CHAPTER 1

Welcome and Overview

Welcome to Con Law! For many of you, this is what you’ve always dreamed of. This is what law school is supposed to be about: big issues, difficult questions, and noble debates. Maybe you even took a class called Constitutional Law in college. But to many others, this is the nightmare of what law school is like: unfamiliar terminology, all full of jargon, extensive history, and convoluted political science, all of which may be new or foreign to you, the Econ, English or Chemistry major. Well, to all of you I say, throw away your preconceptions, because this class is not what you expected. It is a wonderful course, and it is a hard course. Some of it will feel as familiar as seventh grade civics, and some will feel as foreign as another language. But either way, it is all manageable.

Writing this Short & Happy Guide has been lots of fun. But I also have to say that it has been very challenging. Teaching Con Law is my joy, my passion—I am very lucky to have a job that I love so much. But one thing I love about teaching Con Law is that typically it is not short, and not conducive to being reduced to easy rules. It is very philosophical, and a class where we spend a lot of time thinking about the law, and what it ought to be. It contrasts with

other classes where every day you are taught clear-cut rules, like Property and Contracts. More to the point, the various courses in your first year or so are meant to complement each other. Con Law is the place where you spend time in discussion, ask a lot of questions about why, and receive fewer concrete rules, frameworks, and three-part tests. You will still get some of that, but the focus is different. So the point is, I find Con Law to be a very happy subject, but the discussions aren’t always so short.

Let me tell you some of the ways and reasons why Con Law distinguishes itself, both in law school and here in this book.

The most obvious difference is our starting point, the Constitution of the United States of America. On the first day of class I always give each student a pocket Constitution. In a way, that document is all you need (but not really). That’s all we are interpreting. It’s not a statute; it’s not the Model Penal Code; it’s not the Uniform Commercial Code; it’s the charter of existence of our nation, and the basis for this entire class.

But of course, it’s 200+ years old, written by a bunch of long-dead white men who lived in a society that was radically different from the one we live in today, in terms of the people, the customs, the language and more. But something about the Constitution endures. It is our beginning point. And inevitably it must be interpreted, in the constant quest “to form a more perfect Union.” Perhaps it evolves, as Justice Stephen Breyer suggests (but a characterization with which the late Justice Antonin Scalia disagreed). Some read it more broadly and others more narrowly. It is at once steady and static. However we do it, we read the Constitution and try to decipher its meaning and application.

Every day in Con Law we discuss the Constitution itself, but also we read Supreme Court decisions. The daily grind of Con Law involves constant reading and re-reading these opinions written over the past 200+ years. These decisions are written by people who have devoted themselves to the exercise of constitutional interpretation, but who don’t always agree on the way to carry out that exercise or on the conclusions that exercise elicits. So as we read casebooks, we see majority opinions. But we also see concurring and dissenting opinions. Sometimes there’s not even a majority, so we see a plurality. Only rarely do we read unanimous opinions—there is always a range of ways to answer the questions put before the court. That is all very interesting, but it means that we have few short rules and more long discussions.

So, when I wrote the first edition, I thought to myself, how can I make this short and happy? The Happy is easy—I’m that kind of person who truly enjoys reading such opinions; since you are in law school I’m sure you do too! In terms of the Short, I have a basic method for how I present the material. I start with a basic discussion of legal principles and cases. But this is not a treatise, textook or casebook. I expect that you will be reading your casebook, and you will be taking the time to brief cases, etc. After the discussion of the case, principle, etc., I will ask (and answer), What’s the takeaway? That will be my way of presenting something essential about the case—maybe a three-part test, maybe one clear rule, but maybe something more abstract. And then, I will ask (and answer). Why do we read and discuss this? That why is the meat of Con Law. The cases themselves provide lots of ideas and opinions, and there is rarely one right answer. So the key thing for you is to know what the various perspectives are as presented in the different opinions; but you also need to know what’s really behind it all. What does this case say about the role of the Court, for example; or why do the Justices interpret the Constitution in one manner or another. So, I will ask the why question, and I hope that in addition to reading my answer, you will challenge my perspective and also start to think about your own. (And when you are done reading this, let me know what you think—give me your feedback on how to keep it short and happy and helpful: email me at dean@law.villanova.edu.)

With that said, let’s move forward, and I hope you enjoy this Short & Happy Guide to Constitutional Law.

First, in terms of the substance, there are two major divisions in Con Law: the structural side and the individual rights side. Many schools combine the two into one very big course, like a sort of double-course in one semester, or running over a full year. My discussion, as is typical in most schools, starts with the structural side of Con Law. That will encompass the following broad areas and topics:

- The judicial function in constitutional cases—the who, what, when, where, and why of the Court’s role in constitutional adjudication.
- The government’s various branches and their powers to regulate national affairs.
- The interaction between the states and the federal system.
- The Commerce Clause, the central source of congressional power.
- Specific provisions of the Constitution that define other powers of the branches of government.

Separation of powers.

After that, we will look at individual rights, and

- Due Process, and Privacy Rights.
- The Equal Protection Clause.

So let’s get started.
A. Judicial Review

We start by discussing the nature and sources of the Supreme Court’s authority. This chapter will begin by examining the limitations on the decision-making power of the court that is most important for our study in Con Law—the United States Supreme Court. It is important to remember that the Supreme Court is very powerful—an unchallenged authority in the country today. But it hasn’t always been that way. Now we take a moment to reflect on that underlying assumption. In *Marbury v. Madison* (1803) (Marshall), it is a key case, because it is the foundation for judicial review in America. But it is as tough a first case to read as any, so don’t despair—it’s tough for everyone. The opinion itself is dense, confusing, and difficult. My job is to help you push through that—in a short and happy kind of way.

There’s a lengthy background to this case, and I will try to cover it concisely. We begin in 1801, when there was great tension between the two reigning political parties—the Federalists (outgoing President Adams) and the Republicans (incoming)

President Jefferson). Before leaving office, the Federalists tried to entrench their power and their political philosophy by adding a number of judgeships. Marbury was one of the newly-appointed judges, but his commission was not delivered before Jefferson took office, and as a result Marbury was denied his post. Marbury then sued Madison (who was now in charge of these commissions) to get his commission. Marbury sought a writ of mandamus (a court order compelling a government officer to perform a duty) from the U.S. Supreme Court compelling Madison to deliver the commission. The grounds for Marbury’s claims rested on the Judiciary Act of 1789. This Act tried to expand the original jurisdiction (basically, where you first file your case—a concept usually covered in Civil Procedure) of the Court to authorize it to issue writs of mandamus to executive officers, a power not granted to the Court in the Constitution. However, Marbury did not get his writ from the Court. Madison (and therefore Jefferson) won.

The Court ruled against Marbury, holding that it could not issue the writ of mandamus he wanted. More specifically, the Court declared that it lacked jurisdiction to grant mandamus because it did not have original jurisdiction. The Court held the Judiciary Act, which purportedly gave the Court original jurisdiction, to be unconstitutional and therefore void and unenforceable. In getting to its answer, the Court posed and answered three questions to frame the analysis:

1. Did Marbury have a right to the commission? Yes, having been appointed to the position, he had a right to the commission, even if it wasn’t delivered in a timely fashion.
2. If he had a right that had been violated, was there a remedy? Yes, as a general matter, a right without a remedy is meaningless, and in a nation of laws deprived of rights of its citizens must be redressed. In this specific instance, the law (the Judiciary Act of 1789) furnished a remedy for these violations.
3. Was a writ of mandamus from the Court appropriate? Was this within the Court’s power? The Court said this could be a case that called for the writ described by law to be issued. So the writ may have been the right remedy, but could the U.S. Supreme Court issue it? No, Marbury got no relief.

What's the takeaway? Marbury establishes that the judicial branch and the Supreme Court have the sole responsibility to weigh the constitutionality of laws. If Marbury had a right that was violated. In our nation of laws, violated rights are remediable. The Judiciary Act authorized the Court to issue writs of mandamus to executive officers, but that law conflicted with the Constitution. What to do with that conflict? The Court responded: a law which is repugnant to the Constitution is void. It is the Court’s duty and power to make such declarations. No writ.

Why do we read and discuss Marbury? Marbury sets the foundation for understanding the basic role of the Court going forward in Con Law. The core problem in the case is that Article III, Section 2 sets forth a limited set of categories in which the original jurisdiction of the Supreme Court may be exercised. In all other cases the Court has appellate jurisdiction. Marbury is not a case where original jurisdiction is proper, and yet it was not brought pursuant to the Court’s appellate jurisdiction. That’s a problem, when a statute conflicts with the Constitution. So what happens? The Court voids the statute. This is cleverly done by Chief Justice Marshall, maybe even a genius move.

Before reading Marbury, you probably assumed that there was only one way to look at this: a law in violation of the Constitution is not acceptable. Today the term “unconstitutional” is synonymous with invalid or void. But in the early days of the nation, that proposition had not been established. And that is one of the reasons that this opinion is so difficult to read and understand today. It explores an issue that we consider to be long settled, something that is so much a part of the fabric of our nation that it goes without saying. Because this idea is so fundamental to Constitutional Law, it is easy to overlook that it even had to be discussed at that time. But that is also why this case is so important and why we read and discuss it on the first day of class. We are trying to determine the proper role of the judiciary in our constitutional system, and this case (and course) examines those most fundamental questions.

(Having said that, there’s more to discuss. This will still be as short and happy as possible, but just know that this case takes longer than most—but I will reduce it down as much as possible.)

*How does the Court decide whether the statute or the Constitution reigns supreme?* Chief Justice Marshall clearly established the supremacy of the Constitution and that to hold otherwise would “reduce[,] to nothing what we have deemed the greatest improvement on political institutions—a written constitution.” His conclusion is that—as we all have for so long believed—a law repugnant to the Constitution is void. We know that, but stop for a minute. This principle hadn’t been established back then, in the earliest days of our nation. So this was really huge.

But that is not the end of the inquiry, and in fact, this is where the most revolutionary part of the opinion kicks in. Who is to decide whether a law is repugnant to the Constitution, and therefore void? The Judicial Branch—found in Article III. This most-cited part of the whole opinion helps us understand why courts can do this: “It is emphatically the province and duty of the judicial department to say what the law is.” You probably thought the answer was obvious.
before coming to law school, but it was not so clear 200+ years ago. We are exploring the most fundamental issues of scope of judicial authority under Constitution.

Stop for a moment and ask yourself, Why? Seriously. Stop. Ask Why?

Do you have an answer yet?

There is no express judicial review provision in the Constitution, so we cannot find a definitive answer there. Instinctively, at least today, it makes sense to us. But the big point here—and why we read and discuss Marbury at great length—is that back then, this was all new. We assume it now, so it almost doesn’t make sense that we have to read it (which is also why it is a hard case to read). In the end, Marbury declares that the judiciary, or more specifically the U.S. Supreme Court, has the power and the duty of judicial review—to declare laws void. We read and discuss it at such length to carefully consider this state of affairs, and to lay the foundation for what follows.

Here’s one final key point. Chief Justice Marshall could have avoided the question of judicial review in several ways. For example, he could have reversed himself, given his (and his brother) intimate involvement with this case. Or, there was an alternate route based on statutory construction; Marshall could have read the Judiciary Act differently, to say it merely conferred mandamus power in appellate cases. If so, then the proper course would have been to dismiss for lack of jurisdiction, since it was not an appeal. Or he could have read the statute as providing for mandamus as applicable in original jurisdiction, which again would have led to dismissal for lack of jurisdiction. A different common law interpretation could have changed the decision too, as Marshall could have held that the common law right to a commission vests upon delivery, so Marbury had no right to the commission. Or, this could have easily been found to be a political question (more on the

10

Political Question Doctrine coming in the next chapter), out-of-bounds for the judicial branch. One last option to mention: as a matter of constitutional construction, Marshall could have read the enumeration of cases in which Court has jurisdiction as a floor, rather than a ceiling. In that case, the expanded authority set forth in the Judiciary Act would have been within congressional power to expand the Court’s jurisdiction. However you slice it, using these or other avenues, Chief Justice Marshall could have avoided creating such a big moment.

Given that he could have avoided answering this important question, the question remains: Why didn’t he do so? Marshall knew he was walking a fine line. If he ruled in favor of Marbury, then President Jefferson likely would have defied the Court order, throwing the young Court into a much weaker position. This was a power grab. At the time, constitutional judicial review was not new; it had to be established. In Marbury v. Madison, Chief Justice Marshall found the occasion, establishing judicial review while declaring unconstitutional a statute that arguably increased Court’s powers. Politically and practically speaking, Marshall had no choice but to deny Marbury relief. He did more than that. He gave a “victory” on the result to Jefferson and his Republican allies, while strengthening the Court’s power as an institution. Chief Justice Marshall used Marbury v. Madison to establish judicial power, and to articulate a powerful role for the federal courts—a role that has survived for nearly two centuries. (That was a lot, but I promise, it gets more short and happy from here going forward!)

Marbury established the Court’s power today to review the constitutionality of federal executive actions and statutes. However, the question of the Court’s authority to review state court decisions still remained. As we know today, the U.S. Supreme Court has the ultimate authority to review state court interpretations of the Constitution, but that proposition had not

been established two centuries ago. Martin v. Hunter’s Lessee (1800) (Story) established the Court’s authority in this area. Martin involved two conflicting claims to own land within the state of Virginia. Martin claimed title based on an inheritance from Lord Fairfax, a British citizen who apparently had owned the property. On the one hand, the United States and Great Britain had entered into two treaties protecting the rights of British citizens to own land in the U.S. On the other hand, Hunter claimed that Virginia had taken the property before the treaties came into effect, and therefore Martin did not have a valid claim to the land. Resolving the questions depended on the interpretation of the treaties—a question of federal constitutional law.

The case was first heard by Virginia courts. The Virginia Court of Appeals ruled in favor of Hunter and, in essence, in favor of the state’s authority to have taken the land. The U.S. Supreme Court reviewed and reversed the Virginia Court, holding that the federal treaty was controlled. In their view, Martin won.

As we think of things today, that Supreme Court ruling should have been the end of it. But here’s the problem. In response, the Virginia Court of Appeals declared that the U.S. Supreme Court lacked the authority to review state court decisions. You may be thinking to yourself, What? State courts can’t do that. Go back 200 years, and it wasn’t perfectly clear, which is why this case (like Marbury) is hard to fully comprehend the first time through. After the Virginia courts defied the first U.S. Supreme Court ruling, the U.S. Supreme Court again reviewed and explicitly asserted their power to review state court decisions of federal constitutional questions.

This point has been subsequently reemphasized a number of times in the Court’s history, including from a unanimous Court in the 1954 decision in Cooper v. Aaron. In the immediate aftermath of Brown v. Board of Education (1954), U.S. District Courts ordered

the desegregation of public schools across the country, including in Little Rock, Arkansas. The state disobeyed that order. In part based on a claim that it was not bound to comply with federal judicial desegregation decrees; they argued that states had the right to determine the meaning of Equal Protection under the U.S. Constitution and that they didn’t see that it required integrated schools. Each Justice individually signed the opinion that held: “Article VI makes the Constitution the supreme Law of the Land. (Marbury)! declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” This decision stressed the main conclusion from Martin, and we can imagine the consequences—what if states didn’t have to follow what the U.S. Supreme Court had said in Brown? It is a principle that we have long taken for granted, but it was first established back in Martin.

Think about the movies you may have seen about the Civil Rights era, like Mississippi Burning, In the Heat of the Night, maybe even HairSpray. Our nation was in a struggle, in large part with states that opposed integration and a command from society and the courts that society should be integrated. The decisions in those cases make clear that the federal courts’ view of the U.S. Constitution (as definitively expressed by the Supreme Court) ultimately trumps—that opinion is the final word on the subject.

What’s the takeaway? Again, we see something that you probably assumed to be true before you started law school. The U.S. Supreme Court is the final arbiter, the ultimate decision-maker on the U.S. Constitution—it has knowledge and expertise

13

to be. And its word trumps state court interpretations of the U.S. Constitution.
Why do we read and discuss *Martin v. Hunter's Lessee*? It reaffirms the basic power of the Court, and several key points help explain the reasoning in this case:

- **State loyalty.** State courts cannot be trusted to adequately protect federal rights. State court judges might be more loyal to their state and its constitution, and the state’s judges and policies might obstruct federal law. The Court has ruled that state courts must be neutral in enforcing federal laws.

- **The Supremacy Clause.** The U.S. Constitution is the supreme legal document (Art. VI, cl. 2) and cannot be subordinated to state charters.

- **Uniformity.** The U.S. Supreme Court's final and exclusive review can ensure uniformity in the interpretation of federal law throughout the nation. Multiple declarations and interpretations only confuse matters.

One last quick point on the flip side of the Martin coin: There are corresponding limitations on U.S. Supreme Court review of state court decisions. The U.S. Supreme Court has jurisdiction to review state court determinations of federal law, but not to review state court determinations of state law. In *Michigan v. Long* (1986), the Court emphasized the rule that if adequate and independent state grounds exist for a state court ruling, then the U.S. Supreme Court usually will not hear the matter. Our federalist system is built on respect and independence for both the state and federal courts; if the U.S. Supreme Court were to tell state high courts what to do regarding state laws, it would disrespect that division. The Nine in Washington do not have a superior expertise or ability to interpret state constitutions, even if a provision is seemingly identical to one in the U.S. Constitution.

**B. Federalism Broadly**

The United States of America is not a purely centralized nation-state, nor is it a loose confederation of independent sovereign entities. The Constitution was designed to replace the weak national government of the Articles of Confederation with a stronger federal government, while still maintaining a strong role for states. *Marbury v. Madison* (1803) (Marshall). The case presented concerns whether Maryland could collect a tax from the Bank of the United States. To provide some background, there’s an ongoing story that spanned over 23 years of fighting between Congress and the Executive Branch over whether Congress had the authority to create the Bank of the United States. This dispute, as in *Marbury*, pitted Federalists, who strongly favored creating the Bank, against Republicans, who opposed it. Ultimately, Congress created the Bank. After a couple of decades, with the economy in poor health, the Bank attempted to collect on many outstanding loans that were owed by the states. This move by the national government angered many state governments. Some states, including Maryland, reacted by enacting laws prohibiting the national Bank’s operation within the state and by imposing significant taxes on the Bank. The Bank in turn refused to pay the tax, so Maryland responded by suing the Bank. In the end, Chief Justice Marshall construed federal congressional powers broadly and limited the authority of State governments to impede the federal government.

Chief Justice Marshall considered two questions: First, *Does Congress have the authority to create the Bank?* Yes. Most notably, Marshall observed that the Constitution gives Congress broad powers pursuant to Article I. While the Constitution does not enumerate a specific power to create a Bank of the United States, that was not dispositive—it did not resolve the question. The Constitution thus allowed for greater congressional powers, with the opinion observing that while there are some specific enumerated congressional powers, no constitution can describe and anticipate all the possible tools necessary for the job at hand: “In considering this question, then, we must never forget that it is a constitution we are expounding.”

The Court held that Congress is not limited to those acts specified in the Constitution; Congress may choose any means, not prohibited by the Constitution, to carry out its lawful authority. If Congress could only do exactly what is stated in the Constitution, paralysis would grip the national government. The Necessary and Proper Clause (Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,” or in any Department or Officer thereof) gave Congress the power to enact the Bank.

The second question was, *is the Maryland tax on the Bank constitutional?* No. This was dispositive. In answering, the opinion staked out powerful territory for the federal government, and consequently, restricted state power. The central premise was that the Constitution controls the laws of the states, and not vice versa.

From this followed three key points:

1. A power to create implies a power to preserve; thus the federal government can create the Bank, and it may take steps to protect it;
2. A power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve; thus there is a conflict between the federal action and the state’s reaction; and
3. Where this repugnancy exists, that authority which is supreme must control and not yield to that over which it is supreme; thus the Bank must stand, and the Maryland tax must fail.

What’s the takeaway? Supremacy. The Court struck a strong position in favor of the power of the federal government in holding that the national government is supreme over states. And correspondingly, the Court held that the states lack authority to negate federal actions, such as by imposing taxes or regulations on the federal government. The Maryland tax was unconstitutional.

The takeaway in this case really just sets up the question: *Why do we read and discuss *McCulloch*?* First, there’s a point about constitutional interpretation. Chief Justice Marshall read the great document broadly, so as to effectuate a bigger purpose. And it didn’t stop there. As with *Marbury*, this case is another power grab, articulating a broad vision of federal power, specifically.
Increasing the power of the national government at the expense of the states. Though the Constitution does not enumerate a specific power to create a Bank of the United States, the Court looked more broadly at the meaning behind the document, rather than its explicit enumerations. As Marshall engaged in a close reading of the text of the Articles of Confederation and the Constitution, he focused on very particular points of the use of the term “delegated” to argue for greater congressional powers under the constitutional schema. Most importantly, he observed that while there are enumerated congressional powers, no constitution can describe and anticipate all the possible tools necessary for the job at hand. As noted above, in one of the most famous lines in Con Law, Justice Marshall wrote: “In considering this question, then, we must never forget that it is a constitution we are expounding.”

Meaning? The Constitution is fundamentally distinct from and must be read and interpreted differently than a statute. First, read the Constitution and its goals. Congress should then find the means that best fit those ends. Congress is not limited to those acts specified in the Constitution; Congress may choose any means not prohibited by the Constitution to carry out its lawful authority. This is the biggest part of the power grab: expanding the power of Congress. Any limits are found in the Necessary and Proper Clause (Art. I, Sec. 8, final clause). The Court holds that the Bank is constitutional because it was enacted pursuant to congressional authority found in the Necessary and Proper Clause. So while Congress has room to carry out certain ends, there are some limits on the means chosen. “Let the end be legitimate, let it lie within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional.” And ultimately, Marshall reaffirms Marbury: the judiciary can and will review the constitutionality of federal laws, keeping a check on that power.

One last reason why we read and discuss McCulloch is to firmly introduce federalism into the course and in particular to weigh some of the advantages of a relatively strong national government, as compared to the advantages of a system of relatively strong state governments.

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2. Id. at 137.
7. Id. at 407.
8. Id. at 412.
§1.5 WHO SHOULD BE THE AUTHORITATIVE INTERPRETER OF THE CONSTITUTION?

The Issue

Regardless of the method of interpretation, who should interpret the Constitution? The correct answer is that all government officials and institutions are required to engage in constitutional interpretation. All elected officeholders take an oath to uphold the Constitution. Therefore, legislators — federal, state, and local — are obliged to consider the constitutionality of bills before ratifying them. The executive must consider constitutionality in deciding what laws to propose, which bills passed by the legislature to veto, and what executive policies to implement. Ever since *Marbury v. Madison*, the judiciary has had the authority to review the constitutionality of laws and of executive acts. So the real question is not who should interpret the Constitution but, more specifically, who should be the authoritative interpreter of the Constitution? When there is a disagreement over how the Constitution should be interpreted, who resolves the conflict? This is an issue that arises in many ways throughout the book.

Approach 1: No Authoritative Interpreter

There are three possible answers to the question of who should be the authoritative interpreter of the Constitution. One approach is for no branch to be regarded as authoritative in constitutional interpretation. Each branch of the government would have equal authority to determine the meaning of constitutional provisions, and conflicts would be resolved through political power and compromise. If Congress and the president believe that a law is constitutional, they could disregard a judicial ruling of unconstitutionality. If the president believes a law to be unconstitutional, he or she could refuse to enforce it, notwithstanding declarations of its constitutionality from the legislature and judiciary.

This approach to constitutional interpretation finds support early in United States history from presidents such as Thomas Jefferson and Andrew Jackson. Jefferson wrote:

>[N]othing in the Constitution has given . . . [the judges] a right to decide for the Executive, more than the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch.

Similarly, in vetoing a bill to recharter the Bank of the United States, President Andrew Jackson declared:
The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point, the President is independent of both.3

In the 1980s, Attorney General Edwin Meese took exactly this position. Meese challenged the view that the judiciary is the ultimate arbiter of constitutional questions and argued that each branch has equal authority to decide for itself the meaning of constitutional provisions.4 Meese remarked: “The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution — the executive and legislative no less than the judicial — has a duty to interpret the Constitution in the performance of its official functions.”5 More recently, advocates of “popular constitutionalism” have criticized what they regard as “judicial supremacy.”6 Although these terms are not defined with precision, a core aspect is to challenge the Court as ultimate arbiter of the meaning of the Constitution.2

**Approach 2: Each Branch Is Authoritative in Certain Areas**

A second approach to the question of who is the authoritative interpreter of the Constitution is that for each part of the Constitution one branch of government is assigned the role of being the final arbiter of disputes, but it is not the same branch for all parts of the Constitution. Thus, each branch would be the authoritative interpreter for some constitutional provisions. Because the Constitution does not specify who should interpret the document, some institution would need to allocate interpretive authority among the branches of government.

Arguably, the second approach is the one that best describes the current system of constitutional interpretation. The judiciary has declared that certain parts of the Constitution pose political questions and are matters to be decided by branches of government other than the courts.4 For example, the courts frequently have held that challenges to the president’s conduct of foreign policy — such as whether the Vietnam War was constitutional — pose a political question not to be resolved by the judiciary.9 By declaring a matter to be a political question, the Court states that it is for the other branches of government to interpret the constitutional provisions in question and determine whether the Constitution is violated. The effect of the political question doctrine is that for each part of the Constitution there is a final arbiter, but it is not the same branch for all constitutional provisions.

**Approach 3: The Judiciary Is the Authoritative Interpreter**

A third and final approach is to assign to one branch of government final authority for all constitutional interpretation. Although every governmental institution interprets the Constitution, one branch is assigned the role of umpire; its views resolve disputes and
are final until reversed by constitutional amendment. Arguably, Marbury v. Madison endorses this approach in Chief Justice John Marshall’s famous declaration: “It is emphatically the province and duty of the judicial department to say what the law is.” Similarly, in United States v. Nixon, the Supreme Court held that it was the judiciary’s duty to determine the meaning of the Constitution. In rejecting the president’s claim that it was for the executive to determine the scope of executive privilege, Chief Justice Warren Burger, writing for the Court, stated: “The President’s counsel . . . reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison that ‘it is emphatically the province and duty of the judicial department to say what the law is.’ ”

But Marbury and Nixon also can be read as ambiguous and as not resolving the question of which of these three approaches is preferable. Marbury could be read narrowly as holding only that the Court is the final arbiter of the meaning of Article III of the Constitution, which defines the judicial power. The specific issue in Marbury, which is discussed in §2.2, is whether a section of the Judiciary Act of 1789 is consistent with Article III of the Constitution. Accordingly, Marbury could be interpreted, consistent with the second approach described above, as assigning to the judiciary only the responsibility for interpreting Article III.

In fact, Marbury even could be seen as consistent with the first approach, that there is no final arbiter of the meaning of the Constitution. By this view, Marbury simply holds that the judiciary may interpret the Constitution in deciding cases — it is one voice — and that it is not required to defer to legislative or executive interpretations. Marbury, according to this argument, says nothing about whether other branches of government are bound to follow the Court’s interpretation. Chief Justice Marshall’s declaration could be understood as emphatically declaring that courts do have a voice.

Likewise, United States v. Nixon could be viewed as a limited ruling that the judiciary has the final word in cases raising the question of access to evidence necessary for criminal trials. The Court in Nixon emphasized the judiciary’s special role in ensuring fair trials. Thus, the case could be seen as holding only that the Court is the final arbiter in matters relating to the judiciary’s powers under Article III.

Like the debate over the method of constitutional interpretation, there is no definitive answer to the question of who should be the authoritative interpreter of the Constitution. There is an obvious benefit to having a single institution — the judiciary — resolve disputes. The federal judiciary, with its greater insulation from majoritarian politics, is arguably best suited to interpret and enforce the antimajoritarian American Constitution. But there is also value in allowing each institution to decide for itself the meaning of the Constitution, or in allowing each branch a realm where it is the final arbiter of the Constitution’s meaning. The anti-majoritarian nature of the federal judiciary is seen by some as a reason to restrict its role.

Although this issue does not often arise explicitly, it underlies many constitutional issues. For example, should there be a political question doctrine where the interpretation of particular constitutional provisions is left to the political branches of government, or should the judiciary decide these questions? Can Congress use its power to create “exceptions and regulations” to the Supreme Court’s appellate jurisdiction to attempt to change the law, such as by keeping the Court from hearing challenges to state abortion
laws? Can Congress use its powers under §5 of the Fourteenth Amendment to enact laws that interpret the amendment differently from the Supreme Court and thus effectively overrule Supreme Court decisions? All of these issues require consideration of who is the authoritative interpreter of the Constitution.
Article III of the Constitution, a substantial departure from the Articles of Confederation, created the federal judiciary and defines its powers. The Confederation Congress had very limited authority to create courts, and the only national court established under the Articles was the Court of Appeals in Cases of Capture. This court existed for admiralty cases, specifically for instances in which American ships seized vessels, termed “prizes,” belonging to enemy countries. The Confederation Congress also had the authority to establish courts to punish piracies, but this power was immediately delegated to the states and never exercised at the national level.

The Constitutional Convention recognized the need for a federal judiciary and unanimously approved Edmund Randolph’s resolution “that a National Judiciary be established.” Article III covers seven important topics concerning the federal judiciary.

First, the initial words of Article III — “the judicial Power of the United States shall be vested” — created a federal judicial system. Although there was substantial disagreement about the appropriate structure and authority of the federal courts, there was consensus that a national judiciary was necessary.

Second, Article III vests the judicial power “in one supreme Court and in such inferior courts as Congress may from time to time ordain and establish.” A major dispute at the Constitutional Convention was whether lower federal courts should exist. The Committee of the Whole, echoing resolutions offered by Randolph, proposed that there should be both a Supreme Court and inferior courts. This proposal drew strong opposition from those who thought that it was unnecessary and undesirable to create lower federal courts. Opponents of lower federal courts argued that state courts, subject to review by the Supreme Court, were sufficient to protect the interests of the national government. Furthermore, lower federal courts were perceived as an unnecessary expense and a likely intrusion on the sovereignty of state governments.

But others expressed distrust in the ability and willingness of state courts to uphold federal law. James Madison stated: “Confidence cannot be put in the State Tribunals as guardians of the National authority and interests.” Madison argued that state judges were likely to be biased against federal law and could not be trusted, especially in instances where there were conflicting state and federal interests. Appeal to the Supreme Court was claimed to be inadequate to protect federal interests because the number of such appeals would exceed the Court’s limited capacity to hear and decide cases.

Thus, the question of whether state courts are equal to federal courts in their willingness and ability to uphold federal law — an issue that continues to be debated and that influences a great many aspects of the law of federal jurisdiction — has its origins in the earliest discussions of the federal judicial power. The proposal to create lower federal courts was initially defeated, 5 votes to 4, with two states divided.
Madison and James Wilson then proposed a compromise. They suggested that the Constitution mandate the existence of the Supreme Court, but leave it up to Congress to decide whether to create inferior courts. Their proposal was adopted by a vote of eight states to two, with one state divided.\textsuperscript{8} Congress, in its first judiciary act in 1789, established lower federal courts, and they have existed ever since.

Third, Article III ensures the independence of the federal judiciary by according all federal judges life tenure, “during good Behaviour,” and salaries that cannot be decreased during their time in office.\textsuperscript{9} A crucial lasting difference between federal and state court judges is the electoral accountability of the latter. In 39 states, voters elect trial or appellate judges at the polls.\textsuperscript{10} Some contend that this makes federal courts uniquely suited for the protection of constitutional rights.\textsuperscript{11}

Fourth, Article III, §2, defines the federal judicial power in terms of nine categories of “cases” and “controversies.” These nine categories fall into two major types of provisions. One set of clauses authorizes the federal courts to vindicate and enforce the powers of the federal government. For example, federal courts have authority to decide all cases arising under the Constitution, treaties, and laws of the United States. Additionally, the federal courts have authority to hear all cases in which the United States is a party. The federal government’s powers in the area of foreign policy are protected by according the federal courts authority to hear all cases affecting ambassadors and other public ministers and consuls; to hear all cases of admiralty and maritime jurisdiction; and to hear cases between a state, or its citizens, and a foreign country, or its citizens.

A second set of provisions authorizes the federal courts to serve an interstate umpiring function, resolving disputes between states and their citizens. Thus, Article III gives the federal courts the authority to decide controversies between two or more states, between a state and citizens of another state,\textsuperscript{12} between citizens of different states, and between citizens of the same state claiming land in other states.

The fifth major topic covered in Article III is the allocation of judicial power between the Supreme Court and the lower federal courts. Article III states that the Supreme Court has original jurisdiction over 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 is granted appellate jurisdiction, both as to law and fact, subject to “such Exceptions and under such regulations as Congress shall make.”

The Supreme Court has held that Congress can give the lower federal courts concurrent jurisdiction, even over those matters where the Constitution specifies that the Supreme Court has original jurisdiction.\textsuperscript{13} Under contemporary practice, the Supreme Court’s original jurisdiction is limited to disputes between two or more states.\textsuperscript{14}

Sixth, Article III prescribes that the trial of all crimes, except in cases of impeachment, shall be by jury. Furthermore, it requires that the trial shall occur in the state where the crime was committed.

Finally, Article III provides that treason shall consist only in “levying war” against the United States or giving aid or comfort to the enemy and that no person shall be convicted of treason except on testimony of two witnesses or confession in open court. Article III concludes by stating that Congress has the power to prescribe the punishments for
treason, but that “no Attainder of Treason shall work corruption of blood, or Forfeiture during the Life of the Person attained.” In other words, the traitor’s heirs and descendants may be punished only for their own wrongdoing.

**Authority for Judicial Review**

Interestingly, Article III never expressly grants the federal courts the power to review the constitutionality of federal or state laws or executive actions. Perhaps the silence reflects the shared understanding that courts possess the authority for constitutional review and it was thought unnecessary to enumerate this. Perhaps the silence reflects a failure to consider the issue in drafting the Constitution or even the assumption that courts would not have this authority. Courts would exist, as is the case in Great Britain, to hear civil and criminal cases, but not to declare unconstitutional government actions.

There were proposals at the Constitutional Convention to create a Council of Revision, composed of the president and members of the national judiciary. The Council of Revision would have reviewed “every act of the National Legislature before [it went into effect].”¹⁵ The proposal was defeated every time it was raised. Opponents successfully argued that it was undesirable to involve the judiciary directly in the lawmaking process.

³⁸

There have been 200 years of debate as to whether the rejection of the Council of Revision also was an implicit rejection of the power of the federal courts to declare statutes unconstitutional.¹⁶ Professor Henry Monaghan cogently remarked that it is “increasingly doubtful that any conclusive case can be made one way or the other.”¹⁷

However, from the earliest days of the country, the Supreme Court has claimed the power to review the constitutionality of federal and state laws and executive actions. Section 2.2 reviews the seminal cases. Section 2.2.1 focuses on Marbury v. Madison.¹⁸ Section 2.2.2 examines the initial cases establishing the authority for the Supreme Court to review state court judgments and proceedings: Martin v. Hunter’s Lessee¹⁹ and Cohens v. Virginia.²⁰ Because of these decisions, the power of judicial review is firmly established and is an integral part of American government, even though it is not expressly authorized in the text of the Constitution.²¹

**Limits on the Federal Judicial Power**

It is frequently stated and widely accepted that federal courts are courts of limited jurisdiction. There are two primary restrictions on federal judicial power. First, Article III of the Constitution defines the scope of federal court authority. For example, Article III circumscribes the maximum extent of federal court subject matter jurisdiction. Additionally, judicial interpretation of Article III has created crucial doctrines that restrict access to the federal courts. For example, the principles of standing, ripeness, mootness, and the political question doctrine were created through judicial interpretation of Article III. These principles — often termed justiciability doctrines — are discussed in §§2.3 through 2.8. Section 2.3 begins with an introduction to the justiciability doctrines, and the subsequent sections examine, in turn, the prohibition of advisory opinions, standing, ripeness, mootness, and the political question doctrine.
Second, Congress plays an important role in limiting federal court jurisdiction. The Supreme Court has held that a federal court may hear a matter only when there is both constitutional and statutory authorization. Thus, statutes limit the jurisdiction of the federal courts and the reach of the judiciary’s power. Additionally, under Article III, §2, Congress has the power to create “exceptions and regulations” to the Supreme Court’s appellate jurisdiction. However, what Congress may do in exercising this power is very much disputed. Congress’s ability to restrict the jurisdiction of the Supreme Court and the lower federal courts is discussed in §2.9.

Central Themes

Examination of constitutional and statutory limits on the federal judicial power — the focus of this chapter — inevitably entails consideration of separation of powers and federalism concerns. From a separation of powers perspective, a decision about the appropriate content of the constitutional and statutory limits on federal judicial power is a question about the proper role for the federal judiciary in the tripartite scheme of American government. Determining the courts’ constitutional authority or deciding Congress's ability to control federal court jurisdiction inescapably involves separation of powers analysis.

Also, because state courts are the primary alternative to federal courts, the scope of federal judicial power is crucial in determining the authority of the state courts. Expansion of federal judicial authority may be defended on federalism grounds as necessary to protect the interests of the federal government from state intrusion. But, at the same time, increased federal court review can be opposed on federalism grounds as usurping power properly reserved to the states.

§2.2 THE AUTHORITY FOR JUDICIAL REVIEW

§2.2.1 Marbury v. Madison: The Authority for Judicial Review of Congressional and Presidential Actions

Marbury v. Madison is the single most important decision in American constitutional law. It established the authority for the judiciary to review the constitutionality of executive and legislative acts. Although the Constitution is silent as to whether federal courts have this authority, the power has existed ever since Marbury.

Facts

The election of 1800 was fiercely contested, with the three most important candidates being the incumbent John Adams, Thomas Jefferson, and Aaron Burr. Jefferson received a majority of the popular vote but tied in the electoral college vote with Burr. The clear loser among the three was President Adams.

In January 1801, Adams’s Secretary of State, John Marshall, was named to serve as the third Chief Justice of the United States Supreme Court. Throughout the remainder of Adams’s presidency, Marshall served as both Secretary of State and Chief Justice. Adams was a Federalist, and the Federalists were determined to exercise their influence.
before the Republican, Jefferson, took office. On February 13, 1801, Congress enacted the Circuit Court Act, which reduced the number of Supreme Court Justices from six to five, decreasing the opportunity for Republican control of the Court. The Act also eliminated the Supreme Court Justices’ duty to serve as circuit judges and created 16 new judgeships on the circuit courts. However, this change was short-lived; in 1802, Congress repealed this statute, restoring the practice of circuit riding by Supreme Court Justices and eliminating the newly created circuit court judgeships. The constitutionality of congressional abolition of judgeships was not tested in the courts.

On February 27, 1801, less than a week before the end of Adams’s term, Congress adopted the Organic Act of the District of Columbia, which authorized the president to appoint 42 justices of the peace. Adams announced his nominations on March 2, and on March 3, the day before Jefferson’s inauguration, the Senate confirmed the nominees. Immediately, Secretary of State (and Chief Justice) John Marshall signed the commissions for these individuals and dispatched his brother, James Marshall, to deliver them. A few commissions, including one for William Marbury, were not delivered before Jefferson’s inauguration. President Jefferson instructed his Secretary of State, James Madison, to withhold the undelivered commissions.

Marbury filed suit in the United States Supreme Court seeking a writ of mandamus to compel Madison, as Secretary of State, to deliver the commission. Marbury claimed that the Judiciary Act of 1789 authorized the Supreme Court to grant mandamus in a proceeding filed initially in the Supreme Court. Although Marbury’s petition was filed in December 1801, the Supreme Court did not hear the case until 1803 because Congress, by statute, abolished the June and December 1802 Terms of the Supreme Court.

Holding

The Supreme Court ruled against Marbury and held that it could not constitutionally hear the case as a matter of original jurisdiction. The Court held that although the Judiciary Act of 1789 authorized such jurisdiction, this provision of the statute was unconstitutional because Congress cannot allow original jurisdiction beyond the situations enumerated in the Constitution.

Before examining the Court’s reasoning, it should be questioned whether the Court acted improperly in considering any of the issues presented besides the jurisdictional question. It is, of course, a long-standing principle that “the first question necessarily is that of jurisdiction.” Because the Court held that it lacked jurisdiction, all of the other parts of the opinion — such as considering whether the commission had vested and the ability of the judiciary to review the executive’s action — were arguably improper.

Perhaps these parts of the opinion were meant to show that the Court saw no way to decide the case without considering the constitutionality of the statute. Or perhaps these parts of the opinion were simply Chief Justice Marshall’s way of chastising the Jefferson administration for its refusal to deliver the commissions. Politically, Marshall knew that a ruling in favor of Marbury would be futile; the Jefferson administration would ignore it, and that would undermine the Court’s authority at the beginning of its history. Therefore, Marshall may have included the initial parts of the opinion to show that the Jefferson administration improperly denied Marbury his commission, knowing that it was the most Marshall could do for Marbury.
Indeed, it can be questioned whether John Marshall should have participated in deciding the case at all because of his conflict of interest. He was the Secretary of State who signed Marbury’s commission and who was responsible for its delivery. In light of his participation in the events that gave rise to the litigation, there were strong grounds for Marshall to have recused himself.

Marshall likely perceived that the case presented a unique opportunity: the chance to claim the power of judicial review, but in a context least likely to draw opposition. The statutory provision being declared unconstitutional was one that enlarged the judiciary’s power, and the Jefferson administration obviously welcomed the result. As Robert McCloskey wrote: “[The] decision was a masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.”

**Issue 1: Does Marbury Have a Right to the Commission?**

Chief Justice Marshall structured the opinion around three questions. First, does Marbury have a right to the commission? Second, if so, “do the laws of his country afford him a remedy?” Third, if so, can the Supreme Court issue this remedy? Chief Justice Marshall then answers each question in turn.

As to the first question, the Court concluded that Marbury had a right to the commission because all appropriate procedures were followed. Chief Justice Marshall concluded: “It is . . . decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the Secretary of State.”

The Court might have decided this issue differently. President Jefferson took the position that “if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed.” But the Court rejected this view and ruled that delivery was merely a custom and that therefore withholding Marbury’s commission was “violative of a vested legal right.”

**Issue 2: Do the Laws Afford Marbury a Remedy?**

Chief Justice Marshall’s initial answer to this question was that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” The specific issue was whether the Court could give Marbury a remedy against the executive branch of government. The Court answered this by declaring that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.” In other words, no person — not even the president — is above the law.

The Court then drew a distinction as to when the judiciary could afford relief: The judiciary could provide remedies against the executive when there is a specific duty to a particular person, but not when it is a political matter left to executive discretion. Chief Justice Marshall wrote:

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by
law, and individual rights depend upon the performance of that duty, it seems equally
clear that the individual who considers himself injured, has a right to resort to the laws of
his country for a remedy.\textsuperscript{14}

The Court returned to this distinction in considering the next issue: whether mandamus
was an appropriate remedy.

\textit{Issue 3: Can the Supreme Court Issue This Remedy? Is Mandamus an
Appropriate Remedy?}

In considering the former question, the Court again used the distinction between
ministerial acts, where the executive had a duty to perform, and political acts, within the
discretion of the executive. Judicial review, including\textsuperscript{43}mandamus, was deemed
appropriate only in the former realm. Chief Justice Marshall said: “Questions, in their
nature political, or which are, by the constitution and laws, submitted to the executive, can
never be made in this court. . . . [But where the head of department] is directed by law to
do a certain act affecting the absolute rights of individuals, . . . it is not perceived on what
ground the courts of the country are further excused from the duty of giving judgment that
right be done to an injured individual.”\textsuperscript{15}

\textit{Marbury} thus establishes the power of the judiciary to review the constitutionality of
executive actions. Some matters — such as whether to veto a bill or whom to appoint for
an office — are entirely within the president’s discretion and cannot be judicially reviewed.
But where the executive has a legal duty to act or refrain from acting, the federal judiciary
can provide a remedy, including a writ of mandamus.

The Court’s claimed authority to review executive actions drew the most contemporary
criticism.\textsuperscript{16} But because the Court announced this power in a case in which it ruled in favor
of the president, there was neither a confrontation nor disregard of a judicial order. The
power of the federal courts to review presidential actions is the basis for many important
Supreme Court decisions throughout American history. Perhaps most notably, in \textit{United
States v. Nixon}, the Court’s holding — that the president had to comply with a subpoena
to provide tapes of conversations for use in a criminal trial — led to the resignation of
President Richard Nixon.\textsuperscript{17}

\textbf{Does the Law Authorize Mandamus on Original Jurisdiction?}

Having concluded that Marbury had a right to the commission and that the Court had
the authority to issue mandamus as a remedy, the Court then turned its attention to the
issue of jurisdiction. As mentioned above, there is a strong argument that the Court should
have begun with the jurisdictional question and discussed nothing else once it concluded
that jurisdiction was absent.

Marbury argued that the Supreme Court had original jurisdiction to hear his suit for
mandamus pursuant to §13 of the Judiciary Act of 1789. The Court agreed.\textsuperscript{18} Yet a close
reading of §13 of the Judiciary Act raises doubts as to the Court’s conclusion. Section 13
stated, in part:

\begin{quote}
The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts
of the several states, in the cases herein after specially provided for; . . . and shall have
power to issue writs of prohibition . . . to the district courts, when proceeding as courts of
\end{quote}
Although the Court read this statute as granting it original jurisdiction over requests for mandamus, alternative readings seem even more plausible. For example, the statute might be read as pertaining only to the Court's appellate jurisdiction because that is the only type of jurisdiction mentioned. Alternatively, the statute might be understood as according the Court the authority to issue mandamus wherever appropriate, in cases properly within its jurisdiction. By this reading, the statute does not create original jurisdiction, but simply grants the Court the remedial powers when it has jurisdiction. Under either of these approaches, Marbury still would have lost, but the Court would have avoided the question as to whether the statute was constitutional and thus would have lost the opportunity to announce its power to declare statutes unconstitutional.

**Does Mandamus on Original Jurisdiction Violate Article III?**

Once it concluded that §13 of the Judiciary Act of 1789 authorized mandamus on original jurisdiction, the Court then considered whether this violated Article III. The Court concluded that Article III enumerated its original jurisdiction and that Congress could not enlarge it. Article III authorizes original jurisdiction for suits "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." The Court said that Congress could not add to this list cases seeking a writ of mandamus.

Chief Justice Marshall stated: "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." In other words, Marshall said that Article III's enumeration of original jurisdiction would be "mere surplusage, . . . entirely without meaning," if Congress could add more areas of original jurisdiction.

Justice Marshall's analysis again is open to question. Article III’s enumeration of the Court’s original jurisdiction still has meaning even if Congress can increase it. Article III might be viewed as the floor, the minimum grant of jurisdiction that cannot be reduced by Congress.

Irrespective of possible alternative interpretations, the Court’s holding that Congress cannot increase the Supreme Court’s original jurisdiction remains the law to this day. However, the Court’s statement that the categories of original and appellate jurisdiction are mutually exclusive has not been followed. The Supreme Court subsequently held that Congress could grant the district courts concurrent jurisdiction over matters within the Court’s original jurisdiction. More generally, by viewing Article III as the ceiling of federal jurisdiction, *Marbury* helped establish the principle that federal courts are courts of limited jurisdiction, and that Congress may not expand the jurisdiction granted in Article III of the Constitution.

**Can the Supreme Court Declare Laws Unconstitutional?**
Having decided that the provision of the Judiciary Act of 1789 was unconstitutional, the Court then considered the final question: Did it nonetheless have to follow that provision or could the Court declare it unconstitutional? The Court began by stating: “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.”

Marshall then offered several reasons why the Court could declare federal laws unconstitutional. Interestingly, although they are persuasive arguments, for each there is a reasonable answer.

Marshall argued, for example, that the Constitution imposes limits on government powers and that these limits are meaningless unless subject to judicial enforcement. Borrowing from Alexander Hamilton’s Federalist No. 78, the Court stated: “The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.” This is a powerful argument for judicial review, but it must be remembered that many other nations with written constitutions exist without according the judiciary the power to invalidate conflicting statutes.

Marshall also argued that it is inherent to the judicial role to decide the constitutionality of the laws that it applies. In perhaps the most frequently quoted words of the opinion, Marshall wrote: “It is emphatically the province and duty of the judicial department to say what the law is.” However, the Court could interpret and apply a law without deciding its constitutionality. As mentioned above, there are other countries with judiciaries and constitutions, but without the power of the courts to declare laws unconstitutional.

Marshall then argued that the Court’s authority to decide “cases” arising under the Constitution implied the power to declare unconstitutional laws conflicting with the basic legal charter. But as Professor David Currie explains, “jurisdiction over ‘cases arising under this Constitution’ need not mean that the Constitution is supreme over federal laws as well as over executive or state action.” In other words, the Court’s power to decide cases under the Constitution still could have significant content even if the judiciary lacked the power to invalidate federal statutes. The Court would apply federal statutes to decide cases and could evaluate the constitutionality of state enactments.

Chief Justice Marshall also defended judicial review on the ground that judges take an oath of office and that they would violate this oath if they enforced unconstitutional laws. But this argument is question-begging: Judges would not violate their oath by enforcing unconstitutional laws if they did not have the power to strike down such statutes. In a famous state court dissenting opinion that argued against judicial review, Justice Gibson stated: “[The] oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty.”

Finally, Chief Justice Marshall argued that judicial review is appropriate because Article VI makes the Constitution “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.” Again, though, to say that the Constitution should control over all other laws does not necessarily mean that the judiciary has the power to invalidate laws. The supremacy clause in Article VI could be viewed as a declaration that Congress only should enact laws if they are authorized by the Constitution.
Brilliance of John Marshall’s Opinion

The point of this discussion is not, of course, to argue that Chief Justice John Marshall was wrong or that judicial review is illegitimate. History has proved the opposite. Rather, the point is that constitutional judicial review was not axiomatic or unassailable; it had to be established by the Supreme Court, and John Marshall found the ideal occasion. He established judicial review while declaring unconstitutional a statute that he read as expanding the Court’s powers. The particular statutory provision invalidated was minor, and Marshall’s holding was a victory for his opponents.

The brilliance of Marshall’s opinion cannot be overstated. Politically, he had no choice but to deny Marbury relief; the Jefferson administration surely would have refused to comply with a court order to deliver the commission. In addition, there was a real possibility that Jefferson might have sought the impeachment of the Federalist Justices in an attempt to gain Republican control of the judiciary. One judge, albeit a clearly incompetent jurist, already had been impeached, and not long after his removal the House of Representatives impeached Justice Samuel Chase on the grounds that he had made electioneering statements from the bench and had criticized the repeal of the 1801 Circuit Court Act. Yet John Marshall did more than simply rule in favor of the Jefferson administration; he used the occasion of deciding *Marbury v. Madison* to establish the power of the judiciary and to articulate a role for the federal courts that survives to this day.

The Supreme Court did not declare another federal statute unconstitutional until 1857 in the infamous case of *Dred Scott v. Sandford*, which invalidated the Missouri Compromise and helped to precipitate the Civil War. By then, the power of the Court to consider the constitutionality of federal laws was an accepted part of American government.

§2.2.2 The Authority for Judicial Review of State and Local Actions

*Marbury* established the power of the Supreme Court to review the constitutionality of federal executive actions and of federal statutes. Two other cases — *Martin v. Hunter’s Lessee* and *Cohens v. Virginia* — were key in establishing the Court’s authority to review state court decisions. Although the Constitution does not explicitly say that the Supreme Court may review state court decisions, the Judiciary Act of 1789 provided for Supreme Court review of state court judgments. Section 25 of the Act allowed the Supreme Court to review state court decisions by a writ of error to the state’s highest court in many situations.

*Martin v. Hunter’s Lessee*

The constitutional basis for such Supreme Court review was firmly established by the Court in *Martin v. Hunter’s Lessee*. In *Martin*, there were two conflicting claims to certain land within the State of Virginia. Martin claimed title to the land based on inheritance from Lord Fairfax, a British citizen who owned the property. The United States and England had entered into two treaties protecting the rights of British citizens to own land in the United States. However, Hunter claimed that Virginia had taken the land before the treaties came into effect and, hence, Martin did not have a valid claim to the property.
The Virginia Court of Appeals ruled in favor of Hunter and, in essence, in favor of the state’s authority to have taken and disposed of the land. The United States Supreme Court issued a writ of error and reversed the Virginia decision. The Supreme Court held that the federal treaty was controlling and that it established Lord Fairfax’s ownership and thus the validity of inheritance pursuant to his will. The Virginia Court of Appeals, however, declared that the Supreme Court lacked the authority to review state court decisions. The Virginia court stated that the “Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty — and, of course, their commands or instructions impose no obligation.”

The United States Supreme Court again granted review and, in a famous opinion by Justice Joseph Story, articulated the Court’s authority to review state court judgments. Chief Justice John Marshall did not participate because he and his brother had contracted to purchase a large part of the Fairfax estate that was at issue in the litigation. Justice Story persuasively argued that the Constitution presumed that the Supreme Court could review state court decisions. Story argued that the Constitution creates a Supreme Court and gives Congress discretion whether to create lower federal courts. But if Congress chose not to establish such tribunals, then the Supreme Court would be powerless to hear any cases, except for the few fitting within its original jurisdiction, unless it could review state court rulings.

Additionally, Justice Story explained the importance of Supreme Court review of state courts. Justice Story said that although he assumed that “judges of the state courts are, and always will be, of as much learning, integrity, and wisdom as those of courts of the United States,” the Constitution is based on a recognition that “state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.” Furthermore, Justice Story observed that Supreme Court review is essential to ensure uniformity in the interpretation of federal law. Justice Story concluded that the very nature of the Constitution, the contemporaneous understanding of it, and many years of experience all established the Supreme Court’s authority to review state court decisions.

Cohens v. Virginia

The Supreme Court has never questioned its constitutional authority to take appeals from state courts or to command state judiciaries to follow federal law. An important elaboration of the Court’s power to take cases from state courts was Cohens v. Virginia. Two brothers were convicted in Virginia state court of selling District of Columbia lottery tickets in violation of Virginia law. The defendants sought review in the United States Supreme Court because they claimed the Constitution prevented them from being prosecuted for selling tickets authorized by Congress. Virginia argued that the Supreme Court had no authority to review state court decisions in general, and, in particular, review was not allowed in criminal cases and in cases where a state government was a party.
The Supreme Court, in an opinion by Chief Justice John Marshall, reaffirmed the constitutionality of §25 of the Judiciary Act and the authority of the Supreme Court to review state court judgments. The Court emphasized that state courts often could not be trusted to adequately protect federal rights because “[i]n many States the judges are dependent for office and for salary on the will of the legislature.” The Court thus declared that criminal defendants could seek Supreme Court review when they claimed that their conviction violated the Constitution.

Cooper v. Aaron

The Supreme Court, of course, is not limited to reviewing state court decisions; federal courts also have the authority to review the constitutionality of state laws and the actions of state officials. This was resoundingly reaffirmed in Cooper v. Aaron in 1958. A federal district court ordered the desegregation of the Little Rock, Arkansas, public schools. The state disobeyed this order, in part, based on a professed concern that compliance would lead to violence, and, in part, based on a claim that it was not bound to comply with judicial desegregation decrees.

In an unusual opinion, signed individually by each Justice, the Court rejected this position and emphatically declared: “Article VI of the Constitution makes the Constitution ‘the supreme Law of the Land.’ . . . Marbury v. Madison . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . ‘to support this Constitution.’ ”
§3.2 McCulloch v. Maryland and the Scope of Congressional Powers

Factual Background of McCulloch

McCulloch v. Maryland is the seminal case defining the scope of the federal legislative power and its relationship to state government authority. The specific issue posed in McCulloch is whether the State of Maryland could collect a tax from the Bank of the United States. Chief Justice John Marshall used the case as an occasion to broadly construe Congress’s powers and narrowly limit the authority of state governments to impede the federal government.

The controversy over the Bank of the United States began almost 30 years before McCulloch, in 1790, when there was a major dispute in both Congress and the executive branch as to whether Congress had the authority to create such a bank. Secretary of the Treasury Alexander Hamilton strongly favored creating a Bank of the United States, but he was opposed by Secretary of State Thomas Jefferson and Attorney General Edmund Randolph. Both Jefferson and Randolph argued that Congress lacked the authority under the Constitution to create such a bank and that doing so would usurp state government prerogatives. Ultimately, Hamilton persuaded President George Washington to support creating the bank, but the debate continued in Congress. James Madison, then in the House of Representatives, echoed the views of Jefferson and Randolph, and opposed the bank. Despite this august opposition, the Federalists, who then solidly controlled Congress, successfully enacted legislation to create the Bank of the United States.

The bank existed for 21 years until its charter expired in 1811. However, after the War of 1812, the country experienced serious economic problems and the Bank of the United States was re-created in 1816. In fact, although he had opposed such a bank a quarter of a century earlier, as president, James Madison endorsed its re-creation. The United States government actually owned only 20 percent of the new bank.

The Bank of the United States did not solve the country’s economic problems and, indeed, many blamed the bank’s monetary policies for aggravating a serious depression. State governments were particularly angry at the bank, especially because the bank called in loans owed by the states. Thus, many states adopted laws designed to limit the operation of the bank. Some states adopted laws prohibiting its operation within their borders. Others, such as Maryland, taxed it. The Maryland law required that any bank not chartered by the state pay either an annual tax of $15,000 or a tax of 2 percent on all of its notes, which needed to be on special stamped paper.

The bank refused to pay the Maryland tax, and John James sued for himself and the State of Maryland in the County Court of Baltimore to recover the money owed under the tax. The defendant, McCulloch, was the cashier of that branch of the Bank of the United States. The trial court rendered judgment in favor of the plaintiff, and the Maryland Court of Appeals affirmed.

The Supreme Court, in a famous opinion by Chief Justice John Marshall, reversed. Marshall’s opinion considered two major questions: First, does Congress have the authority to create the Bank of the United States; and second, is the state tax on the bank
constitutional? It is notable that Marshall posed the first question because technically the sole issue before the Court was whether Maryland constitutionally could collect its tax. There are probably several reasons why Marshall began by considering Congress’s power. Once it is established that Congress has the power to create the bank, it then is easier to explain why the states cannot tax or regulate it. Also, undoubtedly, John Marshall recognized this case as an ideal opportunity to articulate a broad vision of federal power, much as he used *Marbury v. Madison* to establish the power of judicial review.

**Congress’s Authority to Create the Bank of the United States**

As to the first question, whether Congress has the authority to create the Bank of the United States, Marshall made four arguments. First, historical practice established the power of Congress to create the bank. Marshall began his opinion by declaring: “It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”

In other words, Marshall invoked the history of the first Bank of the United States as authority for the constitutionality of the second bank. Marshall expressly noted that the first Congress enacted the bank after great debate and that it was approved by an executive “with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast. . . .” Although Marshall did not mention James Madison by name, Marshall remarked on how even those who opposed the first bank endorsed creating the second bank. Marshall concluded that “[i]t would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.”

Marshall’s contention, that historical experience justifies the constitutionality of a practice, is a type of argument that often appears in Supreme Court opinions. For example, in *United States v. Midwest Oil Co.*, the Court declared that a “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent. . . .” In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Felix Frankfurter expressed the view that a “systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on ‘executive power’ vested in the President.” In *Dames & Moore v. Regan*, the Court approvingly invoked Justice Frankfurter’s words in upholding an executive agreement to lift a freeze on Iranian assets in the United States as a part of a deal to have American hostages there released.

The underlying question, however, is whether a description of a historical practice should have normative significance in resolving questions about its constitutionality. No court ever had ruled on the constitutionality of the Bank of the United States, and it is questionable why an unreviewed practice should create a presumption of constitutionality. Moreover, as Justice Holmes declared in oft-quoted language, that laws may be “natural and familiar . . . ought not to conclude our judgment upon the question whether [the] statutes . . . conflict with the Constitution of the United States.”
In considering the constitutionality of the Bank of the United States, Marshall's second major point was to refute the argument that states retain ultimate sovereignty because they ratified the Constitution. This view, sometimes called “compact federalism,” sees the states as sovereign because they created the United States by ceding some of their power and by ratifying the Constitution. Chief Justice Marshall described this view when he stated: “The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.” The implication is that if the states are sovereign, then they would have the authority to veto a federal action, such as the creation of the Bank of the United States.

Marshall emphatically rejected this view and contended that it was the people who ratified the Constitution, and thus the people are sovereign, not the states. Marshall wrote: “The government proceeds directly from the people; is ‘ordained and established’ in the name of the people. . . . The assent of the States, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments.”

Marshall’s argument is rhetorically powerful; it concludes that “[t]he government of the Union . . . is, emphatically, and truly, a government of the people.” The Court thus rejected the view that the Constitution should be regarded as a compact of the states and that the states retain ultimate sovereignty under the Constitution.

Yet Marshall’s reasoning can be questioned. Article VII of the Constitution states: “The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” The Constitution was not approved by a national plebiscite; it was ratified by the states. Marshall explains that it was natural that people would act within states, but this does not address the language of Article VII, which clearly indicates that the states themselves had to ratify the Constitution, not the people.

Nonetheless, Marshall’s view has controlled throughout American history. There, however, have been challenges and reassertions of the theory of compact federalism. During the early part of the nineteenth century, John Calhoun defended slavery by claiming that states could interpose their sovereignty between Congress and the people and nullify federal actions. During the 1950s and 1960s, opponents of federal civil rights initiatives again raised claims of state sovereignty. Subsequently, in 1995, in United States Term Limits v. Thornton, Justice Thomas, in dissent, expressed the view that states retain ultimate sovereignty except in those areas where the Constitution expressly delegates power to the federal government. Although it was surprising to see such a strong reassertion of this view in 1995, it was not at all surprising to see the Justices in the majority respond by quoting John Marshall’s opinion in McCulloch v. Maryland.

In discussing the constitutionality of the creation of the bank, the Court’s third major point was to address the scope of congressional powers under Article I. It is important to note that the Court broadly described Congress’s authority even before addressing the necessary and proper clause. Chief Justice Marshall admitted that the Constitution does not enumerate a power to create a Bank of the United States, but said that this is not dispositive as to Congress’s power to establish such an institution. Marshall explained that “[a] constitution, to contain an accurate detail of all the subdivisions of which its great
powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”

Marshall then uttered some of the most famous words in all of the United States Reports: “In considering this question, then, we must never forget that it is a constitution we are expounding.”

Felix Frankfurter described this sentence as “the single most important utterance in the literature of constitutional law — most important because [it was] most comprehensive and most comprehending.” Although Marshall’s language seems tautological, his point is that the Constitution is different from a statute and therefore should be interpreted differently. Marshall’s ultimate conclusion is that Congress is not limited only to those acts specified in the Constitution; Congress may choose any means, not prohibited by the Constitution, to carry out its lawful authority. Even though the Constitution does not mention a power to create a Bank of the United States, Congress can create one as a means to carrying out many of its other powers.

This is a dramatic expansion in the scope of congressional authority. If Congress were limited to the powers specifically enumerated in Article I, the range of laws would be finite. But if Congress can choose any means not prohibited by the Constitution to carry out its powers, it truly has an almost infinite range of options that can be enacted into law. Indeed, in opposing the initial creation of the Bank of the United States, Thomas Jefferson saw how broad Congress’s power would be if it could choose any means to implement its authority: “Congress [is] authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at ‘This Is the House that Jack Built.’ ”

Yet if Congress’s powers had been narrowly restricted to those enumerated in the Constitution, it is doubtful that the Constitution could have survived, at least without extensive amendments. The problems of the twentieth and twenty-first centuries, and the range of laws needed to deal with them, can be dealt with under an eighteenth-century Constitution only because of the broad construction of congressional powers found in McCulloch. What is notable, and often overlooked, is that the Court adopted this expansive view even before it considered the “necessary and proper clause.”

The fourth and final point that Marshall made in explaining the constitutionality of the creation of the Bank of the United States concerns the meaning of the necessary and proper clause. Article I, §8, concludes by granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Chief Justice Marshall said that this provision makes it clear that Congress may choose any means not prohibited by the Constitution to carry out its express authority. In some of the most important words of the opinion, Marshall writes: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”
The contrary view is that the necessary and proper clause is a limit on Congress’s powers, allowing Congress to adopt only those laws that are truly necessary. In fact, in other areas of constitutional law, the word “necessary” means indispensable. For example, when there is discrimination based on race or interference with a fundamental right, the government will prevail only if its action is necessary to achieve a compelling interest; necessary in this context means essential to achieve the goal.24

Yet John Marshall rejects that restrictive interpretation of the necessary and proper clause. Necessary here means useful or desirable, not indispensable or essential. In part, Marshall again explains that this is because of the nature of a Constitution. Marshall observed that the “provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”25

Furthermore, Marshall noted that the necessary and proper clause is placed in Article I, §8, which expands Congress’s powers, and not in Article I, §9, which limits them. Furthermore, its “terms purport to enlarge, not to diminish the powers vested in the government.”26

The Court, however, rejected any contention that this gives Congress limitless authority. Marshall stated that “[s]hould congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.”27 Marshall thus reaffirmed Marbury v. Madison and the power of the judiciary to review the constitutionality of federal laws.