, a court cannot hear a case unless it has the authority—the jurisdiction—to do so.

Article III, Section 2, defines the jurisdiction of U.S. federal courts. Lower courts have the authority to hear disputes involving particular parties and subject matter. The U.S. Supreme Court's jurisdiction is divided into original and appellate: the former are classes of cases that originate in the Court; the latter are those it hears after a lower court.

To what extent does jurisdiction actually constrain the federal courts? *Marbury v. Madison* provides an authoritative ruling on original jurisdiction. Recall that Chief Justice Marshall informed Congress that it could not alter the original jurisdiction of the Court either by expanding or contracting it.

The issue of appellate jurisdiction may be a bit more complex. Article III explicitly states that for those cases over which the Court does not have original jurisdiction, it "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." In other words, the exceptions clause seems to give Congress authority to alter the Court's appellate jurisdiction—including to subtract from it.

Would the justices agree? In *Ex parte McCordle* the Court addressed this question, examining whether

Congress can use its power under the exceptions clause to *remove* the Court's appellate jurisdiction over a particular category of cases.

Ex parte McCordle

74 U.S. (7 Wall.) 506 (1869)

<http://caselaw.findlaw.com/us-supreme-court/74/506.html>

Vote: 8 (Chase, Clifford, Davis, Field, Grier, Miller, Nelson, Swayne)
0

OPINION OF THE COURT: Chase

FACTS:

After the Civil War, the Radical Republican Congress imposed a series of restrictions on the South.⁵² Known as the Reconstruction laws, they in effect placed the region under military rule. Journalist William McCordle opposed these measures and wrote editorials urging resistance to them. As a result, he was arrested for publishing allegedly "incendiary and libelous articles" and held for a trial before a military tribunal established under Reconstruction.

Because he was a civilian, not a member of any militia, McCordle claimed that he was being illegally held. He petitioned for a writ of habeas corpus under an 1867 act stipulating that federal courts had the power to grant writs of habeas corpus in all cases where prisoners—state and federal—were deprived of their liberty in violation of the Constitution, laws, or treaties of the United States. When this effort failed, McCordle appealed to the U.S. Supreme Court. Under the Judiciary Act of 1789, the Supreme Court already had appellate jurisdiction over federal habeas cases; the 1867 law extended appellate jurisdiction to cases involving state prisoners. Even though McCordle was held by federal authorities, he brought his case to the Court under the 1867 law.

In early March 1868, *McCordle* "was very thoroughly and ably [presented] upon the merits" to the U.S. Supreme Court. It was clear to most observers that "no Justice was still making up his mind": the Court's sympathies, as was widely known, lay with McCordle.⁵³ But before the justices issued their decision, Congress, on March 27, 1868, enacted a law repealing the provision of the 1867 Habeas Corpus Act that gave the Supreme Court authority to hear appeals

⁵¹*Ex parte McCordle* (1869).

⁵²See Lee Epstein and Thomas G. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts*, ed. Lee Epstein (Washington, DC: CQ Press, 1995), 315–346.

⁵³Charles Fairman, *History of the Supreme Court of the United States*. Vol. 7: *Reconstruction and Reunion* (New York: Macmillan, 1971), 456.

arising from it; that is, Congress removed the Court's jurisdiction to hear appeals in cases like *McCardle's*. This move was meant either to punish the Court or to send it a strong message. Two years before *McCardle*, in 1866, the Court had invalidated President Abraham Lincoln's use of military tribunals in certain areas, and Congress did not want to see the Court take similar action in this dispute.⁵⁴ The legislature felt so strongly on this issue that after President Andrew Johnson vetoed the 1868 repealer act, Congress overrode the veto.

ARGUMENTS:

For the appellant, William McCardle:

- According to the Constitution, the judicial power extends to "the laws of the United States." The Constitution also vests that judicial power in one Supreme Court. The jurisdiction of the Supreme Court, then, comes directly from the Constitution, not from Congress.
- Suppose that Congress never made any exceptions or any regulations regarding the Court's appellate jurisdiction. Under the argument that Congress must define when, where, and how the Supreme Court shall exercise its jurisdiction, what becomes of the "judicial power of the United States," given to the Supreme Court? It would cease to exist. But the Court is coexistent and co-ordinate with Congress and must be able to exercise judicial power even if Congress passed no act on the subject.
- By interfering in a case that has already been argued and is under consideration by the Court, Congress is unconstitutionally exercising judicial power.

For the appellee, United States:

- The Constitution gives Congress the power to "except" any or all of the cases mentioned in the jurisdiction clause of Article III from the appellate jurisdiction of the Supreme Court. It was clearly Congress's intention, in the repealer act, to exercise its power to except.
- The Court has no authority to pronounce any opinion or render any judgment in this cause because the act conferring the jurisdiction has been repealed, and so jurisdiction ceases.
- No court can act in any case without jurisdiction, and it does not matter at what period in the progress of the case the jurisdiction ceases. After it has ceased, no judicial act can be performed.

⁵⁴That action came in *Ex parte Milligan* (1866), discussed in Chapter 5.

THE CHIEF JUSTICE DELIVERED THE OPINION OF THE COURT.

The first question necessarily is that of jurisdiction, for if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. From among the earliest Acts of the first Congress, at its first session, was the Act of September 24th, 1789, to establish the judicial courts of the United States. That Act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction. . . .

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . .

It is quite clear, therefore, that this . . . court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of

the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

As we can see, the Court acceded and declined to hear the case. *McCardle* suggests that Congress has the authority to remove the Court's appellate jurisdiction as it deems necessary. As Justice Frankfurter put it in 1949, "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice* [before a judge]." ⁵⁵ Former justice Owen J. Roberts, who apparently agreed with Frankfurter's assertion, proposed an amendment to the Constitution that would have deprived Congress of the ability to remove the Court's appellate jurisdiction. ⁵⁶ To Frankfurter, Roberts, and others in their camp, the *McCardle* precedent, not to mention the text of the exceptions clause, makes it quite clear that Congress can remove the Court's appellate jurisdiction. ⁵⁷

But not all justices agreed. In 1962, Justice William O. Douglas remarked, "There is a serious question whether the *McCardle* case could command a majority view today." ⁵⁸ And even Chief Justice Chase himself suggested limits on congressional power in this area. After *McCardle* was decided, he noted that use of the

exceptions clause was "unusual and hardly to be justified except upon some imperious public exigency." ⁵⁹

Why the disagreement over the precedential value of *McCardle* when the Court's holding—not to mention the text of the Constitution—seems so clear? One argument against *McCardle*'s viability is that it was something of an odd case, that the Court had no choice but to acquiesce to Congress if it wanted to retain its legitimacy in post-Civil War America. The pressures of the day, rather than the Constitution or the beliefs of the justices, may have led to the decision. As Chief Justice John G. Roberts Jr. explained, "*McCardle* has been alternatively described as 'caving to the political dominance' of the Radical Republicans or 'acceding to Congress's effort to silence the Court.'" ⁶⁰

Some commentators also suggest that *McCardle* does not square with American traditions: although Congress has occasionally limited or stripped the Court's appellate jurisdiction, it has not taken this dramatic step in response to some of the Court's most controversial constitutional decisions such as those in abortion and gay rights cases, as Table 2-3 indicates. ⁶¹

Then there is the related claim that, taken to its extreme, jurisdiction stripping could render the Court virtually powerless. Would the framers have vested judicial power in "one Supreme Court" only to allow Congress to destroy it? Many scholars say no. And the Court, in *McCardle* itself, seemed to agree. Recall the last paragraph of Chief Justice Chase's opinion: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error." Chase is correct. Although Congress eliminated the route that *McCardle* took—the 1867 law—it did not end another: the Judiciary Act of 1789, which, as we noted, gave the Court jurisdiction over habeas petitions filed by federal prisoners, which *McCardle* was.

⁵⁵*National Mutual Insurance Co. v. Tidewater Transfer Co.* (1949).

⁵⁶See Owen J. Roberts, "Now Is the Time: Fortifying the Supreme Court's Independence," *American Bar Association Journal* 35 (1949): 1. The Senate approved the amendment in 1953, but the House tabled it. Cited in Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury, NY: Foundation Press, 1991), 45.

⁵⁷We deal only with the question flowing directly from *McCardle*—of whether Congress can remove the Supreme Court's appellate jurisdiction—not the related questions of whether it can strip jurisdiction from the lower federal courts or strip all federal jurisdiction. For interesting commentary on these questions, see Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System*, 7th ed. (New York: Foundation Press, 2020); and Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," *Stanford Law Review* 36 (1984): 895–922.

⁵⁸*Glidden Co. v. Zdanok* (1962).

⁵⁹*Ex parte Yerger* (1869).

⁶⁰Chief Justice John G. Roberts Jr. dissenting in *Patchak v. Zinke* (2018), excerpted in this chapter.

⁶¹Tara Leigh Grove argues that this tradition follows the requirements of enacting legislation (primarily bicameralism and presentment) outlined in Article I. These "structural safeguards," she argues, "give competing political factions (even political minorities) considerable power to 'veto' legislation." And such factions are especially "likely to use their structural veto to block jurisdiction-stripping legislation favored by their opponents." Grove, "The Structural Safeguards of Federal Jurisdiction," *Harvard Law Review* 124 (2011): 869–940.

Table 2-3 A Sample of Congressional Proposals Aimed at Limiting or Eliminating the U.S. Supreme Court's Appellate Jurisdiction in the Wake of Controversial Constitutional Decisions

Issue	Court Decision Provoking Proposal	Proposal
Criminal confessions	<i>Miranda v. Arizona</i> (1966), in which the Court required police to read those under arrest a series of rights.	A 1968 proposal sought to remove the Court's jurisdiction to hear state cases involving the admissibility of confessions.
Abortion	<i>Roe v. Wade</i> (1973), in which the Supreme Court struck down state laws criminalizing abortion. <i>Roe</i> legalized abortion during the first two trimesters of pregnancy.	In the 1970s and 1980s several proposals sought to remove the Court's authority to hear abortion cases.
Pledge of Allegiance	<i>Newdow v. U.S. Congress</i> (2003), in which the U.S. Court of Appeals for the Ninth Circuit struck down the mandatory saying of the Pledge of Allegiance in public schools because the pledge has the phrase "under God."	A proposal in 2004 sought to remove the jurisdiction of the lower courts and the Supreme Court to hear any case on the constitutionality of the Pledge of Allegiance.
Gay rights	<i>Lawrence v. Texas</i> (2003), which struck down same-sex sodomy laws; <i>Obergefell v. Hodges</i> (2015), which invalidated state bans on same-sex marriage.	In 1996 Congress passed the Defense of Marriage Act (DOMA), which defines marriage as between one man and one woman. Either anticipating constitutional challenges to DOMA or in response to <i>Lawrence</i> (or both), a proposal in 2004 sought to remove the Court's appellate jurisdiction to decide on the constitutionality of DOMA. After the Court invalidated DOMA, in <i>United States v. Windsor</i> (2013) but before <i>Obergefell</i> , a bill was introduced in the House to "prevent the federal courts from hearing marriage cases."

Sources: Adapted from Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law*, 15th ed. (New York: Foundation Press, 2004), 83–85; Tara Leigh Grove, "The Structural Safeguards of Federal Jurisdiction," *Harvard Law Review* 124 (2011): 869–940.

And, in fact, shortly after *McCardle*, the Court heard the case of *Ex parte Yerger* (1869), which also involved a military trial for a private citizen. But this case reached the Court through its jurisdiction under the 1789 act, not the 1867 law, and led to a different outcome. In an opinion written by Chief Justice Chase, the author of *McCardle*, the Court affirmed its power to issue the writ of habeas corpus in such cases.

The *Yerger* decision, combined with *McCardle*'s last paragraph, has led some experts to conclude that the Court would have been less likely to cave to

Congress in *McCardle* had Congress "foreclosed all avenues for judicial review of *McCardle*'s complaint."⁶² The suggestion here is that had the 1867 law been the only habeas route to the Court, the justices would have been resistant to Congress's efforts to render it powerless.

These are main reasons that have led some justices to cast some doubt on *McCardle*. But what about

⁶²Chief Justice Roberts dissenting in *Patchak v. Zinke* (2018).

precedent? What has the Court said about *McCardle*? The modern-day case law is sparse—and mixed.⁶³

Take the case of *Hamdan v. Rumsfeld* (2006), which came to the Court 137 years after the *McCardle* decision. It once again provided the opportunity for the justices to consider a challenge to their appellate jurisdiction over petitions for writs of habeas corpus, this one filed by a Yemeni national, Salim Ahmed Hamdan, who was imprisoned by the U.S. military in Guantanamo Bay, Cuba. Shortly after the Court agreed to hear Hamdan's case, Congress enacted the Detainee Treatment Act (DTA) of 2005, which said "no court, justice, or judge shall have jurisdiction to hear or consider" habeas corpus petitions filed by detainees at Guantanamo Bay. Although the act was silent about pending cases, the U.S. government believed that the act removed the Supreme Court's jurisdiction to resolve Hamdan's suit and asked the justices to dismiss the writ of certiorari.

Some legal commentators thought that the justices might go along with the government and take the opportunity to reinforce *McCardle*; others argued that they would overturn it. The majority did neither. Justice Stevens, writing for himself and Justices Breyer, Ginsburg, Kennedy, and Souter, said that it was "unnecessary" to consider the various constitutional arguments because the DTA did not expressly cover pending cases. The three dissenters, Justices Alito, Scalia, and Thomas, deemed Stevens's reading of the DTA "patently erroneous." Believing that the law had "unambiguously"

removed the Court's jurisdiction, they would have refrained from resolving the dispute.

Then less than two decades later, in *Patchak v. Zinke* (2018), the majority seemed to take a position more in line with *McCardle*. Prior to passage of a federal law (the Gun Lake Act of 2014), the federal courts had jurisdiction to hear cases involving a particular piece of land (the "Bradley Property"); after passage of the law, the courts no longer had jurisdiction because, under the act, federal courts must "promptly dismiss" any action relating to the Bradley Property. Almost all of the justices agreed that Congress had stripped the Court's jurisdiction to hear cases involving the property. But they disagreed over whether Congress had acted constitutionally.

Writing for a plurality (and emphasizing *McCardle*), Justice Thomas upheld the Gun Lake Act: "Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power." Chief Justice Roberts, in dissent did the reverse: minimized—perhaps even questioned—*McCardle*'s precedential value. As we noted earlier, he suggested that *McCardle* was produced by a timid Court that was concerned about retribution from Congress if it ruled against Congress's wishes. Roberts also reiterated that the Court's decision *McCardle*, "did not foreclose all avenues for judicial review of *McCardle*'s complaint," differentiating it from the act at issue in *Patchak*.

Thomas's view prevailed but was adopted by only three other justices. For this reason, *Patchak* (nor *Hamdan*, for that matter) seems to bring closure to the debate over Congress's power to strip the Court's jurisdiction—a debate that has been ongoing almost from the day the Court issued *McCardle*.

Justiciability

According to Article III, the federal courts' judicial power is restricted to "cases" or "controversies." Taken together, these words mean that litigation must be justiciable—appropriate or suitable for a federal tribunal to hear or to solve. As Chief Justice Earl Warren asserted, the words *cases* and *controversies*

are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define

⁶³In addition to the two cases we discuss below, some commentators point to *United States v. Klein* (1871) as a decision undermining *McCardle*'s precedential value. This is a complicated dispute but the upshot is that in 1870 the Supreme Court ruled that a presidential pardon would provide conclusive evidence of loyalty among people living in rebel states to obtain money from the sale of property seized by the government during the Civil War. Concerned that President Andrew Johnson would pardon too many Confederate supporters, Congress passed a law, in 1870, instructing the Supreme Court to dismiss suits in which a lower court had found in favor of the pardoned claimant and the government had appealed for lack of jurisdiction. The Supreme Court struck down the law. Among its defects the Court found that Congress had "inadvertently passed the limit which separates the legislative from the judicial power" by dictating how cases should be resolved.

In so ruling, the Court, yes, invalidated a jurisdiction-stripping law but on grounds different than *McCardle*. Even the Court, in *Klein*, acknowledged that if the act "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of Congress power to make "such exceptions from the appellate jurisdiction."

the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.⁶⁴

Although Warren also suggested that “justiciability is itself a concept of uncertain meaning and scope,” he elucidated several characteristics of litigation that would render it nonjusticiable. We treat five: advisory opinions, collusion, mootness, ripeness, and political questions. In what directly follows, we consider the first four because collusion, mootness, ripeness are doctrines designed to implement the first characteristic, the ban on advisory opinions. In the next section, we take up political questions and then conclude with a concept related to justiciability—standing to sue.

Advisory Opinions

In some U.S. states and foreign countries, judges of the highest court are required to give their “advice” on the constitutionality of a proposed policy at the request of the executive or legislature. Since the time of Chief Justice John Jay, however, federal judges in the United States have refused to issue advisory opinions. They do not render advice in hypothetical suits because if litigation is abstract, it possesses no real controversy. The language of the Constitution does not prohibit advisory opinions as opinions, but the framers rejected a proposal that would have permitted the other branches of government to request judicial rulings “upon important questions of law, and upon solemn occasions.” Madison was critical of this proposal on the ground that the judiciary should have jurisdiction only over “cases of a Judiciary Nature.”⁶⁵

The Supreme Court agreed. In July 1793 Secretary of State Thomas Jefferson asked the justices if they would be willing to address questions concerning the appropriate role America should play in the ongoing British-French war. Jefferson wrote that President George Washington “would be much relieved if he found himself free to refer questions [involving the war] to the opinions of the judges of the Supreme Court in the United States, whose knowledge . . . would secure us against errors

dangerous to the peace of the United States.”⁶⁶ Less than a month later the justices denied Jefferson’s request, with a reply written directly to the president:

We have considered [the] letter written by your direction to us by the Secretary of State [regarding] the lines of separation drawn by the Constitution between the three departments of government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments [italics provided].⁶⁷

With these words, the justices sounded the death knell for advisory opinions: such opinions would violate the separation of powers principle embedded in the Constitution. The subject has resurfaced only a few times in U.S. history. In the 1930s, for example, President Franklin D. Roosevelt considered a proposal that would require the Court to issue advisory opinions on the constitutionality of federal laws. But Roosevelt quickly gave up on the idea, in part because of its dubious constitutionality.

Nevertheless, scholars still debate the Court’s 1793 letter to Washington. Some agree with the justices’ logic. Others assert that more institutional concerns were at work; perhaps the Court—out of concern for its institutional legitimacy—did not want to become embroiled in “political” disputes at this early phase in its development. Whatever the reason, all subsequent Courts have followed that 1793 precedent: requests for advisory opinions to the *U.S. Supreme Court* present nonjusticiable disputes.⁶⁸

⁶⁶The full text of Jefferson’s letter is in Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process*, ed. William N. Eskridge Jr. and Philip P. Frickey (Westbury, NY: Foundation Press, 1994), 630–632.

⁶⁷Quoted in *ibid.*, 637.

⁶⁸We emphasize the Supreme Court because some state courts do, in fact, issue advisory opinions. Also keep in mind that the Supreme Court allows a U.S. court of appeals to certify a “question or proposition of law on which it seeks instruction for the proper decision of a case.” Supreme Court Rule 19. Answering certified questions is a form of advice, though it occurs within the context of a case or controversy in the lower court.

⁶⁴*Flast v. Cohen* (1968).

⁶⁵Quoted by Farber and Sherry, *A History of the American Constitution*, 65.

But justices have still found other ways to offer advice.⁶⁹ A few have sometimes given political leaders' informal suggestions in private conversations or correspondence.⁷⁰ Furthermore, justices of the Supreme Court have often given advice in an institutional but indirect manner. The Judiciary Act of 1925, which granted the Court wide discretion in controlling its docket, was drafted largely by Justice Willis Van Devanter. Chief Justice William Howard Taft and several associate justices openly lobbied for its passage, "patrolling the halls of Congress," as Taft put it. In 1937, when the Senate was considering President Roosevelt's Court-packing plan, opponents arranged for Chief Justice Charles Evans Hughes to send a letter to Senator Burton K. Wheeler, advising him that increasing the number of justices would impede rather than facilitate the Court's work and that the justices' sitting in separate panels to hear cases—a procedure that increasing the number of justices was supposed to allow—would probably violate the constitutional command that there be one Supreme Court. Along similar lines, it has become customary for chief justices to prepare annual reports on the state of the judiciary for Congress. Sometimes in these reports they explain not only what kind of legislation they believe would be good for the courts but also the likely impact of proposed legislation on the federal judicial system. In one of his addresses, Chief Justice Roberts minced no words in "advising" the Senate to stop blocking judicial nominees and begin filling judicial vacancies posthaste or else many judicial districts would experience "acute difficulties."

Finally, justices have occasionally used their opinions to provide advice to nonjudicial decision makers. In *Regents of the University of California v. Bakke* (1978), the Court held that a state medical school's diversity program had deprived a white applicant of equal protection of the laws by rejecting him in favor of students of color, some of whom the school ranked lower on various academic criteria. But Justice Lewis F. Powell Jr.'s opinion proffered the advice that the kind of program operated by Harvard University would be constitutionally acceptable. Of course, Powell's advice—unlike the kind George

Washington wanted—came in the context of a real case or controversy.

Even so some justices have bristled at such "advice," suggesting that it goes beyond the bounds of appropriate judicial behavior. Consider *Gill v. Whitford* (2018) in which the Court refused to resolve the constitutionality of a state redistricting plan on procedural grounds. In a concurring opinion, Justice Elena Kagan seemed to offer advice on how the plaintiffs could succeed in their quest to have federal courts hear and invalidate such plans, which led Chief Justice Roberts to respond: "But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others."

Collusion

A second aspect of justiciability is collusion. The Court will not decide cases in which the litigants (1) want the same outcome, (2) evince no real adversariness between them, or (3) are merely testing the law. Indeed, Chief Justice Taney once said that collusion is "contempt of the court, and highly reprehensible."⁷¹ Although the ban on collusion is distinct from the ban on advisory opinions, they are related. Were the Court to resolve collusive disputes, it would be giving advice because no real controversy existed. Seen in this way, declining to decide collusive suits is a way to enforce the ban on advisory opinions.

Muskrat v. United States (1911) well illustrates these points. At issue here were several federal laws involving land distribution and appropriations to Native Americans. To determine whether these laws were constitutional, Congress enacted a statute authorizing David Muskrat and other Native Americans to challenge the land distribution law in court. This legislation also ordered the courts to give priority to Muskrat's suit and allowed the attorney general to defend his claim. Furthermore, Congress agreed to pay Muskrat's legal fees if his suit was successful. When the dispute reached the U.S. Supreme Court, the justices dismissed it. Justice William R. Day wrote,

This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no

⁶⁹We adopt some of the material to follow from Murphy et al., *Courts, Judges, and Politics*, chap. 6.

⁷⁰See, for example, Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven, CT: Yale University Press, 1997).

⁷¹*Lord v. Veazie* (1850).

interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.

The Court, however, has not always followed the *Muskrat* precedent. Indeed, several collusive suits resulted in landmark decisions, including *Pollock v. Farmers' Loan and Trust Co.* (1895) (excerpted in Chapter 8), in which the Court declared the federal income tax unconstitutional. The litigants in this dispute, a bank and a stockholder in the bank, both wanted the same outcome—the demise of the tax. *Carter v. Carter Coal Company* (1936) provides another example. Here the Court agreed to resolve a dispute over a major piece of New Deal legislation even though both litigants, a company president and the company, which included the president's father, wanted the law invalidated (see Chapter 7).

Why did the justices resolve these disputes? One answer is that the Court might overlook some element of collusion if the suit presents a real controversy or the potential for one. Another is that the temptation to set “good” public policy (or strike down “bad” public policy) is sometimes too strong for the justices to follow their own rules. But resist they should, according to some commentators, with *Pollock* and *Carter Coal* providing examples of why: in 1913 the country ratified the Sixteenth Amendment to overturn *Pollock*, and the Court itself limited *Carter Coal* in the 1941 case of *United States v. Darby* (excerpted in Chapter 7).

Mootness

In general, the Court will not decide cases in which the controversy is no longer live by the time it reaches the Court's doorstep. Deciding “dead” cases, the justices believe, would amount to giving advice and so declining to resolve moot disputes is yet another approach to enforcing the ban on giving advice.

DeFunis v. Odegaard (1974) provides an example. Rejected for admission to the University of Washington

Law School, Marco DeFunis Jr., a white male, brought suit against the school, alleging that it had engaged in discrimination because it had denied him a place but accepted statistically less qualified students of color. In 1971 a trial court found merit in his claim and ordered that the university admit him. While DeFunis was in his second year of law school, the state's high court reversed the trial judge's ruling. DeFunis then appealed to the U.S. Supreme Court. By that time, he had registered for his final quarter in school. In a per curiam opinion,⁷² the Court refused to rule on the merits of DeFunis's claim, asserting that it was moot:

Because [DeFunis] will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.

In his dissent, Justice William J. Brennan Jr. noted that DeFunis could conceivably not complete his studies that quarter, and so the issue was not necessarily moot. This suggests that the rules governing mootness are a bit fuzzier than the *DeFunis* majority opinion characterized them.

To see this possibility, consider another example: *Roe v. Wade* (1973), in which the Court legalized abortions performed during the first two trimesters of pregnancy. Norma McCorvey, also known as Roe, was pregnant when she filed suit in 1970, and by the time the Court handed down the decision in 1973, she had long since given birth and put her baby up for adoption. But the justices did not declare this case moot. Why not? What made *Roe* different from *DeFunis*?

The justices provided two legal justifications. First, DeFunis brought the litigation in his own behalf, but *Roe* was a class action—a lawsuit brought by one or more persons who represent themselves and all others similarly situated. Second, DeFunis had been admitted to law school, and he would “never again be required to run the gauntlet.” *Roe* could become pregnant again; that is,

⁷²A per curiam opinion represents the view of a majority of the justices, but, unlike most other Supreme Court opinions, it is unsigned. Per curiam opinions tend to be shorter than other opinions and are generally but certainly not always used for less weighty cases.

pregnancy is a situation “capable of repetition, yet evading review.”

Are these reasonable points? Or is it possible, as some suspect, that the Court developed them to avoid particular legal issues? In either case, it is clear that the exceptions the Court has carved out can make mootness a rather fluid concept, open to interpretation by different justices and Courts.

Ripeness

Ripeness is the flip side of mootness. Whereas moot cases are brought too late, “unripe” cases are those that are brought too early. In other words, under existing Court interpretation, a case is nonjusticiable if the controversy is premature—has insufficiently gelled—for review. Like mootness and collusion, this aspect of justiciability is yet again an approach for ensuring that the Court does not give advice—here, to litigants whose dispute is more hypothetical than real.

United Public Workers v. Mitchell (1947) is an oft-cited example. In this case, government workers challenged the Hatch Act of 1940, which prohibits some types of federal employees from participating in political campaigns. But only one of the appellants had actually violated the act; the rest simply expressed an interest in working on campaigns. According to the justices, only the one employee had a ripe claim because “the power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in.”

The justices echoed the sentiment of *Mitchell* in *International Longshoremen’s Union v. Boyd* (1954). This case involved a 1952 federal law construed by the Immigration and Naturalization Service to mandate that all people “domiciled in the continental United States” seeking to return to the United States from Alaska be “examined” as if they were entering from a foreign country. Believing that the law might affect seasonal American laborers working in Alaska temporarily, a union challenged the law. Writing for the Court, Justice Frankfurter dismissed the suit. In his view,

Appellants in effect asked [the Court] to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf

relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court’s assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the . . . constitutionality of the legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

In addition, the ripeness requirement mandates that a party exhaust all available administrative and lower court remedies before seeking review by the Supreme Court. Until these opportunities have been fully explored, the case is not ready for the justices to hear.

Justiciability and Political Question Doctrine

There is yet one other kind of dispute that is nonjusticiable: disputes that raise “political questions.” Twice in *Marbury v. Madison* (1803), Chief Justice Marshall hinted at this general idea. When deciding whether the laws afforded Marbury a remedy (Question 2), Marshall wrote:

[W]here the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. 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 a right to resort to the laws of his country for a remedy.

Then, when considering whether Marbury was entitled to writ of mandamus (Question 3), Marshall had this to say:

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.

Taken together, Marshall seemed suggest that when Constitution assigns a specific duty to the president—say, deciding who to appoint to serve as an ambassador—the courts will not address questions over how executives exercise their discretion to carry out their responsibilities. Doing so, the argument goes, would amount to stepping on the toes of another branch of government, in contravention to the separation of powers doctrine. Only the people and their elected representatives, not the unelected courts, get to judge the president's choices. This is what Marshall meant when he wrote that such acts are “only politically examinable.”

These ideas may have served as the foundation for the political question doctrine, but it was up to future courts to determine exactly the kinds of political questions that federal judges will not address. The Court took its first stab at a definition in *Luther v. Borden* (1849). This case has its origins in the 1840s, when some citizens of Rhode Island, led by Thomas Wilson Dorr, tried to persuade the state legislature to change suffrage requirements (which mandated the ownership of property as a criterion for voting) or to hold a convention for the purpose of writing a constitution (which Rhode Island did not have, as it was still operating under its royal charter from King Charles II). When the government rejected these proposals, these citizens wrote their own constitution and created their own government. Meanwhile, the existing government issued a proclamation placing the entire state under martial law, and the governor warned citizens not to support the new constitution. He even contacted President John Tyler for help in suppressing the rebellion, sometimes called the “Dorr Rebellion.” Although Tyler did not send in federal troops, he agreed to do so if war broke out.

Eventually, the existing government managed to suppress the rebels, but one of them, Martin Luther, sued. Luther asserted that the Rhode Island Charter violated Article IV, Section 4, of the U.S. Constitution, which states, “The United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive

(when the Legislature cannot be convened) against Domestic violence.” Luther asked the Court to declare the charter government illegitimate and to supplant it with the new constitution.

The Supreme Court, however, refused to go along with Luther. Writing for the majority, Chief Justice Taney held that the Court should avoid deciding any question arising out of the guarantee clause because such questions are inherently “political.” He based the opinion largely on the words of Article IV, which he believed governed relations between the states and the federal government. As Taney put it,

Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. . . . It is true that the contest in this case did not last long enough to bring the matter to this issue, and, as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

Taney's general approach seemed to echo Marshall's view that the Constitution commits certain matters to the unreviewable discretion of the other branches. But *Luther* was important for a more specific reason: For nearly a hundred years, the Court followed Taney's view that any case involving the guarantee clause was nonjusticiable.

In the 1940s, however, an issue came before the Court that presented it with an opportunity to rethink its position. The issue was reapportionment, the way the states draw their legislative districts. Initially, in the case of *Colegrove v. Green* (1946), the Court held that the entire matter presented a political question. Less than two decades later, however, in *Baker v. Carr* (1962), the Court held that reapportionment was a justiciable issue. What brought about this change? And, more relevant here, what meaning does *Baker* have for the political question doctrine? In particular, does it overrule *Luther*, or does it merely change the interpretive context?

Baker v. Carr

369 U.S. 186 (1962)

<http://caselaw.findlaw.com/us-supreme-court/369/186.html>

Oral arguments are available at <https://www.oyez.org/cases/1960/6>.

Vote: 6 (Black, Brennan, Clark, Douglas, Stewart, Warren)
2 (Frankfurter, Harlan)

OPINION OF THE COURT: *Brennan*

CONCURRING OPINIONS: *Clark, Douglas, Stewart*

DISSENTING OPINIONS: *Frankfurter, Harlan*

NOT PARTICIPATING: *Whittaker*

FACTS:

Under the U.S. Constitution, each state is allotted a certain number of seats in the House of Representatives based on the population of the state. Once that number has been determined, it is up to the state to map out the congressional districts. Article I specifies,

Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.

Article I makes clear that a ten-year census determines the number of representatives each state receives. But no guidelines exist as to how those representatives are to be allocated or apportioned within a given state.

Some states redrew their congressional district lines as population shifts occurred within them around the middle of the twentieth century. The new maps meant creating greater parity for urban centers as citizens moved out of rural areas. Other states, however, ignored the population shifts and refused to reapportion seats. Over time, the results of their failure to do so became readily apparent. It was possible for two districts within the same state, each electing one member to the House, to have large differences in population.

Because malapportionment generally had the greatest effect on urban voters, grossly undervaluing their voting power, reform groups representing the interests of these voters began to bring litigation to force legislatures to reapportion. In one of the most

important of these efforts, *Colegrove v. Green* (1946), they did so under Article IV's guarantee clause. They argued that the failure to reapportion legislative districts deprived some voters of their right to a republican form of government. By way of proof, plaintiffs indicated that a large statistical discrepancy existed between the voting power of citizens in urban areas and that of rural dwellers because the Illinois legislature had not reapportioned since 1901. The state parties, on the other hand, asked the court to dismiss the case on the ground that it raised "only political issues."

The Court agreed with the state. Writing for the Court, Justice Frankfurter dismissed *Colegrove* on the ground that legislative reapportionment within states was left open by the Constitution. If the Court intervened in this matter, it would be acting in a way "hostile to a democratic system." Put in different terms, reapportionment constituted a "political thicket" into which "courts ought not enter."

As a result of the Court's decision in *Colegrove*, states that had not reapportioned since 1900 were under no federal constitutional mandate to do so, and disparities between the voting power of urban and rural citizens continued to grow. Figure 2-2 shows that a rural vote for the Tennessee legislature counted nearly four times as much as an urban vote.

Naturally, many citizens and organizations wanted to force legislatures to reapportion, but under *Colegrove* they could not do so using the guarantee clause. They looked, therefore, to another section of the Constitution, the Fourteenth Amendment's equal protection clause, which says that no state shall "deny to any person within its jurisdiction the equal protection of the laws." From this clause they made the argument that the failure to reapportion led to unequal treatment of voters.

Although this strategy represented a clever legal attempt to reframe the issue of reapportionment, when attorneys sought to apply it to the Tennessee situation, a lower federal district court dismissed their suit.⁷³ Relying on *Colegrove* and other cases, that court held reapportionment to constitute a political question on which it could not rule.

ARGUMENTS:

For the appellants, Charles W. Baker et al.:

- This case is distinguishable from *Colegrove* because in *Colegrove* the door to alternative relief, including relief by Congress, appeared to be open, whereas in this case, sixty

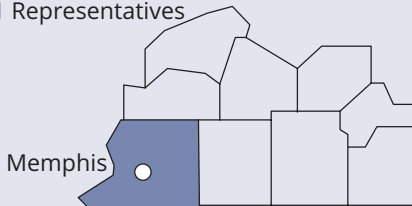
⁷³For more on this, see Richard C. Cortner, "Strategies and Tactics of Litigants in Constitutional Cases," *Journal of Public Law* 17 (1968): 287–307; and Richard C. Cortner, *The Apportionment Cases* (Knoxville: University of Tennessee Press, 1970).

Figure 2-2 Maps of Districts in Tennessee, 1901 and 1950

(a)

1901

- 43,000 Voters
7½ Representatives
- 43,000 Voters
11 Representatives

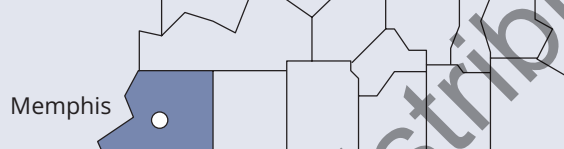


Battle of the ballot: In 1901 Memphis, Tennessee, had as many people as eight nearby counties together and elected nearly the same number of representatives.

(b)

1950

- 312,000 Voters
7½ Representatives
- 312,000 Voters
26 Representatives



By 1950 Memphis's population equaled that of twenty-four Tennessee counties. Under the state constitution the city should have gained more representatives, but it did not, so the rural vote counted almost four times as much as the urban. Reviewing city voters' complaint that this situation denied them equal protection of the laws, the Court in 1962 held that judges should hear and decide such claims under the Fourteenth Amendment (*Baker v. Carr*). Chief Justice Earl Warren looked back on this decision as the most important and influential in his sixteen years on the Court. It opened the way to enunciation (in *Reynolds v. Sims*) of the "one person, one vote" principle and its enforcement by court order in many related cases across the nation.

Source: *Equal Justice under Law* (Washington, DC: Foundation of the Federal Bar Association, 1965), 108.

years of history have demonstrated that these alternatives are not available to the appellants.

- This case should not be considered a nonjusticiable political question because there is a clear, mathematical standard by which the Court may determine whether appellants' votes have been discriminated against.
- Appellants have been denied the equal protection of the laws because their votes have been systematically discriminated against.

**For the appellees, Joe C. Carr,
Tennessee secretary of state, et al.:**

- In the past, the Court has consistently stated that enforcement of the guarantee of a republican form of government is a political question and does not fall within its jurisdiction.

- Under the constitution of Tennessee, reapportionment has been specifically designated to the legislature and not to the courts.

MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green* . . . [and related cases]. . . . We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. . . .

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." Rather, it is argued that apportionment cases, whatever the actual wording of

the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove v. Green* and other decisions of this Court on which it relied. . . . To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the “political question” doctrine. . . .

We have said that “In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.” The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the “political question” label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. [N]one of those threads catches this case.

Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, [t]hough a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. . . .

Validity of enactments: In *Coleman v. Miller* [1939] this Court held that the questions of how long a proposed amendment to the

Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. Similar considerations apply to the enacting process: “[t]he respect due to coequal and independent departments,” and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. But it is not true that courts will never delve into a legislature’s records upon such a quest: if the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals in order to preserve the enactment. . . .

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence. The doctrine of which we treat is one of “political questions,” not one of “political cases.” The courts cannot reject as “no lawsuit” a bona fide controversy as to whether some action denominated “political” exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution’s guaranty, in Art. IV, §4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a “political question,” and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: . . . Clearly, several factors were thought by the Court in *Luther v. Borden* to make the question

there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. [It] has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question . . .

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable “political question” bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here. . . .

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought “political,” can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause

claims of the elements thought to define “political questions,” and no other feature, which could render them nonjusticiable. . . .

. . . [T]he complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

**MR. JUSTICE FRANKFURTER, WHOM
MR. JUSTICE HARLAN JOINS, DISSENTING.**

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. . . . Disregard of inherent limits in the effective exercise of the Court’s “judicial Power” not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been, and now is, determined. It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements. . . .

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, §4, where, in fact, the gist of their complaint is the same. . . .

In invoking the Equal Protection Clause, they assert that the distortion of representative government complained of is produced by systematic discrimination against them, by way of “a debasement of their votes” . . .

But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of “debasement” or “dilution” is circular talk. One cannot speak of “debasement” or “dilution” of the value of

a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union. . . .

Apportionment battles are overwhelmingly party or intra-party contests. It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them.

Baker v. Carr is important for a number of reasons. First, it opened the window for judicial resolution of reapportionment cases.⁷⁴ Second, and more relevant here, is that *Baker*, unlike *Luther*, established a framework—in the form of elements—for determining whether a dispute presented a political question. As Justice Brennan wrote,

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

As our numbering indicates, this definition contains six elements, though there seem to be two major

⁷⁴We return to the topic of reapportionment at the conclusion of this section and in Chapter 3. For now, suffice it to note that cases continue to appear on the Court's docket, though in different forms. For example, reapportionment battles following the 1990 Census focused on drawing district boundary lines in a manner that would increase the number of officeholders of color. More recently, the constitutional propriety of excessive partisan gerrymandering (drawing district lines to enhance the prospects of the party in power) has been the center of legal battles. Although the federal courts continue to scrutinize plans that take into account race, the Supreme Court, in *Rucho v. Common Cause* (2019), opted out of partisan gerrymandering on the same ground as *Colegrove v. Green*: that the cases presented political questions beyond the reach of the federal courts.

strands.⁷⁵ First, the Court will look to the Constitution to see if there is a “textually demonstrable commitment” to another branch of government. Yet again, this strand seems to find its footing in *Marbury*'s concern with avoiding disputes that center on the discretionary constitutional duties of the other branches. Second, the justices consider whether particular questions should be left to another branch of government as a matter of prudence. This is where factors such as the lack of judicially discoverable standards, embarrassment, and so on come into play.

Note, however, that the definition does not dismiss the logic of *Luther* entirely; it just reworks it a bit. More to the point, Justice Brennan quite clearly states that claims invoking the guarantee clause possess the attributes of a political question (under his definition) and, therefore, are nonjusticiable.

But would any other kinds of disputes fall under the definition? Although some analysts suggest that *Baker* substantially weakened the political questions doctrine—perhaps because Brennan mentioned only the guarantee clause claims as totally out of bounds on political question grounds—it did not lead to its complete demise. Over the years, various justices have used the doctrine to dismiss a range of substantive disputes, particularly those involving international relations. In *Goldwater v. Carter* (1979), which presented a challenge to President Jimmy Carter's unilateral termination of a U.S. treaty with Taiwan, the Court issued a per curiam remanding the case to the lower court with directions to dismiss the complaint. Justice William H. Rehnquist concurred in the judgment, writing for himself and three others (Burger, Stewart, and Stevens) that the case presented a political question. In his view, it involved a foreign policy matter on which the Constitution provided no definitive answer. As such, it “should be left for resolution by the Executive and Legislative branches.”

In *Nixon v. United States* (1993), however, the Court relied heavily on *Baker v. Carr* to examine a domestic issue—the impeachment of a federal judge who claimed that the Senate used unconstitutional procedures in

⁷⁵For another way to consider the *Baker* elements, see Justice Sonia Sotomayor's concurring opinion in *Zivotofsky v. Clinton* (2012), in which she writes, “[T]he *Baker* factors reflect three distinct justifications for withholding judgment on the merits of a dispute.” Sotomayor sees these as (1) textual commitment (*Baker* element 1), (2) “decision-making beyond courts' competence” (*Baker* elements 2 and 3), and (3) prudential considerations (*Baker* elements 4, 5, and 6).

trying his case. As you read *Nixon*, take note of how the modern-day Court applied both strands of the political question doctrine. Also consider the mode of constitutional analysis it used; Chief Justice Rehnquist's opinion serves as an interesting example of the Court searching for the plain "meaning of the words" and the intent of the framers in interpreting a constitutional provision, the Senate's power to try impeachments.

Nixon v. United States

506 U.S. 224 (1993)

<http://caselaw.findlaw.com/us-supreme-court/506/224.html>

Oral arguments are available at <https://www.oyez.org/cases/1992/91-740>.

Vote: 9 (Blackmun, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas, White)

0

OPINION OF THE COURT: *Rehnquist*

CONCURRING OPINIONS: *Souter, Stevens, White*

FACTS:

Walter L. Nixon Jr. was appointed a U.S. district court judge for the Southern District of Mississippi by President Lyndon Johnson in 1968. In 1984 federal prosecutors began to investigate Judge Nixon's relationship with Hattiesburg entrepreneur Wiley Fairchild. They suspected that Fairchild had allowed Nixon to participate in a sweetheart oil and gas deal in return for Nixon's intervention in behalf of Fairchild's son, Drew, who was under state indictment for drug trafficking. Nixon, testifying before a federal grand jury, denied that he had discussed Drew Fairchild's case with the local district attorney or had intervened in any other way in the young man's behalf. In 1986 Nixon stood trial in a federal court for committing perjury in his grand jury testimony and for accepting an illegal gratuity. The jury acquitted Nixon of the illegal gratuity charge but convicted him on two counts of lying to the grand jury. He received a five-year prison term. Nixon, asserting his innocence on all charges, refused to resign from the bench and continued to receive his salary while serving his sentence.

The Judicial Conference of the United States, the policy-making body of the federal judiciary, recommended to the House of Representatives that Nixon be impeached. Impeachment is the only constitutionally permitted method of removing a federal judge from office. Following an investigation by the Judiciary Committee, the House voted 417–0 to impeach Nixon for "high crimes and



Associated Press/Marcy Nighswander

U.S. district court judge Walter Nixon testifying during his 1989 Senate impeachment trial.

misdemeanors." The case then went to the Senate for trial. That body invoked its own rule, Impeachment Rule XI, under which the presiding officer appoints a committee of senators to "receive evidence and take testimony." The presiding officer appointed a special twelve-member bipartisan committee to hear the case and report to the full Senate.

As part of the deliberative process, the Senate committee examined briefs submitted by Nixon and the House impeachment managers, heard from ten witnesses, and allowed Nixon to "make a personal appeal." After four days of hearings, the committee recommended that Nixon be removed from office. In November 1989 the Senate voted 89–8 and 78–19 to convict Nixon on two articles of impeachment stemming from his grand jury testimony. The conviction officially stripped Nixon of his judgeship. By that time he had received an estimated \$286,500 in salary since his federal court conviction.

Nixon responded by claiming in a federal lawsuit that Senate Rule XI violated the Constitution. He argued that the Senate procedure of having a committee—rather than the full Senate—hear his case violated Article I, Section 3, Clause 6, of the Constitution, which states that the "Senate shall have the sole power to try all Impeachments." The committee procedure, he alleged, prohibited the full Senate from participating in the evidentiary hearings. Unsuccessful in the lower courts, Nixon pursued his case to the U.S. Supreme Court.

ARGUMENTS:

For the petitioner, Walter L. Nixon:

- The words used in Article I, Section 3, of the Constitution state that the Senate is to “try” an impeachment “case” before senators who are “present” and “sitting” on “oath.”
- If the Senate is permitted to use whatever rules it wishes in the impeachment of federal judges, then there is no check on this power and the legislature could very easily usurp judicial power.
- The word “sole” in Article I, Section 3, does not preclude judicial review of Senate impeachment procedures because the insertion of the word was simply a cosmetic edit by the Committee of Style.

For the respondents, United States et al.:

- The Constitution explicitly grants the Senate “sole Power” over the trial of impeachments, and therefore this case is not justiciable.
- There is no evidence in either the words of the Constitution or the Constitution’s drafting history that would indicate the framers intended to restrict how the Senate would receive evidence.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, §3, cl. 6. That Clause provides that the “Senate shall have the sole power to try all Impeachments.” But before we reach the merits of such a claim, we must decide whether it is “justiciable,” that is whether it is a claim that may be resolved by the courts. We conclude that it is not. . . .

A controversy is nonjusticiable—i.e., involves a political question—where there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .” *Baker v. Carr* (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the

concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, §3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment.

The language and structure of this Clause are revealing. [It grants] the Senate “the sole power to try all Impeachments”. . . .

Petitioner argues that the word “try” . . . imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. “[T]ry” means more than simply ‘vote on’ or ‘review’ or ‘judge.’ In 1787 and today, trying a case means hearing the evidence, not scanning a cold record.” Petitioner concludes from this that courts may review whether or not the Senate “tried” him before convicting him.

There are several difficulties with this position which lead us ultimately to reject it. The word “try,” both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as “to examine” or “to examine as a judge.” See 2 S. Johnson, *A Dictionary of the English Language* (1785). In more modern usage the term has various meanings. For example, try can mean “to examine or investigate judicially,” “to conduct the trial of,” or “to put to the test by experiment, investigation, or trial.” *Webster’s Third New International Dictionary* (1971). Petitioner submits that “try,” as contained in T. Sheridan, *Dictionary of the English Language* (1796), means “to examine as a judge; to bring before a judicial tribunal.” Based on the variety of definitions, however, we cannot say that the Framers used the word “try” as an implied limitation on the method by which the Senate might proceed in trying impeachments. “As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require.”

The conclusion that the use of the word “try” . . . lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments. [The last three sentences of Art. I, §3, cl. 6 state that] the members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word “try” in the first sentence.

Petitioner devotes only two pages in his brief to negating the significance of the word “sole” in . . . Clause 6. [T]he clause provides that “the Senate shall have the sole Power to try all Impeachments.”

We think that the word “sole” is of considerable significance. Indeed, the word “sole” appears only one other time in the Constitution—with respect to the House of Representatives’ “sole Power of Impeachment.” Art. I, §2, cl. 5. The common sense meaning of the word “sole” is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. “Sole” is defined as “having no companion,” “solitary,” “being the only one,” and “functioning . . . independently and without assistance or interference.” *Webster’s Third New International Dictionary* (1971). If the courts may review the actions of the Senate in order to determine whether that body “tried” an impeached official, it is difficult to see how the Senate would be “functioning . . . independently and without assistance or interference.” . . .

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. . . .

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments. . . . Certainly judicial review of the Senate’s “trial” would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the Framers’ insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature. . . . Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the “important constitutional check” placed on the Judiciary by the Framers. . . .

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker v. Carr*. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would “expose the political life of the country to months, or perhaps years, of chaos.” This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of

a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim? . . .

We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. . . . But we conclude, after exercising that delicate responsibility, that the word “try” in the Impeachment Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, CONCURRING IN THE JUDGMENT.

The Impeachment Trial Clause commits to the Senate “the sole Power to try all Impeachments.” . . . Other significant considerations confirm a conclusion that this case presents a nonjusticiable political question As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government.

One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply “a bad guy,” judicial interference might well be appropriate. In such circumstances, the Senate’s action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. “The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.” *Baker [v. Carr]*.

JUSTICE WHITE, WITH WHOM JUSTICE BLACKMUN JOINS, CONCURRING IN THE JUDGMENT.

Petitioner contends that the method by which the Senate convicted him on two articles of impeachment violates Art. I, § 3, cl. 6, of the Constitution, which mandates that the Senate “try” impeachments. The Court is of the view that the Constitution forbids us even to consider his contention. I find no such prohibition and would therefore reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to “try” petitioner. . . .

[T]he issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, e.g., Art. I, § 8, and it is not thought that disputes implicating these provisions are nonjusticiable. Rather, the issue is whether the Constitution has

given one of the political branches final responsibility for interpreting the scope and nature of such a power. . . .

The majority finds a clear textual commitment in the Constitution's use of the word "sole" in the phrase "[t]he Senate shall have the sole Power to try all Impeachments." Art. I, § 3, cl. 6. It attributes "considerable significance" to the fact that this term appears in only one other passage in the Constitution. See Art. I, § 2, cl. 5 (the House of Representatives "shall have the sole Power of Impeachment"). . . .

The significance of the Constitution's use of the term "sole" lies not in the infrequency with which the term appears, but in the fact that it appears exactly twice, in parallel provisions concerning impeachment. That the word "sole" is found only in the House and Senate Impeachment Clauses demonstrates that its purpose is to emphasize the distinct role of each in the impeachment process. . . . While the majority is thus right to interpret the term "sole" to indicate that the Senate ought to "functio[n] independently and without assistance or interference," it wrongly identifies the Judiciary, rather than the House, as the source of potential interference with which the Framers were concerned when they employed the term "sole." . . .

The majority also . . . does not explain . . . the sweeping statement that the Judiciary was "not chosen to have any role in impeachments." Not a single word in the historical materials cited by the majority addresses judicial review of the Impeachment Trial Clause. And a glance at the arguments surrounding the Impeachment Clauses negates the majority's attempt to infer non-judiciability from the Framers' arguments in support of the Senate's power to try impeachments. . . .

The historical evidence reveals above all else that the Framers were deeply concerned about placing in any branch the "awful discretion" of [impeachment]. . . . While the majority rejects petitioner's justiciability argument as espousing a view "inconsistent with the Framers' insistence that our system be one of checks and balances," it is the Court's finding of nonjusticiability that truly upsets the Framers' careful design. In a truly balanced system, impeachments tried by the Senate would serve as a means of controlling the largely unaccountable Judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials.

The majority also contends that the term "try" does not present a judicially manageable standard. . . . The majority's conclusion that "try" is incapable of meaningful judicial construction is not without irony. One might think that, if any class of concepts would fall within the definitional abilities of the Judiciary, it would be that class having to do with procedural justice.

Petitioner bears the rather substantial burden of demonstrating that, simply by employing the word "try," the Constitution prohibits the Senate from relying on a factfinding committee. It is clear that the Framers were familiar with English impeachment practice, and with that of the States employing a variant of the English model at

the time of the Constitutional Convention. Hence, there is little doubt that the term "try," as used in Art. I, § 3, cl. 6, meant that the Senate should conduct its proceedings in a manner somewhat resembling a judicial proceeding. Indeed, it is safe to assume that Senate trials were to follow the practice in England and the States, which contemplated a formal hearing on the charges, at which the accused would be represented by counsel, evidence would be presented, and the accused would have the opportunity to be heard. . . .

In short, the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a factfinding committee under Rule XI is entirely compatible with the Constitution's command that the Senate "try all impeachments." Petitioner's challenge to his conviction must therefore fail.

Petitioner has not asked the Court to conduct his impeachment trial; he has asked instead that it determine whether his impeachment was tried by the Senate. The majority refuses to reach this determination out of a laudable desire to respect the authority of the Legislature. Regrettably, this concern is manifested in a manner that does needless violence to the Constitution. The deference that is owed can be found in the Constitution itself, which provides the Senate ample discretion to determine how best to try impeachments.

The Court handed Judge Nixon a stinging defeat, and his circumstances did not improve much after the case (*see Box 2-4*). More generally, the Court ruled that Congress's procedures for impeachments are not subject to judicial review because they meet both prongs of the political questions doctrine: Article I of the Constitution assigns the task of impeachment to Congress, and unless Congress violates the constitutional text (say, the Senate removing someone from office by a majority vote instead of the required two-thirds vote), judicial intrusion into impeachment proceedings could create confusion. The majority alludes to the kinds of problems that would emerge if a U.S. president could challenge his impeachment in the federal courts. Would he still be president as his case made its way through the courts, or would his successor be the president? This is not a scenario for which the Court wanted to take responsibility. Even so, note Justice David Souter's caveat: the Court might not be so hesitant to review impeachment procedures if they "[threatened] the integrity of [the Senate's] results." But Justice John Paul Stevens, in a brief concurring opinion, disagreed: "Respect for a coordinate Branch of the Government forecloses any assumption that improbable hypotheticals like those mentioned by Justice Souter . . . will ever occur."

BOX 2-4

Aftermath . . . Walter Nixon

IN MARCH 1986 federal district court judge Walter L. Nixon Jr. was convicted of two counts of perjury for lying to a grand jury. He was sentenced to five years in prison. When his last appeal proved unsuccessful, Nixon entered a federal minimum security prison at Eglin Air Force Base in Florida. He served sixteen months before being released to a New Orleans halfway house in July 1989. Four months later, just eighteen days after the Senate removed him from office, Nixon was released on five years' probation.

Nixon had not heard any cases since his indictment in 1985 but, proclaiming his innocence, refused to resign from office. From 1985 until his removal by the Senate in 1989, Nixon was paid his \$89,500 annual salary, even though he spent part of that time in a federal prison. The removal formally ended his tenure as a federal judge and terminated his salary. At about the same time, the Mississippi Supreme Court disbarred Nixon, so he could no longer practice law.

In 1990 Mississippi wildlife officials discovered Nixon and a former game warden in a field that was

baited to attract wild turkeys. In Nixon's possession was a 12-gauge automatic shotgun. Nixon was charged with conspiracy to hunt wild birds with the aid of bait, a misdemeanor. More serious was his possession of a firearm, which violated the terms of his parole. The U.S. Parole Commission ordered Nixon to return to prison for four months; the punishment was relatively light because the shotgun had never been taken out of its zipped case.

Nixon's efforts to return to the practice of law were ultimately successful. In May 1993 the Mississippi Supreme Court considered Nixon's petition to be reinstated to the bar. The state bar association opposed the request, arguing that Nixon lacked the required moral character to practice law. A parade of public officials, including three former governors and three former state supreme court justices, urged the court to be lenient. The justices agreed to reactivate Nixon's license to practice law once he passed the state bar examination. Chief Justice Armis Hawkins said, "This petitioner has been whipped enough." Nixon passed and was readmitted to the practice of law in September 1993.

Sources: Los Angeles Times, May 21, 1993; Memphis Commercial Appeal, October 3, 1990; New York Times, April 28, 1990, September 26, 1993; Washington Post, February 7, 1986; Washington Times, November 22, 1989; various United Press International reports.

Despite the ruling in *Nixon*, the political questions doctrine remains controversial. Some scholars applaud decisions such as *Nixon* and suggest that the federal courts should continue to avoid cases that raise political questions. Indeed, in the view of these scholars, the Court should make greater use of the doctrine and decline to get involved in disputes best resolved elsewhere (a form of judicial restraint). Other analysts vehemently disagree. They believe that the Court has a responsibility to address constitutional questions, and the failure to do so is antithetical to the statement in *Marbury v. Madison*: "It is emphatically the duty of the Judicial Department to say what the law is."

Where the current Roberts Court stands on political question doctrine is a bit hard to nail down. Consider, first, *Zivotofsky v. Clinton* (2012). At issue in this case was a dispute over whether the passport of a U.S. citizen born in Jerusalem could list "Israel" as the country of birth rather than "Jerusalem." Under a State

Department policy of long standing, the answer was no, only Jerusalem could be listed; but under a federal law, the answer was yes. The district court dismissed the case, holding that it presented a nonjusticiable political question regarding Jerusalem's political status. The D.C. Circuit Court affirmed, reasoning that Article II, which says that the president "shall receive ambassadors and other public ministers," gives the executive the exclusive power to recognize foreign sovereigns, and that the exercise of that power cannot be reviewed by the courts.

The Supreme Court disagreed. Writing for the majority, Chief Justice Roberts had this to say:

In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine. [In a]

controversy [that] involves a political question . . . we have held that a court lacks the authority to decide the dispute before it. . . .

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Finding that the case did not present a political question, the Court sent the case back to the court of appeals to resolve the dispute.⁷⁶

Only Justice Breyer dissented from the Court's approach. Applying the prudential strand of political question doctrine, he would have barred further judicial consideration of the case:

The upshot is that this case is unusual both in its minimal need for judicial intervention and in its more serious risk that intervention will bring about "embarrassment," show lack of "respect" for the other branches, and potentially disrupt sound foreign policy decisionmaking.

Now consider *Rucho v. Common Cause* (2019), in which the Roberts Court declared that claims of partisan gerrymandering (drawing district lines to enhance the prospects of the party in power) presented political questions.⁷⁷ Writing again for the Court, Chief Justice Roberts made plain his rationale:

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." . . .

⁷⁶After the court of appeals ruled against Zivotofsky, the case came back to the Supreme Court. It affirmed the lower court in *Zivotofsky v. Kerry* (2015) (excerpted in Chapter 5).

⁷⁷See note 67.

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.

In other words, the primary problem with claims of partisan gerrymandering was the "lack of judicially discoverable and manageable standards for resolving [them]," to use Justice Brennan's formulation from *Baker*. The four dissenters vehemently disagreed, claiming that, in fact, a perfectly workable standard had emerged and that the Court had a duty to apply it on reasoning that seemed to echo *Baker*:

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. . . .

In thinking about *Zivotofsky* and *Rucho*, do you think Chief Justice Roberts, the author of both majority opinions, was consistent in his application of the political questions doctrine? Regardless, do you agree with his rationale? And do either or both cases sit comfortably with *Baker* and *Nixon*?

Standing to Sue

Another constraint on federal judicial power is the requirement that the party bringing a lawsuit have standing to sue: if the party bringing the litigation is not the appropriate party, the courts will not resolve the dispute. Put in somewhat different terms, "not every person with the money to bring a lawsuit is entitled to litigate the legality or constitutionality of government action in the federal courts."⁷⁸

⁷⁸C. Herman Pritchett, *The American Constitution* (New York: McGraw-Hill, 1959), 145.

To determine whether a party (the “plaintiff”) has standing to bring a lawsuit in federal court, the justices consider two sets of criteria mirroring their approach to political questions. The first set are constitutional requirements that follow from Article III’s “case” or “controversy” language:

1. The plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is:
 - a. concrete and particularized
 - b. actual or imminent, not conjectural or hypothetical
2. Second, there must be a causal connection between the injury and the conduct complained of—such that the injury has to be fairly traceable to the challenged action of the defendant (usually the government in constitutional cases)
3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable court decision.

In addition to this constitutionally derived set of standard requirement, the Court considers a set of prudential factors to determine whether a party has standing. These do not follow strictly from Article III but rather from the Court’s own view of the prudent administration of justice. Among the most prominent are those that limit generalized grievance suits. In these suits the parties do not have an injury that affects them in a “personal and individual way.” Rather they have a “generally available grievance about government,” with the only harm being to their—and every other citizen’s—interest in applying appropriately the laws and Constitution.⁷⁹ As such, should these litigants win their case, they benefit no more directly or tangibly than all other citizens.

In general, these elements are designed to determine whether the party bringing suit has “alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.”⁸⁰

In many disputes, the litigants have little difficulty meeting the Court’s standing requirements. A citizen

who has been denied the right to vote on the basis of race, a criminal defendant sentenced to death, and a church member jailed for religious proselytizing would have sufficient standing to challenge the federal or state laws that may have deprived them of their rights. But what about parties who do not have an injury that affects them in a “personal and individual way.” Do these parties have standing to sue?

To consider this question, in what follows we explore both sets of standing requirement, beginning with the constitutional requirements and then moving to prudential considerations. As you read the following material, ask yourself whether the two sets of standing criteria are rigid and strictly followed or whether they are malleable, giving the justices a good deal of latitude to find standing (or not) as they see fit.

Constitutionally Derived Standing Requirements

To begin to address this question, let’s consider the case of *Lujan v. Defenders of Wildlife* (excerpted below). Note that after laying out the constitutional requirements for standing and applying them to the dispute at hand, Justice Scalia finds that the parties lack standing.⁸¹ Why? And why does Justice Blackmun take issue with this conclusion?

Lujan v. Defenders of Wildlife

504 U.S. 555 (1992)

<http://caselaw.findlaw.com/us-supreme-court/504/555.html>

Oral arguments are available at <https://www.oyez.org/>

Vote: 7 (Kennedy, Rehnquist, Scalia, Souter, Stevens, Thomas, White)

2 (Blackmun, O’Connor)

ANNOUNCING THE JUDGEMENT OF THE COURT AND THE OPINION OF THE COURT: *Scalia*

CONCURRING OPINIONS: *Kennedy, Stevens*

DISSENTING OPINION: *Blackmun*

FACTS:

The Endangered Species Act (ESA) of 1973 seeks to protect species of animals against threats to their continuing existence caused by

⁷⁹*Hollingsworth v. Perry* (2013).

⁸⁰*Baker v. Carr* (1962).

⁸¹The Court’s opinion in *Lujan* also addressed general grievance suits. We discuss the subject later in the chapter.

humans. The ESA instructs the Secretary of the Interior to create a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. Section 7(a)(2) of the Act then provides:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.”

In 1978, the relevant agencies issued a regulation stating that the obligations imposed by 7(a)(2) extend to actions taken in foreign nations. In 1986, however, the Interior Department revised the regulation to cover only actions taken in the United States or on the high seas.

Shortly thereafter, organizations dedicated to wildlife conservation and other environmental causes and some of their members, filed this action against the Secretary of the Interior, seeking to stop the new regulation from going into effect and to restore the original regulation. The district court granted the Secretary’s motion to dismiss for lack of standing. The Court of Appeals for the Eighth Circuit reversed, giving a victory to the environmental groups (now the respondents to the suit).

ARGUMENTS:

For petitioner, Manual Lujan, Secretary of the Interior:

- Respondents lack standing because they failed to show that they suffered an injury-in-fact that was caused by the interpretation of the regulation and that would be redressed by revision of the regulation to state that Section 7(a)(2) of the Endangered Species Act applies to projects in foreign countries.
- Respondents have not proven their standing based on past visits by their members to the vicinity of U.S.-assisted projects in foreign countries; and the members’ vague expression of intent to return sometime in the future is not sufficient to establish standing.

For the respondents, Defenders of Wildlife, et al.:

- On standing, the record before the Court contains testimony of Defenders’ members that they have visited sites of federally funded development projects overseas for the purpose of

viewing and studying endangered species. If the new rule goes into effect, Defenders will be harmed by the increased risk of extinction to these species absent consultation.

- Defenders fully meets the causation element of standing. The respondents’ injury is directly traceable to the Secretary’s actions.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

In *The Federalist* No. 48, Madison expressed the view that [i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere, whereas “the executive power [is] restrained within a narrower compass and . . . more simple in its nature,” and “the judiciary [is] described by landmarks still less uncertain.” One of those landmarks, setting apart the “Cases” and “Controversies” that are of the justiciable sort referred to in Article III—“serv[ing] to identify those disputes which are appropriately resolved through the judicial process”—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Respondents’ claim to injury is that the lack of consultation with respect to certain funded activities abroad “increas[es] the rate of extinction of endangered and threatened species.” Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. See, e.g., *Sierra Club v. Morton*. But the “injury in fact” test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. To survive the Secretary’s summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be “directly” affected apart from their “special interest” in th[e] subject.

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly, and that she will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan.

Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and “observed th[e] habitat” of “endangered species such as the Asian elephant and the leopard” at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she “was unable to see any of the endangered species”; “this development project,” she continued, will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [which] may severely shorten the future of these species”; that threat, she concluded, harmed her because she “intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.” When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.”

[T]hese affidavits plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Mses. Kelly and Skilbred. That the women “had visited” the areas of the projects before the projects commenced proves nothing. . . . Past exposure to illegal conduct does not, in itself, show a present case or controversy regarding injunctive relief. . . . “if unaccompanied by any continuing, present adverse effects.” And the affiants’ profession of an “intent[t]” to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the “actual or imminent” injury that our cases require. . . .

Besides failing to show injury, respondents failed to demonstrate redressability Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: he could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents’ alleged injury unless the funding agencies were bound by the Secretary’s regulation, which is very much an open question. . . .

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to

indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. [I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.

The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

**JUSTICE KENNEDY, WITH WHOM
JUSTICE SOUTER JOINS, CONCURRING
IN PART AND CONCURRING IN THE JUDGMENT.**

I agree with the Court’s conclusion in Part III-A that, on the record before us, respondents have failed to demonstrate that they themselves are “among the injured.” . . .

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced.

**JUSTICE BLACKMUN, WITH WHOM
JUSTICE O’CONNOR JOINS, DISSENTING.**

I part company with the Court in this case. . . . I believe that respondents have raised genuine issues of fact . . . both as to injury and as to redressability.

I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred . . . show[] that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the “actual or imminent” injury standard. The Court dismisses Kelly’s and Skilbred’s general statements that they intended to revisit the project sites as “simply not enough.” But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court’s contention that Kelly’s and Skilbred’s past visits “prov[e] nothing,” the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. . . .

By requiring a “description of concrete plans” or “specification of when the some day [for a return visit] will be,” the Court, in my

view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. . . .

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will [lead federal courts to] demand more and more particularized showings of future harm. Just to [avoid dismissal on standing], for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she would not have accepted work at another hospital instead. . . .

[The] Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. . . .

Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

[The Court] states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." [The Court] neglects to mention that this "fraction" amounts to \$170 million, not so paltry a sum for a country of only 16 million people with a gross national product of less than \$6 billion in 1986, when respondents filed the complaint in this action. . . .

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison* (1803).

I dissent.

Although the constitutional standing requirements outlined in Justice Scalia's opinion seem ironclad and easy enough to apply, the dissent suggests otherwise. To Justice Scalia, the plaintiffs' intentions, lacking any concrete plans, failed to show an actual or imminent injury. "Some day" is not enough to meet this aspect of standing. To Justice Blackmun, in dissent, requiring "detailed descriptions of future conduct" would do little to weed out the "genuinely harmed from those who are not."

More generally, *Lujan* illustrates two basic points about the constitutional requirements of the Court's standing doctrine. First, the facts matter a great deal. A

different answer to when the respondents intended to return to the project sites *may* have led to a different outcome. Or at least in his concurring opinion Justice Kennedy suggests as much. He implies that respondents would have had standing had they shown an actual injury by buying a plane ticket or setting a date for their return.

Second, how the justices interpret the facts also matters a lot. Looking at precisely the same affidavits, different justices can—and do—reach opposing conclusions. Some scholars suggest that such differences trace to the justices' ideology vis-à-vis the litigants. A 2023 study, for example, found that Justice Alito, one of the most conservative members of the current Court, voted in favor of standing 100% of the time when the party was conservative and found against standing 100% when the party was liberal (such as the environmental groups in *Lujan*).⁸² An earlier study, conducted in the 1990s, suggests that Alito is no exception: "Liberals voted to grant access to the courts to environmentalists, employees, and prisoners, but not to banks. Conservatives voted to grant access to banks, but not to environmentalists, employees, or prisoners."⁸³ The author concluded that the standing doctrine is "so malleable . . . that it is impossible to avoid the inference that the Justices manipulated the doctrines to rationalize their politically preferred results." *Lujan* would seem to provide an example, with the conservative Scalia voting against the environmentalists and the liberal Blackmun voting in their favor.

This is not to say that the justices' ideology plays a role in every standing case. In *Hollingsworth v. Perry* (2013), which involved a California ballot initiative (Proposition 8) amending the state's constitution to provide that "only marriage between a man and a woman is valid or recognized in California." After a district court judge declared the initiative unconstitutional, California officials decided not to appeal their loss, but the initiative's official "proponents"—the individuals who submitted the proposal and were responsible for gathering a sufficient number of signatures—did.

The question before the U.S. Supreme Court was whether the proponents had standing. Writing for a five-person majority, Chief Justice Roberts wrote,

To have standing, a litigant must seek relief for an injury that affects him in a "personal and

⁸²Adam Unikowsky, *Adam's Legal Newsletter*, April 30, 2023, at <https://adamunikowsky.substack.com/p/does-standing-follow-the-merits>.

⁸³Pierce, Richard J., Jr. "Is Standing Law or Politics?" *North Carolina Law Review* 77 (1999) 1741–1789.

individual way.” He must possess a “direct stake in the outcome” of the case. Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

Writing for the four dissenters, Justice Kennedy contended that the majority’s reasoning failed to account for the “fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied.”

To be sure, in *Hollingsworth* the Court divided 5–4 on the question of standing but not along traditional liberal-conservative lines. Joining Justice Kennedy’s dissent were liberal Justice Sotomayor (who would later vote to invalidate bans on same-sex marriage) and two conservative justices (Alito and Thomas, both of whom support bans on same-sex marriage).

Prudential Considerations

That the proponents California’s ban on same-sex marriage failed to meet the constitutional standing requirements was only one of the reasons the Court dismissed their suit on standing. The other were prudential considerations, specifically, the majority found that this was a general grievance suit, which, recall, are suits in which the parties do not have an injury that affects them in a “personal and individual way.” The proponents of the California ballot initiative, Proposition 8, claimed that California law gave them a “‘unique,’ ‘special,’ and ‘distinct’ role in passing the initiative—one ‘involving both authority and responsibilities that differ from other supporters of the measure.’” But Roberts, writing for the majority in *Hollingsworth*, was unimpressed. “True enough,” Roberts said, but “once Proposition 8 was approved by the voters, the measure became ‘a duly enacted constitutional amendment or statute.’ Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. They therefore have no ‘personal stake’ in defending its enforcement that is distinguishable from the general interest of every citizen of California.” Their suit amounted to a general grievance suit.

Hollingsworth is but one example. Looking across the Court’s standing decisions, it seems that general



AP Photo/Rich Pedroncelli

Republican state senator Dennis Hollingsworth, who defended the constitutionality of California Proposition 8 under which the state recognized as legally valid only marriages between one woman and one man.

grievance suits come in two forms that are somewhat distinct from *Hollingsworth*: (1) taxpayer suits, which are brought by parties whose only injury is that they do not want the government to spend tax money in a particular way, and what we call (2) government suits, when legislators or states challenge an action by the federal government because they think the action violates the Constitution.

Taxpayer Suits

The Court first addressed taxpayer suits in *Frothingham v. Mellon* (1923). At issue was the Sheppard-Towner Maternity and Infancy Act of 1921, in which Congress provided federal aid to the states to fund programs designed to reduce infant mortality rates. Although many progressive groups had lobbied for the law, other organizations viewed it as an unconstitutional intrusion into the family and into the rights of states, as they believed the Tenth Amendment of the Constitution guaranteed. They decided to challenge it and enlisted one among their ranks, Harriet Frothingham, to serve as a plaintiff. She was not receiving Sheppard-Towner Act aid; she was a taxpayer who did not want to see her tax dollars spent on the program. Her attorneys argued that she had sufficient grounds to bring suit.

The Court did not agree, holding that Frothingham lacked standing to bring the litigation. Justice George Sutherland wrote for the majority:

If one taxpayer may champion and litigate such a cause, then every other taxpayer may

do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.

He also outlined an approach to standing:

The party . . . must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

For the next forty years, *Frothingham* served as a major bar to taxpayer suits. Unless litigants could demonstrate that a government program injured them or threatened to do so—beyond the mere expenditure of tax dollars—they could not bring suit. In *Flast v. Cohen* (1968), however, the Court carved out an exception to the rule. *Flast* involved seven taxpayers who sought to challenge federal expenditures made under the Elementary and Secondary Education Act of 1965. Under this law, states could apply to the federal government for grants to assist in the education of children from low-income families. They could obtain funds for the acquisition of textbooks, school library materials, and so forth. The taxpayers alleged that some of the funds disbursed under this act were used to finance “instruction in reading, arithmetic, and other subjects and for guidance in religious and sectarian schools.” Such expenditures, they argued, violated the First Amendment’s prohibition on religious establishment: “Congress shall make no law respecting an establishment of religion.”

A three-judge district court dismissed their complaint. It reasoned that because the plaintiffs had suffered no real injury and because their only claim of standing rested “solely on their status as federal taxpayers,” they failed to meet the criteria established in *Frothingham*.

Writing for the Court, Chief Justice Earl Warren disagreed. And, in so doing, he revamped the *Frothingham* standard. To determine whether a taxpayer has the requisite “personal stake” to bring suit, Warren wrote:

[I]t is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. . . .

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8. When both nexuses are established, the litigant will have shown a taxpayer’s stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court’s jurisdiction.

Applying this standard to the dispute at hand, Warren found that the *Flast* taxpayers had standing:

Their constitutional challenge is made to an exercise by Congress of its power under Art. I, §8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment.

Would Harriet Frothingham have met this new, more relaxed standard? To this question, Warren answered no:

The allegations of the taxpayer in *Frothingham v. Mellon* were quite different from those made

in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. . . . In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

In the end, *Flast* did not overrule *Frothingham*; in fact, as the previous quotation indicates, the Court was careful to indicate that had the 1968 ruling been applied to *Frothingham*, the plaintiff still would have been unable to attain standing. Still, some thought that *Flast* substantially revised the 1923 precedent. It seemed that if taxpayers could indicate a logical link between their status and the legislation, and one between their status and a specific constitutional infringement, then they might have standing.

Flast symbolized what was at that time a general trend toward lowering barriers to access to federal courts. Twenty-two years earlier, Congress had passed the Administrative Procedure Act of 1946, which, among other things, provided that any person "suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof."

But the days of easing standing requirements in taxpayer suits have apparently come to an end. Beginning in the mid-1970s and extending through today, the justices have restored strict standing requirements and limited access to federal courts. They have read *Flast* rather narrowly, restricting its reach to precisely the kind of suit at issue there—a challenge to the use of federal funds allegedly in violation of the First Amendment's ban of the government's establishment of religion. The Roberts Court's decision in *Hein v. Freedom from Religion Foundation* (2007) supplies an example.

In the years since *Flast*, however, the Court has indicated that unless the suit is a virtual carbon copy

of that case, it will maintain its ban against general grievance suits. Consider *Hein v. Freedom from Religion Foundation* (2007). During the George W. Bush administration, the Freedom from Religion Foundation brought this establishment clause suit to challenge activities associated with the White House Office of Faith-Based and Community Initiatives. It claimed it had standing because its individual members were federal taxpayers opposed to executive branch use of congressional appropriations for activities that allegedly promoted religious community groups over secular groups. The Supreme Court disagreed. Because these were executive branch programs, they did not meet the *Flast* standard. More broadly, Justice Samuel Alito noted in his judgment for the Court that "the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government." *Flast*, Alito wrote, was a "narrow exception."

Such a reading led some scholars to assert that current doctrine governing standing now resembles *Frothingham* rather than *Flast*. At the least, Justice Antonin Scalia suggested, in a concurring opinion (joined by Thomas) in *Hein*, that the Court's decision was inconsistent with *Flast*:

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen* (1968) should be applied to (at a minimum) all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

Whether this and other Roberts Court decisions render *Flast* on life support, we leave for you to determine. What does seem to be true is that like the other “constraints” on judicial power—jurisdiction and justiciability—is open to interpretation.

Government Suits

We might say the same about a second type of general grievance suit: government suits, which themselves take two forms: challenges by legislators and challenges by states.

Starting with challenges by legislators, these suits come about when legislators who voted against a law (“legislative losers”) bring suit to challenge the law’s constitutionality. This occurred in *Raines v. Byrd* (1997), involving the constitutionality of the Line Item Veto Act of 1996, which gave the president the ability to cancel certain tax and spending benefits after they were signed into law. Before the justices could decide whether the law was constitutional, they had to decide whether the six members of Congress—all opponents of the law—who had brought the suit had standing to challenge it.

Writing for the majority, Chief Justice Rehnquist concluded that they did not: The individual members of Congress “have alleged no injury to themselves as individuals [and] the institutional injury they allege is wholly abstract and widely dispersed. We . . . note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).”

In a dissenting opinion, Justice Stevens took issue with Rehnquist’s conclusion:

The Line Item Veto Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature. If the procedure were valid, it would deny every Senator and every Representative any opportunity to vote for or against the truncated measure that survives the exercise of the President’s cancellation authority. Because the opportunity to cast such votes is a right guaranteed by the text of the Constitution, I think it clear that the persons who are deprived of that right by the Act have standing to challenge its constitutionality.

A year later, in *Clinton v. City of New York* (1998), the justices found that parties who had been affected when President Clinton exercised the line-item veto did have standing to challenge the act and decided the case on its merits (*excerpted in Chapter 4*). But the very fact that these justices, in *Raines*, could reach such different conclusions underscores the notion that standing—like justiciability and jurisdiction—may be more fluid than it appears and than the Court sometimes lets on.

The second kind of government suit occurs when states *qua* states challenge action by the federal government. Providing an example is *Massachusetts v. EPA* (2007), in which Massachusetts and other states sued the Environmental Protection Agency (EPA) to compel it to regulate carbon dioxide and other emissions that may contribute to climate change. The Court rejected the EPA’s argument that Massachusetts lacked standing to bring the suit. The majority opinion, written by Justice Stevens, began by seemingly putting a thumb on the scale in favor of state standing: “Given . . . Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.” The majority then went on to find that state met all the requirements set out in *Lujan*:

[A]ccording to petitioners’ uncontested affidavits . . . the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.

But had the majority eased the standing requirements out of respect for the states? Chief Justice Roberts, in dissent, thought so: “Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence, and support for any such “special solicitude” is conspicuously absent from the Court’s opinion.”

After *Massachusetts* it seemed that state suits were becoming increasingly common—and political. As the former Supreme Court correspondent for the *New York Times*, Linda Greenhouse, noted, “blue states [increasingly brought] suits against a Republican president’s

policies”—*Massachusetts* is an example—and “red states against a Democratic White House.”⁸⁴

True enough but at the same time the Court’s responses to these suits were becoming increasingly unpredictable. One lower court judge described the doctrine this way:⁸⁵ “The guidance from our high court on standing continues to be a morass of imprecision. At best, standing is now ‘unsettled in nature [and] beset with difficulties.’” The judge went on to juxtapose two state standing cases from 2023: *United States v. Texas* (“holding that states near an international border lacked standing to challenge the federal government’s immigration enforcement policies because the state’s financial injury” was not an injury in fact—an invasion of a legally protected interest), which the judge thought conflicted with *Biden et al. v. Nebraska* (2023) (holding that Missouri established standing to challenge the Biden administration’s cancellation of some student loans by showing that it “suffered . . . a concrete injury to a legally protected interest, like property or money”). The Supreme Court had decided both cases by divided votes.

Whether the Court will provide clearer guidance on state standing in the near future remains an open question. For now the divergent opinions over state standing and, in fact, standing more generally show that the doctrine continues to remain open to interpretation. The very fact that the majority and dissenting justices could reach such different conclusions again shores up a theme we have emphasized throughout: although Article III places certain limits on the power of the federal judiciary, its language is vague enough to allow for a good deal of judicial latitude.

CONSTRAINTS ON JUDICIAL POWER: JUDICIAL SELF-RESTRAINT AND THE SEPARATION OF POWERS SYSTEM

The jurisdiction, justiciability, and standing requirements place considerable constraints on the exercise of judicial power. Yet it is important to note that these doctrines come largely from the Court’s own interpretation of Article III and its view of the proper role of the judiciary. In other words, the constraints are largely

self-imposed. In *Ashwander v. Tennessee Valley Authority* (1936), Justice Louis D. Brandeis took the opportunity in a concurring opinion to provide a summary of the principles of judicial self-restraint as they pertain to constitutional interpretation (see Box 2-5). His goal was to delineate a set of rules that the Court should follow to avoid unnecessarily reaching decisions on the constitutionality of laws. In the course of outlining these “avoidance principles,” he considered many of the constraints on judicial decision making we have reviewed in this section. More to the point, these “*Ashwander* Principles” serve as perhaps the best single statement of how the Court limits its own powers—and especially its exercise of judicial review.

Given the cases and materials you have just read, we wonder whether you think these are substantial constraints on the Court. Either way, it would be a mistake to conclude that the use of judicial power is limited only by self-imposed constraints. Rather, members of the executive and legislative branches also have expectations concerning the appropriate limits of judicial authority. If the justices are perceived as exceeding their role by failing to restrain the use of their own powers, a reaction from the political branches may occur.

What forms might such a reaction take? First, the other branches of government could attempt to alter constitutional policy established by the Court. Although the Court has shut down efforts to do so through simple legislation—recall *City of Boerne v. Flores* (1997)—the other branches can propose constitutional amendments to overturn Court decisions. This constraint on the Court is especially effective because once an amendment is part of the Constitution, it is “constitutional,” and the justices are bound by it. By the same token, once the amendment process is set in motion, the Court has been reluctant to interfere.

To see why, consider *Coleman v. Miller* (1939), a case to which Justice Brennan made specific reference in his *Baker* opinion. In *Coleman* the Court considered the actions of the Kansas legislature over the child labor amendment. Proposed by Congress in 1924, the amendment stated, “The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.” In January 1925 Kansas legislators voted to reject the amendment. The issue arose again when the state senate reconsidered the amendment in January 1937. At that time the legislative body split, 20–20, with the lieutenant governor casting the decisive vote in favor of it. Members of the Kansas legislature (mostly those who had voted no) challenged the 1937

⁸⁴Linda Greenhouse, *Justice on the Brink* (New York: Random House, 2021), 204.

⁸⁵*Paxton v. Restaino*, 683 F. Supp. 3d 565 (2023).

BOX 2-5

Justice Brandeis, Concurring in *Ashwander v. Tennessee Valley Authority*

IN 1936 Justice Louis D. Brandeis delineated, in a concurring opinion in *Ashwander v. Tennessee Valley Authority*, a set of Court-formulated rules to avoid unnecessarily reaching decisions on the constitutionality of laws. A portion of his opinion setting forth those rules, minus case citations and footnotes, follows:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions “is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”
2. The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it.” “It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”
3. 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.”
4. The Court 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. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.
5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. . . .
6. “The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.”
7. “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.”

vote on two grounds: they questioned the ability of the lieutenant governor to break the tie and, more generally, the reconsideration of an amendment that previously had been rejected. Writing for the Court, Chief Justice Charles Evans Hughes refused to address these

points. Rather, he asserted that the suit raised a political question. In his words, “the ultimate authority” over the amendment process was Congress, not the Court.

It is worth reiterating that Congress does not often propose constitutional amendments or even legislation

to override the Court. Only four times has Congress succeeded in overriding the Court with a constitutional amendment, and attempts to overrule by simple legislation may be equally rare.⁸⁶ And when the legislature attempts to direct the justices on how to adjudicate constitutional cases, they may decline to do so—as the majority’s reaction in *Boerne* indicates. The more general point, however, is this: because Congress has, in the past, overridden the Court, there is no reason for justices to believe that the legislature would not do so in the future. This threat may be sufficient to constrain the justices, even in constitutional disputes.

Second, the elected branches possess various weapons that they could use to punish the Court. Congress can hold judicial salaries constant, impeach justices, change the size of the Court, and make “exceptions” to the Court’s appellate jurisdiction. And these weapons can have an effect on the doctrine the Court produces. Reconsider *Ex parte McCordle*. Perhaps to protect the Court’s institutional legitimacy, the justices chose not to rule the way they really wanted—in favor of McCordle. Instead, they dismissed the suit, thereby lending credence to the notion that Congress can remove the Court’s appellate jurisdiction as it deems necessary. Then again, remember that there are reasons to question the precedential value of *McCordle* leaving open questions about the breadth of Congress’s jurisdiction-stripping power.

Nonetheless, the mere existence of these congressional weapons may serve to constrain policy-oriented justices from acting on their preferences. In *Marbury v. Madison*, Chief Justice Marshall—himself an Adams appointee—must have wanted to give Marbury his appointment. But, at the same time, Marshall was well aware of the serious repercussions of ordering the administration to do so. Jefferson made no secret of his disdain for Marshall, and with impeachment of the chief justice

a distinct possibility in the president’s (and Marshall’s) mind, Marshall was confronted with a dilemma: vote his sincere political preferences and risk the institutional integrity of the Court (not to mention his own job), or act in a sophisticated fashion with regard to his political preferences (refuse to give Marbury his commission) and elevate judicial supremacy (establish judicial review) in a way that Jefferson could accept. Perhaps not so surprisingly, Marshall chose the latter course of action.

Finally, government actors can refuse, implicitly or explicitly, to implement particular constitutional decisions, thereby decreasing the Court’s ability to create efficacious policy. *Immigration and Naturalization Service v. Chadha*, which we discussed at the beginning of this chapter, provides a case in point. Theoretically speaking, *Chadha* nullified on constitutional grounds the practice of legislative vetoes—that is, congressional rejection of policies produced by executive agencies. In practice, however, Congress allows committees to veto agency requests to move funds from one program to another. Some commentators consider this a type of legislative veto because Congress is taking action without presenting a bill to the president. The problem with *Chadha*, so it seems, was that the Court fashioned a rule that was “unacceptable” to the other branches of government and, as a result, one that has been “eroded by open defiance and subtle evasion.”⁸⁷ Why the Court would establish such an inefficacious rule is open to speculation, but the relevant point is simple enough: once the Court reached its decision, it had to depend on Congress to implement it. Because Congress failed to do so, the Court was unable to set long-term policy.

In sum, Article III is not the only source of constraint on the Court’s power. The justices are fully aware that the president and Congress have the ability to impose such checks, and on occasion they may exercise their powers with at least some consideration of how other government actors may respond. Therefore, constraints on judicial power emanate not only from Article III and the Court’s interpretation of it but also from the constitutional separation of powers—a system giving each governmental branch a role in keeping the other branches within their legitimate bounds.

⁸⁶But see James Meernik and Joseph Ignagni, “Judicial Review and Coordinate Construction of the Constitution,” *American Journal of Political Science* 41 (1997): 447–467. They state, “Congress often does reverse Supreme Court [constitutional] rulings.” They claim that of the 569 cases in which the Court rendered unconstitutional a federal law, a state law, or executive order, Congress made 125 attempts to override by constitutional amendment or by statute. Of these, Congress succeeded in reversing the Court in 41. But it is uncertain whether Congress was attempting to reinterpret the Constitution, as it did in the Religious Freedom of Restoration Act, or trying to correct a constitutional defect identified by the Court.

⁸⁷Louis Fisher, “The Legislative Veto: Invalidated, It Survives,” *Law and Contemporary Problems* 56 (1993): 288.

ANNOTATED READINGS

For studies of judicial power, consult the citations in the footnotes in this chapter. Here we wish only to highlight several interesting books that explore the development of judicial power and how the Court interprets (or should interpret) its powers in Article III, along with the role the Court plays (or should play) in American society. These books include Alexander M. Bickel, *The Least Dangerous Branch* (New York: Bobbs-Merrill, 1962); Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago, IL: University of Chicago Press, 1980); Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, NJ: Princeton University Press, 2012); John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980); Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (Lawrence: University Press of Kansas, 2019); Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply in Foreign Affairs?* (Princeton, NJ: Princeton University Press, 2009); Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary* (New York: Oxford University Press, 2011); Larry D. Kramer, *The People Themselves: Popular*

Constitutionalism and Judicial Review (New York: Oxford University Press, 2004); William Lasser, *The Limits of Judicial Power* (Chapel Hill: University of North Carolina Press, 1988); Scott E. Lemieux and David J. Watkins, eds., *Judicial Review and Contemporary Democratic Theory* (New York: Routledge, 2017); Philippa Strum, *The Supreme Court and Political Questions* (Tuscaloosa: University of Alabama Press, 1974); Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999); and Greg Weiner, *The Political Constitution: The Case against Judicial Supremacy* (Lawrence: University Press of Kansas, 2019).

To greater and lesser extents, these works cover *Marbury v. Madison*. Books more explicitly about the case include Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989); William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Lawrence: University Press of Kansas, 2000); and Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (New York: Public Affairs, 2009).

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