d. The most important holding in the case is that the Supreme Court has the power to declare acts of Congress unconstitutional — that is, that it has the power of judicial review. It is striking to many modern readers that Chief Justice Marshall's principal arguments rely not on the text of the Constitution but instead on its structure and on the consequences of a conclusion that judicial review was unavailable.

Consider the following view:

> [The] issue of judicial review was by no means new. The Privy Council had occasionally applied the ultra vires principle to set aside legislative acts contravening municipal or colonial charters. State courts had set aside state statutes under constitutions no more explicit about judicial review than the federal. The Supreme Court itself had measured a state law against a state constitution in Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), and had struck down another under the supremacy clause in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); in both cases the power of judicial review was expressly affirmed. Even Acts of Congress had been struck down by federal circuit courts, and the Supreme Court, while purporting to reserve the question of its power to do so, had reviewed the constitutionality of a federal statute in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796). Justice James Iredell had explicitly asserted this power both in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) and in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and Chase had acknowledged it in [*Cooper*]. In the Convention, moreover, both proponents and opponents of the proposed Council of Revision had recognized that the courts would review the validity of congressional legislation, and Alexander Hamilton had proclaimed the same doctrine in The Federalist. Yet though Marshall's principal arguments echoed those of Hamilton, he made no mention of any of this material, writing as if the question had never arisen before.

Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 655–656 (1982). For a comprehensive account, see P. Hamburger, Law and Judicial Duty (2008). In what ways was the issue in *Ware* and *Cooper* different from that in *Marbury*? Consider the proposition that Marshall's arguments for judicial review supported what has been called "departmentalism." According to one version of departmentalism, each branch has the power to determine for itself, and finally, the constitutionality of legislation affecting its own functions. How expansive would judicial review be under this version of departmentalism?

3. *The justifications for judicial review.* Consider the various arguments for judicial review.

a. *Written Constitution*. Chief Justice Marshall's first argument is that judicial review is a necessary inference from the fact of a written Constitution. "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation." But this argument seems to confound two different issues. (1) Is the Constitution binding on the national government? (2) Are the courts authorized to enforce their interpretation of the Constitution against that of other branches of the national government? Even if the answer to the first question is "yes," that answer does not dictate an answer to the second question. Many countries have had written constitutions without having judicial review. Would it be plausible to respond that the

Constitution would be ineffective or merely hortatory if it were not subject to judicial enforcement?

Consider in this regard The Federalist No. 78, infra; and note that in Eastern Europe, emerging from communism, and South Africa, emerging from apartheid, nations have chosen both a written constitution and judicial review of one sort or another. Indeed, judicial review has been seen as a central part of the new constitutional orders. Consider also Currie, supra, at 657: "Surely the Framers were reasonable people, and surely they could not have meant to appoint the fox as guardian of the henhouse." But on the facts of *Marbury*, who was the fox? Note also that in some nations, certain constitutional provisions, such as those involving social and economic guarantees and environmental protection, are expressly made nonjusticiable.

b. *Notions of judicial role*. Chief Justice Marshall claims that the ordinary role of the courts is to interpret the law. That role, he claims, requires judges to construe the Constitution in the ordinary course of conducting judicial business. But it might be responded that constitutional interpretation — when it takes the form of invalidation of the outcomes reached by the more political branches — is special because of its highly intrusive and largely final character. Should this difference mean that the ordinary interpretive task is no longer appropriate? For an emphatic negative answer, grounded in history, see P. Hamburger, supra.

c. *Supremacy clause*. The supremacy clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." Does this establish the existence of judicial review?

> Assuming that an act repugnant to the Constitution is not a law "in pursuance thereof" and thus must not be given effect as the supreme law of the land, who according to the Constitution, is to make the determination as to whether any given law is in fact repugnant to the Constitution itself? [Chief Justice Marshall] never confronts this question. His substitute question, whether a law repugnant to the Constitution still binds the courts, assumes that such repugnance has appropriately been determined by those granted such power under the Constitution. It is clear, however, that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that this prerogative to determine repugnancy belongs to it.

Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1, 22.

Note also that Chief Justice Marshall gains rhetorical force for his position by referring to clauses that in his view have a "plain" meaning opposed to acts of Congress. But one might doubt whether constitutional provisions are likely to have such meanings in many cases on which Congress and Court will differ. In any event, consider the possibility that the use of these hypothetical cases is misleading in light of the more open-ended character of most constitutional interpretation — of which *Marbury* itself is an example.

d. *Grant of jurisdiction*. The Constitution extends the judicial power of the United States to all cases arising under the Constitution. Chief Justice Marshall argues that the grant of jurisdiction would be meaningless if the courts did not have authority to examine the constitutionality of acts of Congress. Consider A. Bickel, The Least Dangerous Branch 6 (1962):

> If it were impossible to conceive a case "arising under the Constitution" which would not require the Court to pass on the constitutionality of congressional

> legislation, then [Marshall might be correct, for without judicial review] this clause [would be] quite senseless. But there are such cases which may call into question the constitutional validity of judicial, administrative, or military actions without attacking legislative or even presidential acts as well, or which call upon the Court, under appropriate statutory authorization, to apply the Constitution to acts of the states. Any reading but his own was for Marshall "too extravagant to be maintained." His own, although out of line with the general scheme of Article III, may be possible; but it is optional. This is the strongest bit of textual evidence in support of Marshall's view, but it is merely a hint.

e. *Judges' oath*. Chief Justice Marshall relies on the fact that judges take an oath to uphold the Constitution. But consider the fact that 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. [But] granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the constitution, only as far as that may be involved in his official duty; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.

Eakin v. Raub, 12 Serg. & Rawle 330, 353 (Pa. 1825). In short, the oath requires judges to support the Constitution; however, if the Constitution assigns ultimate interpretive power to the legislature, or to the President, then judicial review is not contemplated by the Constitution but is in violation of it. Does this suggest that the "oath" argument is a makeweight?

Perhaps these various arguments appear more forceful in combination than they appear when separated. One might claim that while none is independently decisive, the various arguments together suggest that judicial review is a part of the constitutional structure.

4. *The view of the framers and the ratifiers*. The relevant documents at the time of the framing, and before, indicate that judicial review was generally contemplated. See also A. Bickel, supra, at 15–16:

> [It] is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power — of whatever exact dimensions — to pass on the constitutionality of actions of the Congress and the President, as well as of the several states. Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made. Nor can it be maintained that the language of the Constitution is compellingly the other way. At worst it may be said that the intentions of the Framers cannot be ascertained with finality.

Consider Hamilton's views in The Federalist No. 78:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

How, if at all, do Hamilton's justifications for judicial review differ from Chief Justice Marshall's?

For a detailed treatment of some relevant historical issues, see Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4 (2001). Kramer urges that for the framers the "Constitution was not ordinary law, not peculiarly the stuff of courts and judges." Instead it was "a special form of popular law, law made by the people to bind their governors." Id. at 10. For many members of the revolutionary generation, constitutional principles were subject to "popular enforcement," id. at 40, that is, public insistence on compliance with the Constitution, rather than judicial activity. "It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Courts simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature's decision." Id. at 49. Kramer traces the controversial early growth of the practice of judicial review, with many seeing it as an "act of resistance." Id. at 54. At the founding, a "handful of participants saw a role for judicial review, though few of these imagined it as a powerful or important device, and none seemed anxious to emphasize it. Others were opposed. . . . The vast majority of participants were still thinking in terms of popular constitutionalism and so focused on traditional political means of enforcing the new charter; the notion of judicial review simply never crossed their minds." Id. at 66.

In Kramer's account, constitutional limits would be enforced not through courts, but as a result of republican institutions and the citizenry's own commitment to its founding document. Kramer raises serious doubts about the account in Marbury v. Madison and in particular about judicial supremacy in the interpretation of the Constitution. He suggests that for some of the framers, judicial review was "a substitute for popular resistance" and to be used "only when the unconstitutionality of a law was clear beyond dispute." See also L. Kramer, The People Themselves (2004), for an expanded version of this argument.

Note, however, that many and probably most historians and historically minded lawyers disagree, and believe that Marbury v. Madison had it essentially right. See P. Hamburger, supra; R. Clinton, Marbury v. Madison and Judicial Review (1989). For valuable historical treatments, see W. Nelson, Marbury v. Madison: The Origins and Legacy of Judicial Review (2000); B. Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (2007).

Martin v. Hunter's Lessee

14 U.S. (1 Wheat.) 304 (1816)

[This case arose out of a dispute over the ownership of land in Virginia. Hunter claimed the land pursuant to a grant from the state of Virginia in 1789, which confiscated lands owned by British subjects. Martin, a British subject, claimed that the attempted confiscation was ineffective under anticonfiscation clauses of treaties between the United States and England.

[The Virginia trial court held in favor of Martin; the Virginia Court of Appeals reversed, concluding that the state's title to the land had vested before the relevant treaties, and alternatively that Martin's claim was defeated by a 1796 Act of Compromise between the state and Martin's uncle, from whom Martin's claim derived. The Supreme Court of the United States reversed the Virginia Court of Appeals, neglecting to mention the Act of Compromise, but claiming that Virginia had not perfected its title before the relevant treaties. Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603 (1813). The Supreme Court remanded the case to the Virginia Court of Appeals with instructions to enter judgment for the appellant. But on remand the Virginia court declined. The court said that section 25 of the Judiciary Act was unconstitutional insofar as it extended the appellate jurisdiction of the Supreme Court to the Virginia court.

[In its opinion, the court emphasized that the act placed the courts of one sovereign — Virginia — under the direct control of another, an arrangement incompatible with the notion of sovereignty. "It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. The omission proceeded, probably, from the belief, that such a tribunal would produce evils greater than those of the occasional collisions which it would be designed to remedy."

[The excerpts here deal only with the question of whether the Supreme Court has appellate jurisdiction over constitutional decisions by state courts.]