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The Rise of Judicial Review

Marbury v. *Madison* (1803)

Marbury v. Madison

- 5 U.S. 137 [1 Cr. 137] (1803)
- Decided: February 24, 1803
- Vote: 4–0
- Opinion of the Court: John Marshall
- Not participating: William Cushing and Alfred Moore

What you should know:

1. What is the significance of Marbury v. Madison?
2. Explain and understand the story of Marbury v. Madison.
3. Understand original and appellate jurisdiction of the Supreme Court.

Like many Supreme Court cases, the great case of *Marbury* v. *Madison* began simply. William Marbury and three other people did not receive appointments as justices of the peace for the District of Columbia. Their claim before the Court was the result of a general effort by the outgoing administration of President John Adams to place its Federalist supporters in newly created judicial positions. The Federalist-controlled Congress, for example, passed the Judiciary Act of 1801 in the waning days of the Adams's administration, after Thomas Jefferson had been elected the new President. The law was a combination of well-intended judicial reform and political expediency on the part of the outgoing Federalist Party. It reduced the size of the Supreme Court from six to five justices, an action designed to deprive Jefferson's incoming administration of the opportunity to appoint a high court judge quickly.

The act also created sixteen new federal circuit court judgeships, and two weeks later a separate measure established forty-two justices of the peace in Washington, D.C., where the federal Congress had full control. President Adams appointed the new judges and signed the commissions just before he left office, and so the appointees became known as "midnight judges." For reasons that remain historically murky, however, John Marshall, who was both secretary of state and chief justice of the United States for a brief period, failed to have the commissions delivered to the justices of the peace.

Marbury was one of those "midnight judges" who did not receive a commission. When the new secretary of state, James Madison, took office he refused to deliver the commissions to Marbury and the others. Madison knew that President Jefferson and his stalwarts in Congress intended to repeal the Judiciary Act of 1801, which they did a year later, and that the judges and justices of the peace would soon be out of a job. Marbury and the others, however, decided to protest Madison's action. They brought their case under the Supreme Court's original rather than appellate jurisdiction. The Court can have cases presented to it in two ways. First, and most significantly, the justices hear cases on appeal, after another court, state or federal, has heard the dispute. Alternatively, as with *Marbury*, the justices can hear a small number of cases under the Court's original jurisdiction, which means it holds a trial or similar proceedings in order to determine the facts in the dispute and then settles the case by applying the law. This original jurisdiction, however, is narrowly tailored; the justices can hear only those cases involving ambassadors, public ministers, and consuls and suits involving states as parties. The

Congress had also, in Section 13 of the Judiciary Act of 1789 that organized the American federal courts and legal system, provided that the Supreme Court could issue writs of mandamus. A writ is simply an order by a court. A writ of mandamus (which in Latin means "we command") is one that directs an individual to do something; in this instance, Marbury asked the court to tell James Madison to deliver the signed commissions to Marbury and his colleagues.

Chief Justice Marshall was in a compromised position because he had been the secretary of state who had failed to deliver the commissions in the first place. Despite this apparent conflict of interest, and in stark contrast to the judicial ethics of today, Marshall not only participated in the case but played an active, defining role, and ultimately wrote the opinion for the Court.

In December 1801 Marshall asked the Jefferson administration to respond to Marbury, but Madison ignored the request. The Jeffersonian Republican Congress also sent a direct, although controversial, message to the justices. It ordered that the Court would not meet for the 1801 term. Article III, section 2 provided that "the supreme Court shall have appellate Jurisdiction, both as to Law and Face, with such Exceptions, and under such Regulations as the Congress shall make." Despite the clear wording of the Constitution, Federalists complained that such an action was unconstitutional because it denied citizens access to the Court, but the Republicans, now in control and determined to press their advantage, were unmoved. As a result, Marbury's case did not reach the Court until 1803, two years after it had been brought. In the meantime, the Jeffersonian Congress repealed the Judiciary Act of 1801 and dismissed the judges appointed under its provisions. Jefferson and his followers believed that the Federalists, having lost at the polls, were determined to use the courts to frustrate the Republicans' legislative program. Moreover, the Republicans in Congress were threatening to impeach Federalist judges who could not be removed simply by repealing the 1801 act. It was in this highly charged political atmosphere that Chief Justice Marshall had to settle Marbury's case.

The case raised two distinct issues. The first was whether the justices could exercise the power of judicial review. This term means the power of a court, in this instance the Supreme Court, to review and potentially strike down an act of Congress as unconstitutional and invalid. Marbury's case presented the justices with an opportunity to expand their authority but also raised the possibility that Congress would react by stripping them of some of their powers if they did so.

The second issue was how extensively the justices should become embroiled in political battles. In many ways the question of whether a commission had been delivered was a political, not a legal one. If the justices tried to settle that question they would leave themselves open to charges that they were interfering in matters over which they had no authority.

The Jefferson administration assumed that the Court did not have the authority to address the question of the commission. It refused to give Marbury his commission and it also refused to appear in Court the day the case was argued. Marbury's counsel did appear, however, and managed to demonstrate to the justices through testimony that the commissions had been signed but had disappeared, to where no one knew.

Marshall's opinion for the Court held that Marbury was entitled to his commission and that Madison had wrongfully withheld it from him. But Marshall understood that directly attacking the Jefferson administration by giving Marbury what he wanted would potentially threaten the autonomy of the Court.

Marshall sidestepped the critical questions while establishing the right of the justices to settle such matters conclusively—to exercise judicial review—and to remain free of political entanglements. As Marshall's opinion made clear, the power of the Court derived from its role as a legal, not political, institution. In fact, Marshall noted in his opinion that asking the justices to decide such questions was "peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation." What is genuinely impressive about Marshall's opinion was that he managed to weave through the political maze in such a way that he not only affirmed but enhanced the power of the Court he led.

Marshall held that a writ of mandamus was the appropriate remedy. The important question, Marshall concluded, was whether such a mandamus was available under the grant of original jurisdiction to the Supreme Court in Article 3 of the Constitution. Cleverly, Marshall decided the question by comparing the text of Article 3 with Section 13 of the Judiciary Act of 1789, the section giving the Court the power to issue a writ of mandamus in the first place. Marshall found that Congress could not provide for the Court to use a writ of mandamus because no such power was granted to it in the Constitution.

Marshall used this finding to reach an even more important conclusion. When a statute conflicted with the federal Constitution, Marshall explained, it was "the essence of judicial duty" to follow the Constitution. Marshall went on to explain that "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." Marshall gave a ringing declaration to Marbury's legal rights. "The government of the United States," he continued, "has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal right."

Through these words Marshall established two enduring principles of American law: that courts determine what the law means and that they can overturn those laws that fail to conform with the Constitution. In this instance, Marshall affirmed that Marbury was due his commission, but he also concluded that because the justices could not issue a writ of mandamus since Section 13 of the 1789 Judiciary Act was unconstitutional, there was no means by which Marbury could receive his commission. Marshall's decision made it clear that Marbury had lost an important property right when the commission was not delivered to him, but that the Court could do nothing to help him. "The authority," Marshall explained, "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."

Marshall managed in one opinion to underscore his respect for those property rights and to establish that the judiciary could be, under the right circumstances, a powerful instrument to protect individual rights against legislative action. But because the Jefferson administration was not asked to do anything and Marbury was not going to receive his commission, there was no immediate reason or way for it to strike back and limit the Court's power. Marshall affirmed an enduring principle: what the Court said the Constitution meant was final. Congress can act only within the confines of the Constitution.

Marshall's opinion was an iron fist wrapped in a velvet glove. He asserted

unequivocally the Court's power to rule on the constitutionality of congressional laws, but he kept the justices free from direct political conflict by concluding that the Court was powerless to help Marbury secure his commission. Marshall had managed in a highly charged political environment to build the authority of the Court without producing a political backlash that might have diminished it.

The Jeffersonian Republicans were openly frustrated by Marshall's constitutional dexterity, but in the end they could do little more than complain. Judge Spencer Roane, who like Jefferson and Marshall was from Virginia, attacked the *Marbury* decision in newspaper articles. Roane was a staunch advocate of limited federal judicial power. Two decades later, Judge John Bannister Gibson of the Pennsylvania Supreme Court asserted in the case of *Eakin* v. *Raub* (1825) that the decision in *Marbury* was nothing more than judicial usurpation. Roane and Gibson both insisted that an unelected federal judiciary serving terms during good behavior was too remote from the people to decide the validity of a legislative act. Once the people had spoken through their elected representatives, the courts were powerless to reverse the actions of these representatives.

During the summer of 1803 the Jeffersonian Republicans also launched a direct political attack on sitting federal judges appointed by the Federalists. The first victim was a district court judge, John Pickering of New Hampshire. Pickering was both insane and alcoholic, and in 1804 he became the first federal judge to be impeached, convicted, and removed from office. A year later, the Republicans turned their eye on an associate justice of the Supreme Court, Samuel Chase, who had helped Marshall prepare important parts of the *Marbury* opinion.

Chase was a nakedly partisan Federalist who enjoyed taunting his Republican detractors. He earned their special anger as a result of a charge, or instruction, he gave to a grand jury in Baltimore in which he denounced the repeal of the Judiciary Act of 1801, characterized President Jefferson as immoral, and suggested that the Republicans in Congress were seeking to instigate mob rule. Jefferson personally disliked Marshall. He noted later in life that Marshall's judicial method was "very irregular and very censurable." And Marshall returned the disdain. Even after Jefferson's death, Marshall scornfully wrote that "I have never thought him a particularly wise, sound, and practical statesman." Jefferson also disliked Chase intensely. He personally asked his party's leaders in the House of Representatives to impeach Chase, whom he detested even more than Marshall.

In 1805, the House of Representatives did just that, but the Senate failed to muster the two-thirds majority needed to convict him. When Chase's trial began in the United States Senate, the Republicans were in control of the government and certain that they would convict the partisan justice. Many of the senators treated the trial as something of a kangaroo court, but the presiding officer, Vice President Aaron Burr, conducted the proceedings with great fairness. Chase's lawyer, Luther Martin, had the opportunity to present a complete defense for his client and, in the end, the Senate acquitted Chase. The verdict discouraged further attempts to impeach justices simply because of their political views. Chase's impeachment, however, sent another message: members of the judiciary were expected to avoid partisan politics. Throughout American history, justices have found themselves in trouble when they have been perceived to be involved in ordinary politics.

Ironically, Vice President Burr himself was wanted for killing Alexander

Hamilton in a duel in New Jersey. He was, however, immune from prosecution in Washington, D.C. Two years later, Burr was tried for treason in a case over which Marshall presided and Luther Martin served as Burr's attorney.

Judicial review had certainly been used by other courts before *Marbury*. Both state and lower federal court judges had refused to uphold particular laws because they considered them to be contrary to a state constitution or the federal constitution. Marshall's opinion was important not because it was first but because it was the first statement of the doctrine of judicial review by the nation's highest court. In making his statement Marshall drew his authority from the colonial Massachusetts lawyer James Otis, who had brilliantly argued in the *Writs of Assistance Case* (1761) that judges were prohibited from enforcing laws that were patently unconstitutional. That idea had deep roots in English legal history, stretching at least back to *Dr. Bonham's Case* in 1610. In that instance, Sir Edward Coke, one of the greatest lawyers of English history, articulated the principle that parliamentary statutes contrary to custom and right reason must be held invalid.

Alexander Hamilton drove this same idea home when he argued for the adoption of the Constitution in *The Federalist No. 78* (1788). According to Hamilton, limited government required that courts of justice be empowered to "declare all acts contrary to the manifest tenor of the Constitution void." Marshall's opinion in *Marbury* reflected Hamilton's reasoning and stressed the duty of judges to apply the law to cases before them. Thus, judicial review was a necessary constitutional check on legislative discretion that might rob an individual or his or her life, property, or liberty.

Marbury stated the principle of what is called "coordinate branch" judicial review, in which the Supreme Court limits the power of one of the two other— coordinate—branches of the federal government. The act of judicial review is also important in striking down state laws and judicial decisions that are contrary to the Constitution. The justices have found that when such state measures violate the supremacy clause of Article 6, which says that the Constitution is "the supreme Law of the Land," they cannot pass federal constitutional muster. It was the exercise of this power, the Supreme Court's striking down of state acts, that stirred the greatest outcry in the nineteenth century. The justices did not attempt to void another act of Congress until 1857, when in the Dred Scott case it held invalid the 1820 Missouri Compromise, which involved the regulation of slavery in the western territories. In actuality, the Court's action was little more than a gesture, as Congress had already repealed the compromise when it passed the Kansas-Nebraska Act in 1854.

The significance of *Marbury* has grown over time. When the decision was issued, even its harshest critics, such as Roane, did not appreciate the central role that it would come to play in the American constitutional system and the nation's history generally. Marshall's decision, by establishing the practice of judicial review, granted to future generations of justices one of their central powers. It also underscored that because the justices exercise this power in an often heated political environment they must do so with great care. Today, no other decision by the Court is more frequently cited for its role in American government than *Marbury*.

What is the point of this section? What do they want you to know?

The Constitution is the Supreme Law of the Land

Marbury was not the first case in which courts invoked the power of judicial review, but it was the first time that the Supreme Court had done so to invalidate an act of Congress. In his 1803 opinion, Marshall addressed both judicial review and the doctrine of "political questions." He also asserted a fundamental principle that the Constitution is law and that judges are therefore uniquely positioned to interpret its meaning. Marshall made clear to future generations that the justices had an extraordinary role in making sure that the Constitution functioned properly.

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.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument....

The first object of inquiry is,

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

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

To withhold the 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 inquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection....

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appelof a vested legal right....

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act....

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....

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,

1. 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.

2. 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 inquired whether,

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

1 The nature of the writ applied for. And,

1 The power of this court.

1. The nature of the writ....

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; and the person applying for it must be without any other specific and legal remedy....

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....

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 case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme

court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to 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?...

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.

"An Act of Suicide"

The Supreme Court decided Marbury during President Thomas Jefferson's first term in office. He objected to the practice of judicial review because he believed that it violated the principle of separation of powers and threatened the very survival of the nation. In its place, he proposed that each branch or department of government decide constitutional questions for itself, with the ultimate responsibility resting with the people. Letters Jefferson wrote between 1804 and 1823 outline his views on judicial review and his "departmental" theory of constitutional review.

Nothing in the Constitution has given [the judges] exclusive exposition to the Legislature merits respect a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The Constitution...meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch.
—Thomas Jefferson to Abigail Adams, 1804

The question whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches.
—Thomas Jefferson to W. H. Torrance, 1815

There is another opinion entertained by some men of such judgment and information as to lessen my confidence in my own. That is, that the Legislature alone is the exclusive expounder of the sense of the Constitution in every part of it whatever. And they allege in its support that this branch has authority to impeach and punish a member of either of the others acting contrary to its declaration of the sense of the Constitution. It may, indeed, be answered that an act may still be valid although the party is punished for it, right or wrong. However, this opinion which ascribes for its safety, there being in the body of the nation a control over them which, if expressed by rejection on the subsequent exercise of their elective franchise, enlists public opinion against their exposition and encourages a judge or executive on a future occasion to adhere to their former opinion. Between these two doctrines, every one has a right to choose, and I know of no third meriting any respect.
—Thomas Jefferson to W. H. Torrance, 1815

In denying the right [the Supreme Court usurps] of exclusively explaining the Constitution, I go further than [others] do, if I understand rightly [this] quotation from the *Federalist* of an opinion that "the judiciary is the last resort in relation *to the other departments* of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived." If this opinion be sound, then indeed is our Constitution a complete *felo de se* [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scarecrow.... The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.
—Thomas Jefferson to Spencer Roane, 1819