■ *Marbury v. Madison*

Date: February 24, 1803
Author: Chief Justice John Marshall
Genre: Court Case
Area of Law: separation of powers; judicial review

Summary Overview

Marbury v. Madison was the first significant decision handed down by the U.S. Supreme Court after John Marshall was sworn in as its chief justice in 1801. In this case, for the first time, the Supreme Court declared an act of Congress unconstitutional. *Marbury v. Madison* was not the Court's first exercise of judicial review—the power to determine the constitutionality of legislative and administrative acts—but by declaring the Court the final arbiter of constitutional questions, this seminal decision fully empowered the third branch of government, making the concept of federal checks and balances a reality.

Chief Justice William Rehnquist, in a speech to the Federal Judges Association, once described *Marbury v. Madison* as "the most famous case ever decided by the United States Supreme Court." It is not surprising that the late chief justice, who headed one of the most activist Courts in the nation's history—one that overturned a notably high number of federal statutes—should hold the case in such high regard. But Rehnquist is hardly alone in his admiration for this decision, which governments around the world consider a blueprint for drafting constitutions and formatting the role of judicial systems. With *Marbury v. Madison*, the judiciary became something more than an institution—it became political.

Defining moment

The significance of *Marbury*—like that of its author, Marshall—is bound up with that of Marshall's second cousin and primary rival, Thomas Jefferson. By the time of the fourth presidential election in 1800, the previously dominant Federalist Party, of which Marshall was a leading member, was in disarray. The High Federalists, a party fraction dominated by Alexander Hamilton, actively undermined the reelection of John Adams, their party's nominee. The Republicans nominated Thomas Jefferson and Aaron Burr, and they won the election handily, garnering seventy-three electoral votes to the Federalists' sixty-five.

Naming the next president, however, proved far more difficult. Electoral rules of the day dictated that the runner-up be declared vice president, irrespective of party affiliation. Republican solidarity resulted in a tie between Jefferson and Burr, and by constitutional fiat the election was thrown into the House of Representatives. The House—dominated by Federalists—supported Burr, believing him to be more malleable than Jefferson, an impression that Burr encouraged. Nonetheless, Jefferson was declared the winner after the thirty-sixth ballot and took the presidential oath of office one month after Marshall was sworn in as chief justice.

In the final days of the Adams administration, the Federalists, attempting to pack the federal judiciary with party loyalists, passed two laws: the 1801 Judiciary Act, which the Republicans later repealed, and a law creating a number of justice of the peace positions in the District of Columbia. Adams made his appointments to these positions on March 2, 1801, two days before Jefferson's inauguration, and the appointees were confirmed the following day. Some of the appointees' commissions, however, were not delivered before midnight of March 3, when the Jefferson administration took over, and Jefferson ordered these commissions held back. One of the affected appointees was William Marbury, who then petitioned the Supreme Court for a writ of mandamus requiring the secretary of state, James Madison, to surrender his commission.

Author Biography

Born on the northwestern frontier of Virginia, John Marshall was the eldest of fifteen children. Marshall's formal education lasted only two years. His education came mainly from his father, who not only schooled his

son in *Blackstone's Commentaries on the Laws of England* but also introduced him to politics. The senior Marshall, who served in the Virginia House of Burgesses, also acted as George Washington's assistant surveyor. Father and son enlisted together after war broke out between England and its American colonies in 1776. Serving first with the Culpepper Minute Men and then in the Continental army, John Marshall was with George Washington at Valley Forge during the long, cold winter of 1777 to 1778. This experience of watching his fellow soldiers freeze owing to congressional impotence and inaction ostensibly fostered Marshall's lifelong commitment to a strong central government.

After the war, Marshall attended law lectures at the College of William and Mary in Williamsburg before being admitted to the bar. He set up his law practice in Richmond, where he devoted his time to defending Virginia debtors attempting to avoid prewar obligations to British debtors, eventually arguing one such case—*Ware v. Hylton* (1796)—before the U.S. Supreme Court. This was his only appearance before the Court as an attorney. Marshall became involved in state and local politics, serving several terms in the Virginia House of Delegates. Marshall's passionate advocacy for a federal constitution at the Virginia ratifying conventional led Washington to offer him a commission as the first United States attorney for the District of Columbia. Marshall declined this offer, as he did offers to serve as minister to France and associate justice of the U.S. Supreme Court.

Marshall's reasons for refusing such honors seem to have been primarily financial. Marshall, who was married and had ten children to support, was deeply in debt owing to land speculation. Financial considerations also weighed heavily in his decision to accept a commission to write the five volumes of *The Life of George Washington*, which appeared between 1805 and 1807. In the interim he did accept a government appointment as special envoy to France, a job that promised significant financial rewards. His mission was aborted by the infamous XYZ Affair, during which the French demanded a bribe as a condition to negotiating an end to naval hostilities with the United States. But Marshall's services, including a published response to the blackmailers, earned him $20,000 and public acclaim. Shortly afterward, at Washington's urging Marshall ran for and won a seat in the U.S. House of Representatives, where he successfully defended the Adams administration from Republican attacks. In 1800 the grateful president made Marshall his secretary of state. During the final days of the Adams administration, Marshall served both in this capacity and as chief justice of the Supreme Court.

Thus Marshall began his tenure on the Court under a cloud—one that darkened a month later when his arch antagonist Jefferson took office, making Marshall the first justice to serve under a president from the opposing political party. For Jefferson and his followers, the chief justice was himself one of the spurious "midnight judges." It was not long, however, before Marshall established his authority—as well as the Court's authority—by writing the majority opinion in *Marbury*. Any justice in Marshall's position today would be obliged to recuse him-or herself because of a potential conflict of interest, but Marshall, exercising his considerable powers of logic and diplomacy, managed to craft a decision that at once made the Supreme Court the ultimate arbiter of the constitutionality of legislation and launched his career as the "Great Chief Justice."

Marshall dominated the Court as no other chief justice has. His forceful but engaging personality helped him unite his brother justices, and his enormous capacity for work consolidated his power by allowing him to write the majority of his Court's opinions. Later, as Republicans came to outnumber Federalists on the high bench, Marshall still managed to make most Court decisions unanimous. In *McCulloch v. Maryland* (1819), the case that best illustrates the power of judicial review, the Court unanimously upheld Congress's right to charter a national bank, despite the Republican claim that the Constitution did not grant Congress this right and that the Tenth Amendment reserved all unenumerated powers for the states. Ever the Federalist, Marshall famously countered this argument by saying, "We must never forget that it is a *constitution* we are expounding… intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."

During the final decade of Marshall's tenure, the Court—like the nation as a whole—confronted the steadily increasing power of the states' rights movement. The movement, long championed by Jeffersonian Republicans, reached a kind of apogee under the newly formed Democratic-Republican Party and its standard-bearer Andrew Jackson. Marshall suffered his first significant defeat when the seventh president of the United States refused to honor the chief justice's opinion for the Court in *Worcester v. Georgia* (1832), upholding the sovereignty of the Cherokee Nation: Jackson is reported to have greeted news of *Worcester* by saying, "Well, John Marshall has made his decision; now let him enforce

it." Having spent three decades enhancing the power of the Court, Marshall seems to have met his match. He hoped to outlast Jackson, believing that Jackson's successor might return some balance to the Court, but Marshall did not succeed. On July 6, 1835, grieving his wife's death and suffering from a liver ailment, he succumbed to injuries incurred in a stage coach accident and became the first chief justice to die while still on the bench.

HISTORICAL DOCUMENT

Mr. Chief Justice MARSHALL delivered the opinion of the court.

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

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

…

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

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

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

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

The first object of inquiry is,

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

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years." It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the constitution declares, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The third section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the president, by and with the consent of the senate, or by the president alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the president, and is completely voluntary.

2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "com-

mission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution.…

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration. This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission: still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided.…

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

…

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

…

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and the commission is valid.…

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the livery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission after it shall have been signed by the president. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities.…

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the president. If the executive required that every per-

son appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

…

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

…

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

It is therefore 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.

…

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. 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.

In the third volume of his Commentaries, page 23, Blackstone states… :

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."

…

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

…

It behoves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged with that class of cases which come under the description of damnum absque injuria—a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered as comprehending offices of trust, of honour or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of con-

gress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

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

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

By the act concerning invalids, passed in June 1794, the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.…

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.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

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. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

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.

…

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority, If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being

a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

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,

2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

. . .

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." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

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

. . .

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

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

. . .

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subjects the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has

been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

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."

. . .

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 construction is inadmissible, unless the words require it.…

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 the 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 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.

…

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.

…

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.

GLOSSARY

jurisdiction: the power to hear and decide cases

writ: a court order mandating performance of a specified act

writ of mandamus: a court order compelling a government official to perform some necessary duty