CHAPTER TWO

THE JUDICIARY

Institutional Powers and Constraints

CONCERNED ABOUT the proliferation of child pornography, especially on the Internet, Congress passed the Child Pornography Prevention Act of 1996. The law forbade "any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition covered a wide range of depictions, including "virtual child pornography," computer-generated images that do not show actual children but that Congress reasoned could threaten children in other, less direct, ways. For example, pedophiles could use virtual child pornography to encourage children to participate in sexual activity. Six years after the legislation was passed, in ***Ashcroft v. Free Speech Coalition*** (2002), the U.S. Supreme Court struck down the law as a violation of the First Amendment.

What the Court did was an uncommon, but not unexpected, act. For more than two centuries, federal courts have exerted the power of judicial review, the power to review acts of government to determine their compatibility with the U.S. Constitution. And even though the Constitution does not explicitly give them such power, the courts' authority to do so has rarely been challenged. Today, we take for granted the notion that federal courts may review government actions and strike them down if they violate constitutional mandates.

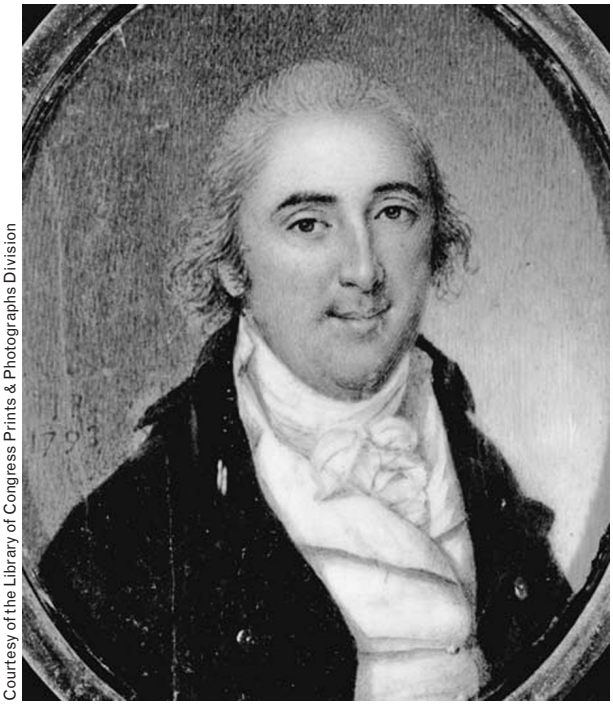
Nevertheless, when courts exert this power, as the U.S. Supreme Court did in *Ashcroft*, they provoke controversy. Look at it from this perspective: Congress, composed of officials we *elect*, passed the Child Pornography Prevention Act, which was then rendered invalid by a Supreme Court of *unelected* judges. Such an occurrence strikes some people as odd, perhaps even antidemocratic. 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?

As we shall see throughout this book, the alleged antidemocratic nature of judicial review is just one of many controversies surrounding the practice. To appreciate them fully, it is important to have a firm grasp of the development of judicial review in the United States. Many of the early justifications for its practice are still fueling disputes.

Judicial review is the primary weapon that federal courts have to keep the other branches of government in check. To be sure, the power to invalidate the actions of other officials is potentially awesome in scope, but it would be wrong to conclude that this authority is unrestricted. In fact, there are very real limits that constrain the use of judicial power. In the second part of this chapter, we explore those limits. An appreciation of both aspects of judicial power is necessary to understand the cases in this chapter and those to come.

JUDICIAL REVIEW

Despite evidence that the framers intended for federal courts to have the potent authority of judicial review, it is not mentioned in the Constitution. Early in U.S. history, justices of the Supreme Court 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 mandate that direct taxes must be apportioned on the basis of population. With only three justices participating, the Court upheld the act. But, by even considering the tax's validity, the Court assumed it could review an act of Congress.



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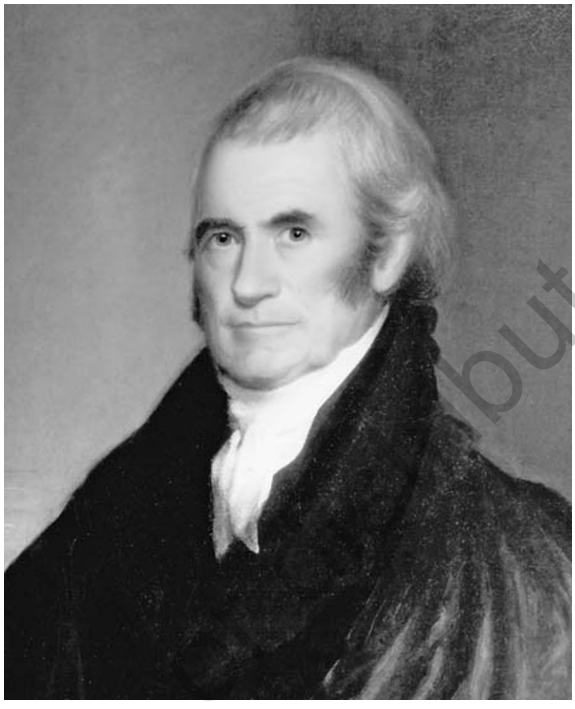
William Marbury



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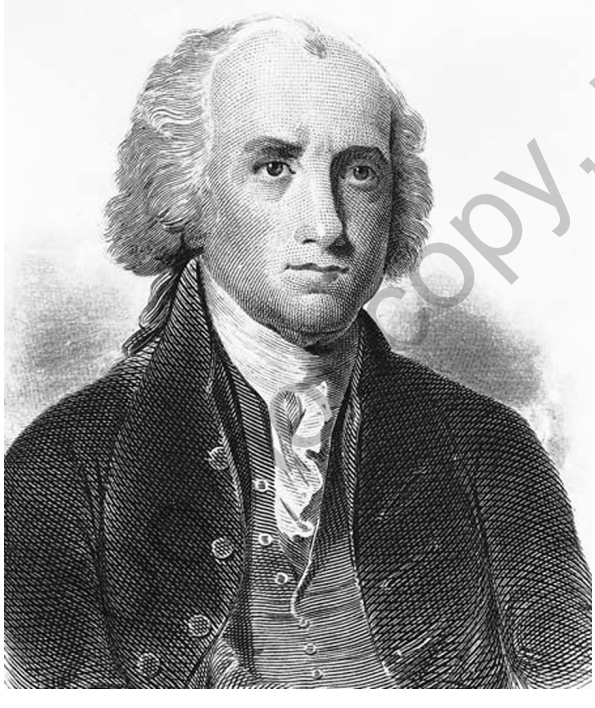
John Marshall



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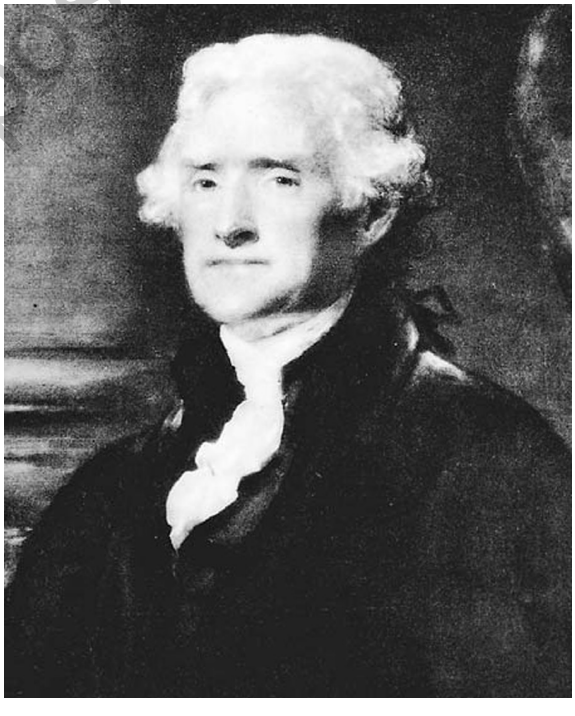
James Madison



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Thomas Jefferson

Not until 1803, however, did 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 John Marshall justify the Court's power to strike down legislation when the newly framed Constitution failed to enumerate it?

Marbury v. Madison

5 U.S. (1 CR.) 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 President John Adams, the Federalist candidate, had lost after a long and bitter campaign, but it was not clear who won. In those days voters did not elect a single ticket consisting of a candidate for president and a candidate for vice president; rather, the person with the most votes became president, and the second-place person became vice president. In 1800 the voting resulted in a tie between Republican candidate Thomas Jefferson and his running mate, Aaron Burr, and the election had to be settled in the House of Representatives, which in February 1801 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.[1]

With these losses in the elected branches, the Federalists took steps before they left office 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. As a result, during the last six months of his term in office, Adams made more than two hundred nominations, with sixteen judgeships approved by the Senate during his last two weeks in office.

An even more important opportunity arose 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 offered the post to John Jay, who had served as the first chief justice before leaving to take what was in those days a more prestigious job—the governorship 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, authorizing 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 drama of *Marbury v. Madison.*

In the waning days of the Adams administration, there was a rush to complete what came to be known the "midnight appointments," and in the confusion, Marshall, the outgoing secretary of state, failed to deliver some of the commissions of office to several of these newly confirmed appointees. 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.[2] Some years later, Jefferson explained the situation 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.[3]

As a result, in 1801 William Marbury and three others who were denied their commissions went *directly* to the Supreme Court (that is, they invoked the Court's original jurisdiction rather than beginning the case in a lower court) and asked it to issue a writ of mandamus ordering Madison to deliver the commissions. A writ of mandamus is a judicial order compelling a public official to carry

[1]Data are from the House's and Senate's websites, http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ and https://www.senate.gov/history/partydiv.htm.

[2]Historical 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 the thirty appointees received their commissions, but five—including William Marbury—did not. See Francis N. Stites, *John Marshall* (Boston: Little, Brown, 1981), 84.

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

out a legally mandated action. Marbury believed he could take his case directly 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 Supreme Court . . . shall have 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.

In this volatile political climate, Marshall, now serving as chief justice, was perhaps in the most tenuous position of all. He had been a supporter of the Federalist Party, which now looked to him to "scold" the Jefferson administration for withholding these commissions. Marshall, however, 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 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, and it comes to the secretary to be sealed, the president has done with it, and nothing remains but that the secretary perform those ministerial acts that the law imposes upon him. It immediately becomes his duty to seal, record, and deliver it on demand. 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. See, e.g., *United States v. Lawrence*, 3 U.S. 42 (1795). 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. Hence it appears there has been a legislative construction of the Constitution upon this point, and a judicial practice under it, since the formation of that government.

For Secretary of State James Madison:

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

MR. CHIEF JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

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 enquiry is,

1. 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. . . .

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:

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

2d. 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.

3d. 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, "commission all the officers of the United States." . . .

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. . . . A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry. . . .

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. 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. . . .

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,

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.

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

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. . . .

It behooves 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. . . .

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. . . .

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. . . .

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.

If this be the rule, let us enquire how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed

cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the president; the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

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 enquired 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. . . .

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 even his critics acknowledge Marshall's shrewdness. By ruling against Marbury—who never did receive his judicial appointment *(see Box 2-1)*—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.

Marbury helped to establish Marshall's reputation as perhaps the greatest justice in Supreme Court history, and it was just the first in a long line of seminal Marshall decisions. More relevant here is *Marbury*'s primary

BOX 2-1

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.

holding: that the federal courts have the power to review government actions and invalidate those that are incompatible with the Constitution.[4] In Marshall's view, such authority—the power of judicial review—while not explicit in the Constitution, fits with the Constitution's system of checks and balances and so with the framers' vision. How else could the Court ensure that the Constitution remained "the supreme Law of the Land"?

Even though universal acceptance of judicial review built only gradually during the nineteenth century,[5] Marshall's opinion makes a plausible argument, and current justices more than occasionally invoke the logic of *Marbury* to invalidate laws, as many of the cases in this book make clear. Moreover, it is not only justices serving in the contemporary era who continue to cite *Marbury* with approval.

Mx_Granger, CC0, via Wikimedia Commons

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.

[4]In *Marbury,* the Court addressed only the power to review acts of Congress. The following year, in *Little v. Barreme* (1804), the justices claimed the same power over the president. But could the Court exert judicial review over the states? According to Section 25 of the 1789 Judiciary Act, it could. Congress gave the Court appellate jurisdiction to cover appeals from a state's highest court if that court upheld a state law against challenges of unconstitutionality or denied some claim based on the U.S. Constitution, federal laws, or treaties. In *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821), the justices upheld Section 25 of the Judiciary Act.

[5]Mark A. Graber, "Establishing Judicial Review? *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51 (1998): 221–239.

Many countries, including Australia, France, Germany, Italy, and Spain, have written judicial review into their constitutions, refusing to leave its establishment to chance.

Even so, *Marbury* still prompts debates among scholars and other commentators. Table 2-1 summarizes the key points of contention, many of which will resurface in the pages to come.[6] These controversies are important because they place judicial review into a theoretical context for discussion. But the questions they raise probably never will be resolved: as one side finds support for its position, the other side always does too.

Also worthy of consideration are several questions arising from the way the Court actually has exercised the power of judicial review: the number of times it has invoked the power to strike laws and the significance of those decisions. Investigation of these issues can help us achieve a better understanding of judicial review and place it in a realistic context.[7] First, how often has the Court overturned a federal, state, or local law or ordinance? The data seem to indicate that the Court has made frequent use of the power, striking down close to fifteen hundred government acts since 1790. Many of those decisions are of recent vintage; between 1980 and 2019 the Court issued 75 decisions striking down all or parts of federal statutes and 221 invalidating state or local laws.[8] As political scientist Lawrence 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.

Second, how significant are the laws the Court strikes down? Using ***Scott v. Sandford*** (1857) as an illustration, some observers argue that the Court often strikes down significant legislation. Undoubtedly, that opinion had major consequences: by ruling that Congress could not prohibit slavery in the territories and by striking down the Missouri Compromise, even though the law had already been repealed, the Court fueled the growing divisions between the North and South, providing 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.

Some other Court opinions striking down government acts have been almost as important as *Scott*—for example, those nullifying state abortion and segregation laws, the federal child labor acts, and many pieces of New Deal legislation. But many others were minor. Consider *Monongahela Navigation Co. v. United States* (1893). In this case, the Court struck down, on Fifth Amendment grounds, a law concerning the amount of money to be paid by the United States to companies for the "purchase or condemnation of a certain lock and dam in the Monongahela River."

Despite the ambiguous record, we can reach two conclusions about the Court's use of judicial review. One is that as "important as judicial review has been, it has not given the Court anything like a dominant position in the national government."[9] The other is that the Court's *use* of judicial review may not be what is significant. Rather, like the president's ability to veto congressional legislation, its power may lie in the threat of its invocation. In either case, it has provided federal courts with their most significant political weapon.

CONSTRAINTS ON JUDICIAL POWER

Given all the attention paid to judicial review, it is easy to forget that the power of courts to exercise it and courts' judicial authority, more generally, have substantial limits. Article III—or the Court's interpretation of it—places three major constraints on the ability of federal tribunals 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). Following is a brief review of the doctrine surrounding these constraints. As you read, bear in mind that the Court serves as its own arbiter of its limits; as they do in any other area of federal law, the justices have the final word on how

[6]Some critics attack specific aspects of the ruling. Jefferson argued that once Marshall ruled that the Court did not have jurisdiction, he should have dismissed it. Another criticism is that Section 13 of the 1789 Judiciary Act—which *Marbury* held unconstitutional—did not "even remotely suggest an expansion of the Supreme Court's original jurisdiction"; Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 23. If this is so, then Marshall "had nothing to declare unconstitutional!" A counterargument is that Section 13 was seen as expanding the Court's original jurisdiction, or else why did Marbury bring his suit directly to the Court? And why did his attorney specifically note that the act was constitutional?

[7]Lawrence Baum makes this point in *The Supreme Court*, 9th ed. (Washington, DC: CQ Press, 2007), 164–170.

[8]Calculated from data in the U.S. Supreme Court Database, http://supremecourtdatabase.org.

[9]Lawrence Baum, *The Supreme Court*, 9th ed. (Washington, DC: CQ Press, 2007), 170.

Table 2-1 Major Controversies over Judicial Review

Controversy	Supporting Judicial Review	Opposing Judicial Review
Framers' Intent: Did the framers intend the federal courts to exercise judicial review?	The framers knew about judicial review. Evidence shows that the concept was adopted in England in the 1600s. Moreover, between 1776 and 1787, eight of the thirteen colonies incorporated judicial review into their constitutions, and by 1789 various state courts had struck down as unconstitutional eight acts passed by their legislatures.	Even though some states adopted judicial review, their courts rarely exercised the power. When they did, the public outrage that followed provides some indication that the practice was not widely accepted.
	The framers left judicial review out of the Constitution because they did not want to heighten controversy over Article III review, not because they opposed the practice.	The participants at the Constitutional Convention rejected the proposed Council of Revision, which would have enabled Supreme Court justices and the president to veto legislative acts.
	The framers implicitly accepted judicial review. Historians have established that more than half of the delegates to the Constitutional Convention approved of it. In *Federalist* No. 78, Hamilton argued that one branch of government must safeguard the Constitution and that the courts were best suited for that task.	
Judicial Restraint: Should unelected courts defer to the elected institutions of government?	The government needs an umpire who will act neutrally and fairly in interpreting the constitutional strictures.	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.
Democratic Checks: Are there sufficient checks on 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 Court, or remove the Court's appellate jurisdiction.	The problem with these checks, some analysts say, is that they are rarely invoked: only five amendments have overturned Court decisions, the Court's size has not been changed since 1869, and only rarely has Congress removed the Court's appellate jurisdiction.
	Although Congress rarely takes direct action against the Court, the fact that the legislature has weapons to use against the judiciary may influence the justices, who might try to accommodate the wishes of Congress rather than risk the reversal of a ruling. It is the existence of congressional threat—not its actual use—that may affect how the Court rules in a given case, which may explain why the justices rarely strike down congressional acts.	

(Continued)

Table 2-1 (Continued)

Controversy	Supporting Judicial Review	Opposing Judicial Review
Role of Courts in a Democratic Society: Do courts need the power of judicial review to protect minority interests?	The Court must have the power of judicial review if it is to fulfill its most important constitutional assignment: protection of minority rights. Because legislatures and executives are popularly elected, they reflect the interests of the majority. 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 position conflicts with the idea of the Court as a body that defers to the elected branches.
		Courts have not always used judicial review to protect minorities: some of the acts they strike down are those that harmed a "privileged class." For example, in *City of Richmond v. J. A. Croson Co.* (1989) and *Adarand Constructors v. Peña* (1995), the justices struck down programs designed to help minority interests.

Source: 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 Constitution circumscribes power. Because the Court engages in its own form of self-regulation, these limits can be quite fluid: some Courts tend toward loose construction of the rules, while others are anxious to enforce them with vigor. What factors might explain these different tendencies? Or, to put it another way, to what extent do these constraints actually 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."[10] 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 may originate in the Court; the latter are those it hears after a lower court.

To what extent does jurisdiction constrain the federal courts? *Marbury v. Madison* provides some answers, although contradictory, to this question. Chief Justice Marshall informed Congress that it could not alter the original jurisdiction of the Court. Having reached this conclusion, perhaps Marshall should have merely dismissed the case on the ground that the Court lacked authority to hear it, but that is not what he did.

Marbury remains an authoritative ruling on original jurisdiction. 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.

[10] *Ex parte McCardle* (1869).

Would the justices agree? In *Ex parte McCardle*, 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 McCardle

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.[11] Known as the Reconstruction laws, they in effect placed the region under military rule. Journalist William McCardle opposed these measures and wrote editorials urging resistance to them. 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, McCardle claimed that he was being illegally held. He petitioned the U.S. circuit court in Mississippi for a writ of habeas corpus (an order issued to determine whether a person held in custody is lawfully detained or imprisoned) under an 1867 act that enabled federal judges "to grant habeas corpus to persons detained in violation" of the U.S. Constitution. When this effort failed, McCardle appealed to the U.S. Supreme Court, which had gained appellate jurisdiction in such cases with passage of the 1867 law.

In early March 1868, *McCardle* "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 McCardle.[12] But before the justices could issue their decision, Congress, on March 27, 1868, repealed the 1867 Habeas Corpus Act and removed the Supreme Court's authority to hear appeals arising from it. This action was meant to punish the Court or to send it a strong message. In 1866, two years before *McCardle,* the Court had invalidated President Abraham Lincoln's use of military tribunals in certain areas.[13] Congress did not want to see the Court take similar action in this dispute. Congress was so adamant on this issue that after President Andrew Johnson vetoed the 1868 repealing act, the legislature overrode the veto.

The Court responded by redocketing the case for oral arguments in March 1869. During the arguments and in its briefs, the government contended that the Court no longer had authority to hear the case and should dismiss it.

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 this 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 this Court? It would cease to exist. But the Court is coexistent and coordinate with Congress and must be able to exercise judicial power even if Congress passed no act on the subject.
- This case had been argued in this Court. Congress has interfered with a case on which this Court has passed, or is passing, judgment. This amounts to an exercise by the Congress of judicial power.

For the appellee, U.S. Government:

- 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.

[11]For more information on *McCardle*, see Thomas G. Walker and Lee Epstein, "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.

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

[13]That action came in *Ex parte Milligan* (1866).

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 . . . 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 Felix 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]."[14] 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.[15] In 1962, however, Justice William O. Douglas remarked, "There is a serious question whether the *McCardle* case could command a majority view today."[16] And even Chief Justice Chase himself suggested limits on congressional power in this area. After *McCardle* had been decided, he noted that use of the exceptions clause was "unusual and hardly to be justified except upon some imperious public exigency."[17]

To this day, then, *McCardle*'s status remains an open question.[18] 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. To Douglas and other commentators, *McCardle* is something of an oddity that does not square with American traditions: before *McCardle*, Congress had never stripped the Court's jurisdiction, and since *McCardle*, Congress has taken this step only rarely and did not take it in the wake of some of the Court's most controversial decisions, such as *Roe v. Wade* and *Brown v. Board of Education*. Then there is the related argument about the separation of

[14]*National Mutual Insurance Co. v. Tidewater Transfer Co.* (1949).

[15]See 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.

[16]*Glidden Co. v. Zdanok* (1962).

[17]*Ex parte Yerger* (1869).

[18]For a review of various answers, see Tara Leigh Grove, "The Structural Safeguards of Federal Jurisdiction," *Harvard Law Review* 124 (2011): 869–940.

powers: taken to its extreme, jurisdiction stripping could render the Court virtually powerless. Would the framers have created an institution only to allow Congress to destroy it? Many scholars say no.

Justiciability

According to Article III, the judicial power of the federal courts is restricted to "cases" and "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, 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 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.[19]

Although Warren also suggested that "justiciability is itself a concept of uncertain meaning and scope," he elucidated several types of cases or characteristics of litigation that would render it nonjusticiable. In this section, we treat five: advisory opinions, collusive suits, mootness, ripeness, and political questions. In the following section, we deal with another concept related to justiciability—standing to sue.

Advisory Opinions. A few states and some foreign countries require judges of the highest court to advise the executive or legislature, when requested to do so, as to their views on the constitutionality of a proposed policy. Since the time of Chief Justice 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, there is no real controversy to resolve. The language of the Constitution does not prohibit advisory 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 the proposal on the grounds that the judiciary should have jurisdiction only over "cases of a Judiciary Nature."

The Supreme Court agreed with Madison. 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."[20] Less than a month later, in a written response sent directly to the president, the justices denied Jefferson's request:

> 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.

With these words, the justices sounded the death knell for advisory opinions: such opinions, issued outside the context of actual litigation, 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 at least in part because of its dubious constitutionality.

[19] ***Flast v. Cohen*** (1968).

[20] For the full text of Jefferson's request and the justices' response, see Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, prepared for publication from the 1958 tentative edition by and containing an introductory essay by William N. Eskridge Jr. and Philip P. Frickey (Westbury, NY: Foundation Press, 1994), 630.

Nevertheless, scholars still debate the Court's 1793 letter to Washington. Some agree with the justices' logic, but others assert that other more institutional concerns were at work—perhaps the Court was concerned about being thrust into disputes prematurely. Whatever the reason, all subsequent Courts have followed that 1793 precedent: requests for advisory opinions to the *U.S. Supreme Court* present nonjusticiable disputes.[21]

But justices have found other ways of offering advice.[22] For example, they have sometimes offered political leaders informal suggestions in private conversations or correspondence.[23] They also often give advice in an institutional but indirect manner. Justice Willis Van Devanter had a hand in drafting the Judiciary Act of 1925, which granted the Court wide discretion in controlling its docket, and 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, D-Mont., advising him that raising 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." More recent chief justices have sent annual reports on the state of the judiciary to Congress explaining not only what kinds of legislation they deemed good for the courts but also the likely impact of proposed legislation on the federal judicial system.

Finally, judges have occasionally used their opinions to provide advice to decision makers. In *Regents of the University of California v. Bakke* (1978) *(excerpted in Chapter 14)*, for example, the Court held that a state medical school's version of affirmative action—one that set aside seats in the incoming class for minority applicants—had deprived a white applicant of equal protection of the laws by rejecting him in favor of minority applicants whom the school ranked lower on all the relevant academic criteria. But, in his opinion, Justice Lewis F. Powell Jr. went beyond merely articulating the reasons why the medical school's model was invalid; indeed, he proffered the advice that the kind of affirmative action program operated by Harvard University would be constitutionally acceptable.

Collusive Suits. Justiciability also precludes collusive suits. That is, the Court will not decide cases in which the litigants (1) want the same outcome, (2) evince no real adversity between them, or (3) are merely testing the law. Why the Court deems collusive suits nonjusticiable is well illustrated in *Chicago & Grand Trunk Railway. Co. v. Wellman* (1892). At issue here was a Michigan law that set maximum passenger fares for railroad companies. On the day the law went into effect, a lawsuit was filed by a passenger who was refused a ticket at the state-mandated price. The railroad company, which wanted to charge its previously higher rate, argued that the Constitution gave the state no power to regulate railroad ticket prices. As the Michigan Supreme Court observed, however, the passenger and the railroad were actually working together, conspiring to create a lawsuit in order to challenge the law. The U.S. Supreme Court agreed and refused to rule on the validity of the regulation. As Justice David J. Brewer explained:

> The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, . . . the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not . . . . It is legitimate only in the last resort, and as a necessity in the determination by 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.

Justice Brewer's rationale is quite clear. The separation of powers does not permit those who lose in the

[21]We emphasize the Supreme Court because some state courts do, in fact, issue advisory opinions.

[22]We 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, 2006), chap. 6.

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

legislature simply to turn to courts for a different outcome by creating a lawsuit.

The Court has not always followed the *Wellman* precedent, however. Several landmark decisions were the result of collusive suits, including *Pollock v. Farmers' Loan and Trust Co.* (1895), 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 Co.** (1936) is also exemplary. Here the Court agreed to resolve a dispute over a major piece of New Deal legislation even though the litigants, a company president and the company, which included the president's father, both wanted the same outcome—the legislation to be declared unconstitutional.

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. But some analysts see it differently. The temptation to set "good" public policy (or strike down "bad" public policy), they say, is sometimes too strong for the justices to follow their own rules. Then again, some commentators argue that they should resist. 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*.

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. ***DeFunis v. Odegaard*** (1974) provides an example. Rejected for admission to the University of Washington Law School, Marco DeFunis Jr. sued the school, alleging that it had engaged in reverse discrimination because it had denied him a place but accepted statistically less qualified minority students. 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 supreme court reversed the trial judge's ruling. He then appealed to the U.S. Supreme Court. By that time, DeFunis had registered for his final quarter in school. In a per curiam opinion, 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 the well-known case of *Roe v. Wade* (1973) *(excerpted in Chapter 10)*, in which the Court legalized abortions performed during the first two trimesters of pregnancy. Norma McCorvey, also known as Jane Roe, was pregnant when she filed suit in 1970. When 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 on his own behalf, while *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, 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 enable the justices to address particular legal issues?

At the same time, when it seems clear that a decision in a case will have no practical significance, the justices do not hesitate to say so. In *New York State Rifle & Pistol Association v. City of New York* (2020), the Court granted certiorari to review a New York City rule that prohibited firearms from being transported to a second home or shooting range outside the city. The Court seemed poised to issue a new ruling on the Second Amendment right to keep and bear arms, but after the justices granted review, the state legislature amended its gun laws and allowed firearms to be taken outside of the city by its residents. The justices ruled that the case was moot, since the state had provided "the precise relief that petitioners requested."

Ripeness. Ripeness is the flip side of mootness. Whereas moot cases are brought too late, "unripe" cases are those that are brought too early. That is, under existing Court interpretation, a case is nonjusticiable if the controversy is premature—has insufficiently jelled—for review. ***International Longshoremen's Union v. Boyd***

(1954) provides an example. This case involved a 1952 federal law mandating that all aliens seeking admission into 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,

> [a]ppellants 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 explored fully, the case is not ready for the justices to hear.

Political Questions. Another type of nonjusticiable suit involves what is deemed a political question. Chief Justice Marshall stated in *Marbury v. Madison*,

> 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.

In other words, the Court recognizes that there is a class of questions the Court will not address because they are better solved by other branches of government, even though they may be constitutional in nature.

But what exactly constitutes a political question? In the case of ***Baker v. Carr*** (1962), Justice Brennan set out the following elements:

> 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.

Note that Brennan's statement contains two major prongs. First, the Court will look to the Constitution to see if there is a "textually demonstrable commitment" to another branch of government. Does the Constitution explicitly reserve the resolution of a question to Congress or the president? 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 forth come into play.

Nixon v. United States (1993) provides an example of both. The case involved a federal judge who challenged the method the Senate used to try him, after the House had impeached him. There the Court held that impeachment procedures are not subject to judicial review because, first, Article I of the Constitution assigns the task of impeachment to Congress, and, second, judicial intrusion into impeachment proceedings could create confusion. Imagine the kinds of problems that would emerge if, say, U.S. presidents could challenge their impeachment in the federal courts. Would they still be president as their case made its way through the courts or would their successor be the president? This is not a scenario for which the Court wants to take responsibility.

While *Baker* established a relatively clear doctrinal base for determining political questions, the doctrine itself remains controversial. Some commentators say that the Court has a responsibility to address constitutional questions; that failure to do so is antithetic to *Marbury v. Madison*–type review. Others, however, suggest that the federal courts should continue to avoid cases

raising political questions.[24] For their part, the justices have sometimes attempted to resolve an issue, only to conclude later that it has evaded the development of clear legal standards. Most recently, in *Rucho v. Common Cause* (2019) *(excerpted in Chapter 15)*, the Court ruled that the issue of drawing legislative districts for partisan advantage could not be resolved successfully by judges.

Standing to Sue

Another constraint on federal judicial power is the requirement that the party bringing a lawsuit have "standing to sue." Many people care a great deal about issues that might come before the Court, but having an interest in an issue does not, by itself, enable one to go to court. 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."[25]

According to the Court's interpretation of Article III, standing requires that (1) the party must have suffered a concrete injury or be in imminent danger of suffering such a loss; (2) the injury must be "fairly traceable" to the challenged action of the defendant (usually the government in constitutional cases); and (3) the party must show that a favorable court decision is likely to provide redress.[26] In general, the requirement of these three elements is designed, as Justice Brennan noted in *Baker*, "to assure . . . concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."

In many disputes, the litigants have little difficulty meeting the standing requirements mandated by Article III. 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 wish to challenge a government action on the ground that they are taxpayers or that they care about the environment? Such claims raise important questions: Does the mere fact that one pays taxes provide a sufficient basis for standing? Does one's interest in the government's treatment of natural resources entitle a person to challenge environmental policy in court?

In general, the answer is no. In addition to the three constitutionally derived requirements, the Court has articulated several prudential considerations to govern standing. Among the most prominent are those that limit generalized grievance suits—mostly those brought by parties whose only injury is as taxpayers who want to prevent the government from spending money.[27]

Constraints on Judicial Power and the Separation of Powers System

The jurisdiction, justiciability, and standing requirements place considerable constraints on the exercise of judicial power. Yet these doctrines come largely from the Court's own interpretation of Article III and its view of the proper role of the judiciary—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 2-2)*. 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.

[24]One illustration of this debate occurred in ***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 "Jerusalem, Israel" as the place 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 lower courts dismissed the case, holding that it presented a nonjusticiable political question. They reasoned 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. Eight of the nine justices disagreed, explaining that the political question doctrine is a "narrow exception" to the basic rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" In dissent, Justice Stephen Breyer argued that the Court should dismiss the case on political question grounds because of the "serious risk that intervention will bring about 'embarrassment,' show lack of 'respect' for the other branches, and potentially disrupt sound foreign policy decisionmaking."

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

[26]See, for example, *Lujan v. Defenders of Wildlife* (1992), which lays out these three elements. See also ***Raines v. Byrd*** (1997), which defines an injury relevant for redress from the Court as personal rather than institutional.

[27]The exception, based on the establishment clause, is quite narrow. See *Flast v. Cohen* (1968) and ***Hein v. Freedom from Religion Foundation, Inc.*** (2007).

BOX 2-2

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."

It would be a mistake, however, 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. Congress could pass statutes or propose constitutional amendments to counteract decisions of the Court. The legislature might also alter the Court's appellate jurisdiction or fail to provide the Court with its requested levels of funding; and the political branches might react by being slow to implement and enforce Court rulings. Even the mere threat of such actions can get the Court's attention. Finally, the president and the

Senate could use their powers in the judicial selection process to fill Court vacancies with new justices whose views on judicial power are more consistent with their own.[28]

[28]See, for example, Tom Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2010); Gerald N. Rosenberg, "Judicial Independence and the Reality of Judicial 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.

The justices are fully aware that the president and Congress can 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.

ANNOTATED READINGS

For studies of judicial power, consult the citations in the footnotes in this chapter. Here we only wish to highlight several interesting books that explore 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: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962); Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: 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); 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); Philippa Strum, *The Supreme Court and Political Questions* (Tuscaloosa: University of Alabama Press, 1974); and Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

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: PublicAffairs, 2010).