American Constitutional Law Introductory Essays and Selected Cases 17th edition Mason Solutions Manual

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TWO

The Constitution, the Supreme Court and Judicial Review

I. Chapter Outline

Granting and Limiting Power
- Constitutionalism
- Separation and Sharing of Powers
- Federalism

The Doctrine of Judicial Review
- The Framers
- The Written and Unwritten Constitution
- From William Marbury to Dred Scott
- Supreme Court Review of State Court Decisions

Influences on Judicial Decision-Making

Checks on Judicial Power
- External Checks
- Political Question Doctrine

Finality of Supreme Court Decisions

Approaches to Constitutional Interpretation
- What Is "The Constitution?"
- Clear Meaning
- Adaptation
- Original Intent
- Structuralism

Judicial Review: A Distinctively American Contribution

II. Chapter Overview and Objectives

Chapter Two lays out the basic component principles of the Constitution of the United States (separation and sharing of powers and federalism), and their place in the Constitution with judicial review, which in turn is highlighted as having been applied for the first time by the Supreme Court in *Marbury* v. *Madison*. By focusing on judicial review in this early chapter in the book, the objective is to interest the student in central issues surrounding judicial review itself, both in terms of its origins and its continuation as a feature of American politics and government.

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This landmark ruling from 1803 in turn is shown to have been anticipated by certain leaders in the founding generation of the nation, specifically Alexander Hamilton and Robert Yates. Both delegates to the Philadelphia Convention in 1787 from the state of New York, Hamilton remained until the convention finished its work while Yates left before the convention finished its work on September 17. Hamilton was an ardent supporter of the Constitution while Yates was one of its chief detractors. Indeed one of Yates's principal concerns was the power he believed the Supreme Court would exercise in the new government as an expositor of the new charter. Hamilton likewise believed the Supreme Court would exercise judicial review, but minimized its frightening potentialities chiefly because the Court would lack the essential tools of political power: That of the "purse" and the "sword," leaving it with merely the power of "judgment." Indeed, the facts of *Marbury* v. *Madison* seemed to validate Hamilton's position, while the later decision in the Dred Scott case perhaps demonstrated the extent of Yates's fears. Coupled with Marshall's defense of judicial review in *Marbury* is Pennsylvania jurist John Bannister Gibson's assault on judicial review, written some 22 years after *Marbury* was decided.

Chapter Two also introduces students to the idea of influences on judicial decision-making by highlighting three theories or models developed by scholars: The legal model, the attitudinal model, and the strategic model.

Similarly the chapter introduces the student to various checks on judicial power, including both checks that are external to the Court and those like the political question doctrine (developed more fully in Chapter Five) that are internal.

The next section may challenge certain assumptions which students have acquired over the years about the finality of Supreme Court decisions. The tendency upon reading *Marbury* v. *Madison* may be to assume that the decision settled the Court's place in American constitutional development as the final authority on the meaning of the Constitution. As materials in this chapter show, the decision did no such thing.

The final section on approaches to constitutional interpretation invites students to reflect on the method(s) justices use when they attempt to give meaning to various provisions of the Constitution. All may agree on what the text of the Constitution actually says, but how does one decide what the words of the text actually mean? The contrast between two of the approaches is highlighted in the excerpts the chapter reports by former Judge Robert Bork and Professor Laurence Tribe.

III. KEY TERMS

constitutionalism

separation of powers

federalism

free government

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political checks

judicial review

supremacy clause

writ of mandamus

legal model

attitudinal model

strategic model

Section 25

guarantee clause

political question doctrine

Religious Freedom Restoration Act

IV. EXCERPTED CASES AND OTHER REPRINTED SOURCE MATERIAL

Unstaged Debate of 1788: *Robert Yates* v. *Alexander Hamilton:*
- Robert Yates's Letters of Brutus
- Alexander Hamilton's *Federalist* No. 78

Marbury v. *Madison* (1803)
Eakin v. *Raub* (1825)
Scott v. *Sandford* (1857)
Ex parte *McCardle* (1869)
Baker v. *Carr* (1962)
City of Boerne v. *Flores* (1997)
Unstaged Debate: *Andrew Jackson, Abraham Lincoln,* and *Arkansas* v. *The Supreme Court*
- President Jackson Vetoes the Bank Act (1832)
- President Lincoln Delivers His First Inaugural Address (1861)
- The Supreme Court Decides *Cooper* v. *Aaron* (1958)

Unstaged Debate of 1986: *Judge Bork* v. *Professor Tribe*
- Robert H. Bork, "Original Intent and the Constitution"
- Laurence H. Tribe, "The Holy Grail of Original Intent"

V. NAMES OF PERTINENT CASES AVAILABLE FROM WEB SITE CASE ARCHIVE

Eakin v. *Raub* (1825) – Justice Gibson's opinion, disputing Chief Justice Marshall's defense of judicial review, is reprinted online in full.

Letters of Brutus (1788) – Several installments of Robert Yates's spirited opposition to the Constitution and especially to the judiciary in the proposed Constitution is reprinted online.

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VI. QUERIES AND SUGGESTED TOPICS FOR LECTURES, CLASS DISCUSSION, AND SELF-ASSESSMENT

1. Was *Marbury* v. *Madison* a usurpation of power by the Supreme Court? Would the absence of judicial review "subvert the very foundations of all written constitutions" as Marshall insists in his opinion?
2. Members of the contemporary Court will sometimes look to foreign courts or international bodies as authorities or guides in interpreting the Constitution. Is this appropriate? Should it matter that judges on courts abroad are not appointed by the president and confirmed by the Senate and that such judges do not take an oath of loyalty to the United States Constitution?
3. Constitutional scholars widely regard *Dred Scott* not only as a consequential decision but also as the worst decision ever rendered by the Supreme Court. Why?
4. On what point are Robert Yates ("Letters of Brutus") and Alexander Hamilton (*The Federalist,* No. 78) in agreement? Where do they disagree? Does Yates overstate the dangers to popular government posed by judicial power? Does Hamilton understate them? Does the Constitution provide adequate safeguards against abuse of judicial power?
5. Both Yates and Hamilton assumed that the Supreme Court would exercise the power of judicial review. Yet those two New York delegates to the Constitutional Convention seemed to believe that judicial review would work in very different ways. Explain.
6. Consider *Chisholm* v. *Georgia* in Chapter Four. Note the curious problem the Court encounters in that case: The text of the Constitution appears to conflict with its meaning, at least as widely understood at the time of ratification. How does the Court resolve this problem? What does Wilson's opinion suggest about how the he perceived the Court's role in the political system, even at so early a date?
7. Marshall (in *Marbury* v. *Madison*) and Pennsylvania's Gibson (in *Eakin* v. *Raub*) reached opposite conclusions about the legitimacy of the Supreme Court's exercise of judicial review with respect to acts of Congress. Does this suggest that they began with different assumptions about the Constitution?
8. Why has the decision in the Dred Scott case almost always been viewed as "the great mistake"? Wholly aside from the results of the case, how does Taney's opinion represent an expansion of Marshall's concept of judicial review?
9. In what way does the *City of Boerne* case illustrate an apparently failed congressional check on judicial power?
10. What approaches to constitutional interpretation do you find in the opinions filed in *District of Columbia* v. *Heller*, reprinted in Chapter Nine? How do you account for the different conclusions reached by the majority and minority in that case?

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VI. MATERIAL SUITABLE FOR CLASS LECTURES, HANDOUTS, AND/OR DISPLAYS

ARTICLES OF CONFEDERATION (1777)

[Note: The document below incorporates the original spelling.]

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

I.

The Stile of this Confederacy shall be

"The United States of America".

II.

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

III.

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

IV.

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

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If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

V.

For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendence on Congress, except for treason, felony, or breach of the peace.

VI.

No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

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No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

VII.

When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

VIII.

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

IX.

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article -- of sending and receiving ambassadors -- entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever -- of establishing rules for deciding in all cases, what captures on land or water shall

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be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated -- of granting letters of marque and reprisal in times of peace -- appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgement and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgement, which shall in like manner be final and decisive, the judgement or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgement, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgement, without favor, affection or hope of reward': provided also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States -- fixing the standards of weights and measures throughout the United States -- regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated -- establishing or regulating post offices from one State to another, throughout all the United States,

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and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office -- appointing all officers of the land forces, in the service of the United States, excepting regimental officers -- appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States -- making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction -- to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses -- to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted -- to build and equip a navy -- to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled. But if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of each State, unless the legislature of such State shall judge that such extra number cannot be safely spread out in the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judeg can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

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X.

The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

XI.

Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

XII.

All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pleged.

XIII.

Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the Year of our Lord One Thousand Seven Hundred and Seventy-Eight, and in the Third Year of the independence of America.

Agreed to by Congress 15 November 1777 In force after ratification by Maryland, 1 March 1781

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THE DECLARATION OF INDEPENDENCE

This text retains the spelling, capitalization, and punctuation of the original. Adopted by the Second Continental Congress, the document was eventually signed by 56 delegates. In justifying rebellion against the Crown, it articulated a basic philosophy of liberty and representative government.

IN CONGRESS, JULY 4, 1776

The unanimous Declaration of the thirteen united States of America

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all

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HAMILTON v. YATES (1788)

Constitutional interpretation:

Common ground: Both Hamilton and Yates assume judicial review.

Yates: Constitution's elasticity leaves too much discretion in the hands of judges.

Hamilton: Assumes a precise Constitution; violations will be clear; little discretion left for judges.

Judicial review and democracy:

Yates: Courts subvert people's will; prefers legislative review.

Hamilton: Courts enforce/protect people's will.

Judicial power:

Yates: Unchecked power; judicial independence run amok.

Hamilton: Judiciary is the weakest branch.

CHRONOLOGY: MARBURY V. MADISON (1803)

May 1800	John Marshall becomes Secretary of State in the Adams administration (Federalist).
Nov. 1800	Fall elections hand control of Congress to the Democratic-Republicans (Thomas Jefferson's party). The newly elected Congress will not convene until December of 1801.
Dec. 1800	"Lame Duck" session of Congress convenes, still controlled by the Federalists.
Jan. 20, 1801	Adams appoints Marshall as Chief Justice, following Oliver Ellsworth's resignation, afte4r John Jay declines to return to his old office. Marshall continues to serve as Secretary of State.

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Feb. 1800	Electoral vote count reveals a tie between Republican Jefferson and Aaron Burr for president. Later in the month, the House of Representatives finally breaks the tie in Jefferson's favor.
Feb. 27, 1801	Congress passes District of Columbia Act, authorizing 42 new justices of the peace (local magistrates) for the District.
Mar. 2, 1801	Adams makes the 42 new appointments, and the Senate confirms them. By the evening of March 3, Secretary of State Marshall fails to have the commissions of office delivered.
Mar. 4, 1801	Marshall delivers the office to Jefferson as the third president. Jefferson later instructs Secretary of State James Madison to deliver 25 of the previously undelivered commissions, but not the remaining 17.
Dec. 1801	Four of the 17 would-be justices of the peace (William Marbury, Dennis Ramsey, Robert Townsend Hooe, and William Harper) file suit in the Supreme Court under section 13 of the Judiciary Act of 1789, to obtain their commissions. They ask the Court to issue a "writ of mandamus" to Madison. Section 13 authorizes the Supreme Court to issue writs of mandamus as part of its original jurisdiction.
Feb. 1803	The Supreme Court hears the case, but the Jefferson administration boycotts the oral argument. The Supreme Court announces its decision on February 24.

MARBURY V. MADISON (1803)

1. Political Background: The election of 1800

2. Facts

3. Questions
   A. Does William Marbury have a right to the commission?
   B. If he has a right to the commission, may the laws of his country afford him a remedy?
   C. If a remedy is available, is it the writ of mandamus?

4. What Marshall said—his reasoning
   A. Purpose of a Constitution

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B. The Constitution therefore trumps a statute that conflicts with the Constitution.
C. It is the Court's duty to decide because the Constitution is a kind of law.

5. Contrast in interpretation: Marshall's strict reading of the Constitution creates a conflict between Article III and the statute; his loose reading of the Constitution provides a way out of the Court's political dilemma.

6. Why Marshall said it.

A. Escapes present dilemma.
B. Stakes a claim for the future role of the Supreme Court.
C. Answers a question the Constitution does not answer.
D. Makes Constitution a juridical document.

[Image below is from the National Archives and shows part of the original motion filed in the U.S. Supreme Court in the case of *Marbury* v. *Madison*.]

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A COMPARISON OF MARBURY & DRED SCOTT

Marbury (Marshall)	**Dred Scott (Taney)**
Basis of decision Article III (seemingly explicit)	Amendment V (open ended)
Interpretive approach Adaptive/textual/structural?	Originalism/adaptive?
Target of decision Court's own power	Congressional policy
Effect on Congress Other mandamus options left untouched	Forecloses most options

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Justice Gibson's Main Points in *Eakin* v. *Raub* (1825)

1. Starting assumption: Civil and political powers of courts.

2. No reason to take cognizance of a collision between a statute and a provision of the Constitution.

3. Absence of express textual authority for judicial review.

4. Reliance on the oath to support the Constitution is misplaced; all officials, not just judges, take the oath.

5. No judicial complicity in wrongdoing when judges apply a statute at odds with the Constitution; blames lies with the legislature alone.

6. Efficacy of a written constitution. Its value remains even without judicial review.

7. Popular check more efficient than judicial check because it is more easily corrected.

8. Article VI exception for *state* judges in situations where a state law arguably violates the federal constitution.

Marshall and Gibson have very different views of "the people" as guardians of the Constitution.

VII. Resources and Suggested Readings

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