SUPREME COURT
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Chief Justice John Marshall and the establishment of judicial review [1]

Introduction

1 On a low plinth in the ground floor of the Supreme Court building in Washington DC sits a bronze statue of John Marshall, the fourth Chief Justice of the United States. The statue was commissioned by the United States Bar Association and originally located in front of the Capitol building in 1884, but moved to its current location in 1981.

2 The statue has pride of place in the ground floor. If you go on a tour in the building, docents will regale you with reasons why John Marshall, the longest servicing Chief Justice, is often regarded as the greatest. One of the first justifications for that view which they will mention is the case of *Marbury v Madison* 5 U.S. 137 (1803).

3 As we all know, in that case Chief Justice Marshall authoritatively established that a purported exercise of legislative or executive power might be reviewed, and its legality ruled upon, by the judicial arm of government.

4 He famously stated:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

And:

> It is emphatically the province and duty of the judicial department to say what the law is.

5 His Honour concluded that:

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

6 Stirring stuff, admittedly. But Marshall's articulation of judicial review was not the first time such theories had ever been propounded.

7 Precursors included:

(a) Observations made in England by Coke in *Dr. Bonham's Case*, 8 Co. Rep. 113b (1610):

> …it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void…

(b) In *Paxton v Gray,*[2] a 1761 colonial case in which an argument was advanced, apparently founded on *Dr Bonham's Case*, that Writs of Assistance approved by Parliament to permit general searches to aid in the enforcement of customs laws were against the constitution of Massachusetts and therefore void.

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[1] Paper delivered for the Selden Society 2017 lecture series. To assist in the readability of this paper, I have, for the most part, not followed the approach of formally citing each of the sources which I consulted. The major sources which I consulted are listed in an endnote. I also wish to acknowledge the valuable assistance of my associate, Mohammud Jaamae Hafeez-Baig, in the preparation of this paper and the accompanying presentation.

[2] Otis's Writs of Assistance Case, also known as *Petition of Lechmere or Paxton v Gray*, was not formally reported and is mainly known through the notes taken by John Adams and Josiah Quincy: see J L Malcolm, 'Whatever the judges say it is? The founders and judicial review' (2010) 26 J L & Pol 1 at n 77.

(c) An express articulation of the underlying principle by Alexander Hamilton in 1788 in Federalist No. 78 (which was cited to the Supreme Court during oral argument in *Marbury v Madison*) (emphasis added):

> The complete independence of the courts of justice is particularly essential in a limited Constitution. **By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority**; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. **Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.**
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> …
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> There is no position which depends on clearer principles, than that every act of 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.

8 Moreover, it is notable that Marshall's articulation of judicial review in 1803 was not even the first time that it had been proposed by a justice of the Supreme Court.

9 In 1795 Supreme Court Justice William Paterson (who later formed part of the Court in *Marbury v Madison*) formulated a charge to a grand jury whilst on circuit in Pennsylvania in *Vanhorne's Lessee v Dorrance*,[3] a case in which he found it necessary to address the constitutional validity of a State law. He explained to the jury (at 308) the English doctrine of parliamentary sovereignty and advised them that in America, the case was widely different because of the existence of written constitutions in these terms:

> … it is evident, that, in England, the authority of the Parliament runs without limits, and rises above controul. It is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humour or political caprice. Some of the judges in England have had the boldness to assert, that an act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendant; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

10 Although his remarks were directed at State constitutions, there could be no doubt as to the generality of his intention. He stated (at 309, emphasis added):

> The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immoveable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. **I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and found, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both Legislators and Judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of that the Judiciary in this country is not a subordinate, but co-ordinate, branch of the government**.

11 And, similarly, in the 1798 decision of *Calder v Bull,*[4] which considered whether a law of the Connecticut legislature was an *ex post facto* law, prohibited by the Federal

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[3] 2 U.S. 304 (1795).
[4] 3 U.S. 386 (1798).

Constitution, Supreme Court Justice James Iredell explicitly stated (at 399), having described Blackstonian parliamentary sovereignty, that (emphasis added):

> **In order, therefore, to guard against so great an evil**, it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, **to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void**; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.

12 Against that background, one might well wonder why *Marbury v Madison* has assumed the prominence which it has. In a recent paper, Ronald Sackville has pointed out that historians in the US have questioned this.[5] As well as the two cases I have just mentioned, Sackville notes that in the 1796 decision of *Hylton v United States,*[6] the Supreme Court addressed the constitutionality of a Federal Statute on a case stated. Although the challenge failed, there was no evident doubt that the Court had jurisdiction to entertain the question.

13 To my mind sufficient justification for the prominence of Marshall's judgment in *Marbury v Madison* is found in the status of the previous decisions and in the doctrine of precedent.

14 Justice Paterson's jury charge in *Vanhorne's Lessee v Dorrance* was to a circuit court grand jury. Justice Iredell's remarks in *Calder v Bull* were made in the course of a case which addressed a State Act and which, in any event, found that the State Act did not contravene the Federal Constitution. And in *Hylton v United States*, the court answered the question posed by the case stated in favour of the conclusion of validity.

15 On the other hand, *Marbury v Madison* was the first time that the Supreme Court determined that part of an otherwise valid legislative act of the Federal Government was void, on the grounds that it was contrary to the Constitution of the United States. It is the articulation of judicial review as part of the *ratio decidendi* of the first case which so found which gives the judgment of Chief Justice Marshall its place in legal history.

16 In this lecture, I propose first to place John Marshall and the issues decided in *Marbury v Madison* in their historical context. Then I will explain how the case was decided. I will conclude with a brief examination of a recent example of its contemporary relevance.

Historical context

17 To put John Marshall and *Marbury v Madison* in their context it is as well first to remind ourselves of some important matters concerning that period of the history of the United States.

18 The two superpowers of that time were Great Britain and France. They and their allies had fought the so-called Seven Years War between 1754 and 1763. The outcome greatly reduced French power in North America, and for the time being entrenched the power of Great Britain over its North American colonies, albeit at great financial cost to it.

19 A relatively brief post-war period in America was characterised by colonial concern as to the nature and manner of Great Britain's exercise of dominion over its colonies. The Royal Proclamation of 1763 limited settlement of lands to the east of the Appalachians,

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[5] The various theories are identified in R Sackville, 'The changing character of judicial review in Australia: The legacy of Marbury v Madison' (2014) 25 PLR 245 at 247-250.

[6] 3 U.S. 171 (1796).

and thereby stymied for a time the hopes of people who wanted to settle the West and caused great dissatisfaction. So too did the *Stamp Act of 1765*, which imposed direct taxes on the colonies for the first time.

20 British insistence on the legitimacy of these and other exercises of power was resisted by many in the colonies. Taxation without representation led to political tensions and soon enough to boycotts and physical confrontations. The so-called Boston Tea Party took place on 16 December 1773 and involved the destruction of a shipment of tea in protest against British attempts to stop illegal importation of tea and ensure consumption of legal tea on which duties had been paid.

21 Massachusetts was declared to be in a state of rebellion against the British in February 1775. In April 1775 Paul Revere rode, the shooting started when battles between British military and colonial militia took place at Concord and Lexington, and the American War of Independence began. It did not end formally until the Treaty of Paris was signed on 3 September 1783. Amongst other things, Great Britain recognised the independence of the 13 colonies comprising the United States.

22 It was during the course of the War of Independence that the American colonies commenced taking the steps necessary to create the nation of the United States of America. On 4 July 1776, the colonies unanimously adopted the Declaration of Independence. In 1781, with the ratification of the Articles of Confederation, a new Confederation Congress came into being. It was succeeded by the Congress of the United States which had been provided for by the United States Constitution which had been ratified in 1788.

23 By 1803, the new constitutional arrangements had only been in place for some 15 years. Although the new Constitution provided for the US Supreme Court when ratified in 1788, it was not until the following year that the *Judiciary Act of 1789* actually established the Court with a Chief Justice and 5 Associate Justices. The first session of the Court did not take place until February 1790.

24 Where did John Marshall fit in, in all of this?

25 He was born in 1755 to a prosperous family in Virginia. His father was the American agent of Lord Fairfax, a British nobleman who had very significant landholdings in that colony. His father was prominent in the community, serving as a justice of the peace, a county surveyor, and sheriff.

26 Marshall was mostly home-schooled. However, the lack of formality did not seem to cause any harm: he and his many siblings became accomplished and literate through education supervised by their father and other tutors. Certainly he had access to his father's own library and, through his father, to the extensive library of his father's employer Lord Fairfax. It is said that he obtained a set of Blackstone's Commentaries on the Laws of England and studied them in his teens.

27 At the start of the War of Independence, at age 20, John Marshall joined a militia unit in which his father had a command. He saw active service in a battle against the British in that role. He soon accepted a commission as a lieutenant in the Continental army and spent 4 years at the side of George Washington, ultimately becoming promoted to captain. Washington and Marshall's father were old friends. Washington recognized Marshall's talent and added him to his headquarters staff, working closely with him. Marshall was with Washington at Valley Forge. For his part, Marshall regarded Washington as a great leader and personal mentor. Indeed, Marshall became Washington's first biographer.

28 In 1779 Marshall was discharged from the army and soon determined to embark upon a career in the law. He commenced study at the College of William and Mary in Williamsburg, Virginia. In 1780, at age 25, he began his practice as a lawyer in the new State Capital of Richmond. Within a few years he was regarded as one of the leading advocates in the State.

29 In the meantime, and in parallel to his burgeoning career as a lawyer, he embarked on a political career. In 1782, at age 27, he was elected to the Virginia House of Delegates, in which he served until 1789. His talent must have been obvious because he was virtually immediately elected by his colleagues in the House to serve on the Council of State. He also became an alderman in Richmond and was elected as recorder of the city, serving as a member of Richmond's municipal court.

30 Politically, he was a member of the Federalist party (of which more later) and as such was a key spokesman during the Virginia convention in 1788 which debated ratification of the proposed Federal Constitution. He was 33.

31 In the late 1780's and early 1790's he focussed on his legal career and building his personal finances. He continued to develop professionally. One case in which his argument was highly regarded was *Ware v Hylton* 3 U.S. 199 (1796), which involved his ultimately unsuccessful attempt to persuade the Supreme Court that a Virginia statute passed during the War of Independence and which nullified debts owed to British creditors, had not been rendered void by the Treaty of Paris in 1783.

32 He was offered national office in Washington's second term but declined. However he had remained both active in Virginia politics and interested in foreign policy. The US was a neutral in the wars which were then continuing between France and Great Britain, and Marshall had been outspoken in his support of Washington's foreign policy. But neutrality and the attempt to maintain a trading relationship with both warring parties was not without its problems.

33 By early 1797, the efforts of the French navy in intercepting US shipping with a view to interfering with US trade with Britain had reached crisis point. The new President John Adams appointed John Marshall to a 3-man diplomatic mission to France to negotiate a settlement of those difficulties and to avoid the threat of war. The French foreign minister insisted that the US lend France $12m and that huge bribes be paid to he and other French officials before commencing negotiations. Marshall refused those demands. The commission was a failure, although it might be said to have paved the way for the resolution which followed a few years later. At home, Marshall's account of what came to be called the XYZ affair inflamed public sentiment against the French and made him personally popular. He was 42.

34 After Marshall's return, former President Washington persuaded him that it was his patriotic duty to run for Congress, which he duly did in 1799 as a Federalist, even declining an earlier offer of a seat on the Supreme Court by then President Adams. He became a Congressman that year, aged 44. President Adams nominated Marshall to become Secretary of War, but before confirmation changed the nomination to become Secretary of State. He served in that role until his appointment as Chief Justice, which occurred in the wake of President Adams' defeat in the presidential election of 1800.

35 The two opposing candidates in the election of 1800 were on the one hand the incumbent President of the United States, John Adams and, on the other, the incumbent Vice-President of the United States, Thomas Jefferson. Adams was the leader of the Federalist Party and Jefferson the leader of the Democratic-Republican Party.

36 With no doubt great oversimplification, it suffices to say that the Federalists supported a strong national government and friendly relationships with Great Britain. They saw in Jefferson and the Democratic-Republicans a lack of religious belief and the threats to religion, life and property which had been found in revolutionary France. The Democratic-Republicans opposed the centralizing policies of the Federalists, avowing that mankind were capable of governing themselves. They favoured States' rights over the conferral of too much power on the Federal Government. They saw in the Federalists the threat of return to quasi-monarchical rule and the subversion of republican liberties.

37 The election was held from Friday, October 31 to Wednesday, December 3, 1800 and Adams and the Federalists were soundly beaten. However, Jefferson was not sworn in until 4 March 1801, there being a delay because there was a tie between Jefferson and Aaron Burr in the Electoral College which needed to be resolved before the House of Representatives. The House endorsed Jefferson as the next President on 17 February 1801.

38 In the meantime the Chief Justice of the Supreme Court had become ill and submitted his resignation. President Adams initially offered the job to John Jay, who had been the first Chief Justice, but in January 1801 Jay declined. President Adams offered the job to Marshall, age 45. With only weeks to go in the Adams administration, Marshall's appointment was confirmed and he took office on 4 February 1801.

39 Bizarrely to modern eyes, but perhaps reflecting the relative immaturity of all of the institutions of government, Chief Justice Marshall remained as acting Secretary of State for the final month of the Adams administration and assisted in the transfer of power to the incoming Jefferson administration. As Chief Justice he administered the oath of office to Thomas Jefferson, who asked Marshall to stay on as acting Secretary of State for a few days until his successor could arrive in town.

40 It was whilst he was acting Secretary of State in the last days of the Adams administration and before swearing in the new President that Marshall actually had a role in the events which gave rise to the dispute which his Court determined in 1803 in *Marbury v Madison*.

41 First, a little more background.

42 Prior to 1801, a structural problem existed within the Federal Judiciary. The *Judiciary Act of 1789* had set up a Federal Judiciary with three tiers: District Courts in each State headed by a Federal District Judge; three circuit courts staffed by two Supreme Court Judges and by the District Court Judge for each district where the circuit rode; and the Supreme Court. The burden on the Supreme Court Judges, both in having to attend to their own work and also having to ride circuit, was significant. And the system resulted in the Supreme Court Judges having to hear appeals from their own decisions sitting as circuit courts, which created administrative issues. A reform was needed.

43 The reform came, but via highly contentious and overtly political means.

44 Having lost the election, in December 1800 a lame duck Federalist Congress enacted the *Judiciary Act of 1801*, sometimes known as the Midnight Judges Act. The Act became law on 13 February 1801, less than 3 weeks before President Adams' term would expire and the Jefferson administration would commence. The Act expanded the jurisdiction of the lower Federal Courts; abolished the existing circuit courts and created six new circuit courts staffed by 16 new Federal Circuit Court Judges; and relieved the Supreme Court of the burden of riding circuit. President Adams filled all 16 of the new positions in the last days of his presidency, and entirely with Federalists. The appointees became

known as the midnight judges, so-called because Adams was said to be literally signing appointments at midnight on the last day of his administration.

45 One can well imagine the fury of the incoming Jefferson administration.

46 As part of essentially the same round of last ditch manoeuvring and under the auspices of the *District of Columbia Act of 1801* (which became law on 27 February 1801), President Adams nominated a number of men to the Senate to be appointed Justices of the Peace of the District of Columbia for 5 year terms; the Senate advised and consented to the appointments on 3 March 1801; commissions in due form were signed by the President appointing them justices, and the seal of the United States was in due form affixed to the commissions late into the evening of 3 March 1801. However some of the commissions – including one to a certain William Marbury – were not actually delivered before President Jefferson took office on the following day. When the incoming Secretary of State, James Madison, refused to deliver the commissions, Marbury and some others in the same boat sought a writ of mandamus, and so was born *Marbury v Madison*.

47 The incoming Jefferson administration reacted swiftly to the Midnight Judges Act. The *Judiciary Act of 1802* repealed the *Judiciary Act of 1801*. The constitutionality of so doing formed a large part of the debate in Congress. Current Supreme Court Justice Stephen Breyer, writing extra-judicially, has pointed out that the repealing Act included a provision which postponed the next sitting of the Supreme Court until 1803.[7]

Marbury v Madison

48 The Court at the time of the hearing in February 1803 comprised Chief Justice John Marshall and Justices William Paterson, Samuel Chase, Bushrod Washington, William Cushing and Alfred Moore. Justices Cushing and Moore took no part in the hearing or determination of the case. That left the Court with the bare minimum quorum of four. The unanimous opinion of the four members of the Court who did hear the case was delivered by the Chief Justice.

49 The facts before the Court were not entirely clear, the applicants having apparently been stonewalled by lack of co-operation from the Jefferson-led executive even in their attempts to find out whether commissions had been formally executed in their names. Ultimately the facts I have referred to above were proved by evidence heard by the Supreme Court.

50 But that gives rise to a particular oddity concerning the case. The person who affixed the seal to the disputed commissions appointing justices of the peace on literally the last day of the Adams administration was in fact Chief Justice John Marshall, wearing his hat as acting Secretary of State. If anything further than affixation of the seal was necessary to make the commissions lawful (e.g. delivery of the signed and sealed commissions), then, presumably, it would have been his responsibility to make that happen. And the person who had attempted and failed to deliver the commissions and whose affidavit was relied on by the applicants, was James Marshall, the younger brother of the Chief Justice. In fact James Marshall had been nominated by President Adams as one of the new Federal Circuit Judges, was confirmed by the Senate on 3 March 1801, and received his commission on the same day. The report of *Marbury v Madison* records his evidence in this way:

[7] S Breyer, *America's Supreme Court: Making Democracy Work* (Oxford University Press, 2010) at 14.

> Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

51 So in a case argued before the Supreme Court in which the question concerned whether the Court should give a remedy forcing the Democratic-Republican Secretary of State to give effect to wildly controversial conduct of the previous Federalist administration, the Chief Justice was in fact a person who had been a prominent member of the very administration which enacted the legislation, including acting as such at the time of the controversy. Moreover, the hearing of the case involved the need for a factual determination as to whether or not commissions had been duly signed and sealed in favour of the applicants, and the Chief Justice, acting as a member of the Federalist administration, was the very person who had affixed the seal to the commissions late into the evening of 3 March 1801, and the person on whose watch delivery had failed to occur. And part of the mode by which that failure occurred, included, on the evidence, conduct of the Chief Justice's own brother.

52 The application of modern standards concerning apparent bias would certainly have led to a successful challenge to the participation of the Chief Justice in the case, or, more properly, to his voluntarily recusing himself from the hearing in the first place. Whether it is appropriate to assess the Chief Justice's conduct by such standards is unclear. Georgetown's Professor Susan Low Bloch has suggested that under the ethical standards at the time, only financial conflicts required recusal.[8]

53 Turning back to the facts of the case, the "Mr Lee" mentioned in the quote concerning the evidence of James Marshall was Charles Lee, a Virginian lawyer who had been the United States Attorney General under the Adams administration, and who was counsel for the applicants.

54 Having ultimately proved the existence of the commissions, Lee's argument sought to establish three propositions:

(a) First, that the Supreme Court had jurisdiction to award the writ of mandamus;

(b) Second, that mandamus would lie to a Secretary of State in certain circumstances;

(c) Third that mandamus should lie to James Madison, in the circumstances before the court.

55 As to the first proposition, concerning the general jurisdiction of the Supreme Court to award a writ of mandamus, he relied upon the Constitution, and upon the specific conferral of jurisdiction by the *Judiciary Act of 1789* and, effectively, also on an argument as to the inherent jurisdiction of the Court:

(a) As to the Constitution, article 3 provided, relevantly (emphasis added):

> **The judicial power of the United States, shall be vested in one Supreme Court**, and in such inferior Courts as the Congress may from time to time ordain and establish. …

[8] S L Bloch, '*Marbury* Redux' in M Tushnet (ed), *Arguing Marbury v Madison* (Stanford Law & Politics, 2005).

> **The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution**, the Laws of the United States ….
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> **In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction**, both as to Law and Fact**, with such Exceptions, and under such Regulations as the Congress shall make**.
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> …

(b) As to the *Judiciary Act of 1789*, s 13 was explicit (emphasis added):

> **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 admiralty and maritime jurisdiction; and **writs of mandamus, in cases warranted by the principles and usages of** law, to any courts appointed, or **persons holding office, under the authority of the United States**.

(c) Lee contended that if the courts of King's Bench had the jurisdiction to award writs of mandamus and prohibition, it must follow that the Supreme Court of the United States had such jurisdiction. He contended that the term "appellate jurisdiction" in article 3 should be taken in its largest sense and was sufficient to encompass the nature of the court's jurisdiction to superintend inferior tribunals. And he noted that on two earlier occasions the Court had in fact entertained applications for writs of mandamus and prohibition, although there had been no challenge to the court's jurisdiction to grant the relief sought.

56 As will appear, it was in the first limb of his argument that Lee failed, the Court ultimately determining that it did not have jurisdiction to award a writ of mandamus because the grant of jurisdiction so to do by s 13 of the *Judiciary Act of 1789* was void as being contrary to the Constitution.

57 As to the second proposition, concerning the circumstances in which mandamus would lie to a Secretary of State, Lee accepted that the writ could not lie in all cases. The Secretary of State acts in two capacities. In one, he is the agent of the President, and not liable to a mandamus, but in the other, he is acting as a ministerial officer of the people of the United States and in that capacity mandamus would lie. Examples of that capacity were occasions in which the Secretary was discharging duties assigned him by law, independently of all control, including the President, e.g. as a recorder of the laws of the United States, keeper of the great seal, recorder of deeds of land and letters patent and commissions. Just as mandamus would lie if the secretary refused to affix the great seal to a patent or land deed, so would it lie in relation to the commission of a judicial officer.

58 As to the third proposition, that mandamus would lie to Secretary Madison in the circumstances before the Court, Lee pointed out that the subject commissions were commissions which appointed their recipients to exercise the judicial power of the United States. He emphasised the importance of such appointments, including, interestingly, by referring specifically to Federalist No. 78 as setting out the correct view concerning the exercise of judicial power. Finally, he sought to demonstrate that mandamus was, in the language of the *Judiciary Act 1789*, "warranted by the principles and usages of law".

59 The summary of Lee's argument I have just given derives from the detailed reporting of the applicants' argument in the official report of the case. That gives rise to a second curiosity about the case. There is no reporting of any argument for the respondent. The reason for that is straightforward: no lawyer representing Secretary Madison appeared

before the Court in 1803. In light of the highly political and well-publicized nature of the case, that was no accident. It would have been hard to construe the failure to appear as anything other than an implicit threat by the Jefferson administration to ignore the outcome, were the Court to determine in favour of the applicants and grant the mandamus.

60 Of course, the Court still had to do its job, notwithstanding the lack of a contradictor.

61 Marshall's opinion considered Lee's arguments in a different structure, posing three questions for analysis:

(a) First, did the applicant have a right to the commission?

(b) Second, if he had a right, and that right had been violated, did the law afford him a remedy?

(c) Third, if the law did afford him a remedy, was it a mandamus issuing from the Supreme Court?

62 First, did Marbury have a right to the commission?

(a) Marshall concluded that once the commission had been signed by the President and had the seal affixed to them by the Secretary of State, the appointments the subject of the commissions were duly made. Delivery of the commissions were not necessary for validity.[9]

(b) Mr. Marbury, then, was duly appointed as a justice of the peace, his appointment was not revocable; but vested him legal rights, which were protected by law. To withhold his commission, therefore, was an act deemed by the court not warranted by law, but violative of a vested legal right.[10]

63 Second, did the law afford him a remedy?

(a) The answer to the first question virtually dictated the affirmative answer which Marshall gave to the second question, but in the course of answering it, Marshall drew an important distinction affecting the circumstances in which executive acts might be justiciable.

(b) Marshall cited with approval the statement in Blackstone's Commentaries that "… it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[11]

(c) The Chief Justice then essentially adopted the distinction which Lee had drawn between the two capacities in which the Secretary of State might act and used that as the distinction between circumstances in which executive acts might be justiciable and circumstances in which they could not. This distinction is the progenitor of the so-called "political question" doctrine in modern American Constitutional law. The Chief Justice stated:

> … where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual

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[9] *Marbury v Madison* 5 U.S. 137 (1803) at 158-9, 162.
[10] *Marbury v Madison* 5 U.S. 137 (1803) at 162.
[11] *Marbury v Madison* 5 U.S. 137 (1803) at 163.

> 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.

(d) The political question doctrine now holds that a question may be regarded as fundamentally political and not justiciable in certain circumstances. The current leading case on the political question doctrine is *Baker v Carr* 369 U.S. 186 (1962). In that case the Supreme Court determined that a political question may arise when any one of the following six circumstances is present:

(i) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

(ii) a lack of judicially discoverable and manageable standards for resolving it;

(iii) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;

(iv) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

(v) an unusual need for unquestioning adherence to a political decision already made; or

(vi) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

(e) Having articulated the nascent political question doctrine, the Chief Justice acknowledged that the discretion of the President to nominate to the Senate a judicial officer for appointment and having done so, to appoint the person nominated, were powers to be exercised according to the President's discretion and unreviewable. But having exercised the discretion and made the appointment, the discretion had been completely exercised and could not be reversed. Except in the case of officers removable at the will of the President, the appointee had rights which were protected by the law and which could not be extinguished by executive authority.

(f) Marbury had a right to his commission and a refusal to deliver it was a violation of his rights, for which the law afforded a remedy.

64 The authoritative establishment of the doctrine of judicial review occurred in the course of the Chief Justice's answering of the third question, namely if the law did afford Marbury a remedy, was it a mandamus issuing from the Supreme Court? The Chief Justice posed two further sub-questions, namely whether the case was an appropriate case for mandamus and, if it was whether such a writ could issue from the Supreme Court.

65 The former issue was resolved in favour of the applicants. Although, the judgment acknowledged that:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

this was not such a case because it concerned vested rights created by the exercise of such discretions. It was, the Chief Justice opined, "… a plain case for a mandamus, either to deliver the commission, or a copy of it from the record …"

66 The problem for the applicants was that it was only a plain case for mandamus if they were in a Court which could grant that remedy.

67 In addressing the question of the jurisdiction of the Court to issue mandamus, the Chief Justice first acknowledged that the only way in which it would not have jurisdiction was if s 13 of the *Judiciary Act* was unconstitutional and therefore incapable of conferring the jurisdiction.[12] He proceeded to construe article 3 of the Constitution essentially by the application of the argument from redundancy (in his words "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it").[13] His analysis ran as follows:

(a) Article 3 contemplated one class of cases in which the court had original jurisdiction and another in which it had appellate and not original jurisdiction.

(b) Given that the case did not fall within the limited class of cases in which original jurisdiction of the Supreme Court, it would only be if the issue of mandamus was an exercise of appellate jurisdiction or necessary to exercise such jurisdiction, that there would be jurisdiction.

(c) The fact that the Constitution specifically adverted to both types of jurisdiction was enough to justify the rejection of the broad approach to "appellate jurisdiction" which Mr Lee invited the court to take.

(d) The issue of a writ of mandamus to the Secretary of State would not be an exercise of appellate jurisdiction and, accordingly, the s 13 grant of authority to the Supreme Court was not warranted by the Constitution.

68 It was then that the Chief Justice came to the analysis for which his judgment has become famous.

69 Having said that s 13 was not warranted by the Constitution, he next thought it was necessary to enquire whether the jurisdiction so conferred could nevertheless be exercised. He plainly did not think that was a very difficult question, observing:

> The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

70 The logic of the Chief Justice's analysis was as follows.

71 **First**, the Constitution was a fundamental expression of the will of the people.

72 **Second**, the Constitution was framed so as to assign to different "departments" of government their respective powers and to establish certain limits not to be transcended by those departments. It was to define and limit the powers of the legislature and to ensure that those limits might not be mistaken that the constitution was written. This led to the first passage which I quoted at the outset:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

73 **Third**, the Chief Justice thought that proposition must be true because either the Constitution was paramount, giving rise to that conclusion, or it was just an ordinary legislative act, alterable whenever the legislature thought fit. He rejected the latter proposition as contrary to the contemplation of all those who have framed written constitutions.

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[12] *Marbury v Madison* 5 U.S. 137 (1803) at 173.
[13] *Marbury v Madison* 5 U.S. 137 (1803) at 174.

74 **Fourth**, the Chief Justice posed the question whether the courts might somehow be bound to give effect to an act of the legislature which was repugnant to the Constitution and void. That gave rise to the second of the passages quoted at the outset:

> It is emphatically the province and duty of the judicial department to say what the law is.

75 The Chief Justice's point was that if an act of the legislature was opposed to the constitution, and both the act and the Constitution applied to a particular case, it was of the essence of judicial duty to decide which of the two conflicting rules governed the case.

76 **Fifth**, it was then an easy step for the Chief Justice to conclude that, if the Constitution is to be regarded as superior to an ordinary act, then it must be the Constitution which prevailed when the court made the choice between the two conflicting rules. Any other doctrine would subvert the foundation of written constitutions. That it would do so would be sufficient justification for the conclusion that the Constitution must prevail.

77 **Finally**, the Chief Justice thought that an additional justification for reaching the same result came from the wording of article 3 of the Constitution, which, as we have seen, vested the judicial power of the United States in the Supreme Court, and extended it to all cases arising under the Constitution. He thought that if the power extended to cases arising under the Constitution, it must follow that the intention must have been that judges were intended to examine the constitution and to interpret it. Thus he concluded with the final of the passages I quoted at the outset:

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

78 The rule nisi which had been granted requiring the secretary of state to show cause why a mandamus should not issue, was discharged.

79 The technical result, of course, was that Marbury and the other applicants failed to obtain their remedy. Given, however, the explicit Supreme Court acknowledgment that the applicants had vested legal rights and that mandamus was an appropriate remedy, one might well wonder why they didn't simply turn around and attend the nearest Federal Circuit Court and seek mandamus in that court. That court undoubtedly had jurisdiction to grant mandamus. One possibility is that with little over half the period of the fixed term appointment left, and given the relatively small emoluments concerned, the game was no longer worth the candle. Another is that the applicants, all ardent Federalists, had only ever been concerned with making some political point against the Jefferson administration and the Democratic-Republicans, and were sufficiently happy with what they had got out of the Supreme Court.[14]

80 There is an enormous literature both of hagiography and, frankly, demonization of Marshall and his decision. Time does not permit a critical analysis of either. Because the orthodox view inclines towards hagiography and is well known I will not examine it, but it might be interesting at least to touch upon three aspects in which the case has been criticised.[15]

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[14] S L Bloch, '*Marbury* Redux' in M Tushnet (ed), *Arguing Marbury v Madison* (Stanford Law & Politics, 2005).
[15] For a fascinating and far more detailed analysis of the historical context and the decision itself than I have presented, accompanied by excoriating criticism of Marshall, see MRLL Kelly, '*Marbury v Madison* – An Analysis' (2005) 1(2) High Ct Q Rev 58. That paper contains a number of references to other critical analyses.

81 First, an obvious and possibly legitimate line of criticism concerns the choice which the Chief Justice made to participate in the hearing in the first place. He was needed for a quorum – given the absence of two other members of the Court – but adjournment could have cured that problem. By modern standards, the choice not to recuse was indefensible. Whether that is a valid criticism by the standards of the time is not clear.

82 Second, there is the Chief Justice's choice to address the merits of the question whether Marbury had rights for which the law should provide a remedy, rather than to follow the more orthodox approach of considering first whether the Court had jurisdiction to grant the remedy sought. One might initially discern validity in this criticism especially when one considers that the argument presented by Lee followed the orthodox course. Strictly, the *ratio* of the case was that the Supreme Court had no jurisdiction to grant mandamus for the reasons the Chief Justice articulated. The consideration of the merits, and the various powerful statements concerning the vested rights of the persons who were supposed to receive the commissions, were *obiter*. The logic of the case could have proceeded by dealing with Lee's first argument, concluding that there was no jurisdiction for the reasons expressed, and then ruling that the other questions were unnecessary to answer.

83 Critics of Marshall suggest that his choice to express his views on the merits and **then** to consider jurisdiction may have been informed by Marshall's own strong Federalist politics, and could even have been influenced by a concern not to have his own conduct criticised. The latter read of the decision contends that his conclusion that the commissions were valid upon the seal being affixed without the need for delivery might have been influenced by the fact of his involvement in the failure to deliver them and a concern that his conduct not be criticised. This line of criticism seems to me to be speculative, but it is certainly one which is opened up by Marshall's decision to participate in the hearing.

84 Justice Breyer, in the book to which I have earlier referred,[16] defends the decision to embark upon the merits in a different way, which picks up on the orthodox view about the brilliance of Marshall's decision. He makes these points:

(a) First, concerning the decision as a general proposition:

(i) The perception of the Court and the public at the time, correctly, would have been that there was a real risk that the Jefferson administration would not comply with any decision which involved his bitter political enemies (including Marshall) forcing him to accept one of their Federalist appointees.

(ii) This put the Court onto the horns of a dilemma. On the one hand, if the Court held that the law did not entitle Marbury to his commission, that failure to force the Executive to do the routine act of delivering a piece of paper would radiate institutional weakness on the part of the Court in the face of a determined Executive. On the other hand, if it decided Marshall was entitled, and gave the remedy sought, the Executive might simply ignore it. Again the Court would have failed to act effectively.

(iii) Marshall brilliantly escaped the dilemma by finding that the law did entitle Marbury to the commission, and by finding that Jefferson won the case on

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[16] S Breyer, *America's Supreme Court: Making Democracy Work* (Oxford University Press, 2010) at 15-16, 20-21.

constitutional grounds, all the while by adopting Hamilton's theory of judicial review.

(b) Second, concerning Marshall's decision to embark upon the merits:

(i) Breyer suggests that there were two methodological propositions concerning judicial decision making which were in play. First, where a court lacks jurisdiction it should not decide the merits of the case. And, second, a court should try to avoid making constitutional decisions by deciding non-constitutional matters first. In other words, a court ought not to decide constitutional matters unless it has to do so.

(ii) Breyer suggests that in the circumstances before him, Marshall would have found it difficult to show that he had to decide the constitutional question, without embarking on the analysis which demonstrated that the question had to be decided. It was only by demonstrating that Marbury had legal rights which called for mandamus that Marshall demonstrated that he had to decide the constitutional question whether the Court had jurisdiction to issue mandamus.

(c) To my mind Justice Breyer's argument is a powerful riposte to the critics.

85 The final criticisms which should be touched upon address the merits of Marshall's theory of judicial review itself, namely that legislation contrary to the Constitution is void, and the Supreme Court is the appropriate body to make that determination. Sackville's paper, to which I have earlier referred, identifies two central criticisms here.[17] First, that Marshall assumes rather than demonstrates that the proper construction of the Constitution was that the Courts should exclusively have the jurisdiction to decide the limits of constitutional power. Second, that the principal philosophical problem with the Marshall theory of judicial review is its counter-majoritarian character, in that, by declaring a legislative act invalid, the Court thwarts the will of the representatives of the people.

86 In my view, the latter line of criticism involves normative rather than legal considerations. If the proper construction of the Constitution is as Marshall posited, then it is not Marshall's theory which is counter-majoritarian, but the Constitution itself. Any normative discussion is to my mind properly directed at the Constitution and whether there might be a better way to organize how society answers questions posed by judicial review. The normative assessment of judicial review is interesting but not one on which I will spend any time. Jeremy Waldron's article "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346, discussed by Sackville, is worth reading on the point.

87 That brings us to the question whether there was a gap in Marshall's reasoning in justifying his conclusions about what the Constitution called for. Certainly his reasoning was brief and propositionally framed. But I think it is logically complete. His starting point was that, by the adoption of their written Constitution, the American people had intentionally rejected the notion of untrammelled legislative or executive authority and had sought to impose legal limits designed to be permanent and not capable of being altered by the ordinary acts of government. This assumption seems to me to be the proper construction of the Constitution. I do agree that it is assumed, rather than demonstrated, but I have not read any persuasive argument against its correctness. Once that basal

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[17] R Sackville, 'The changing character of judicial review in Australia: The legacy of Marbury v Madison' (2014) 25 PLR 245 at 250-252.

assumption is accepted, then one asks oneself who decides whether one of the "departments" of government has sought to go beyond the limits. It could not be the legislature or the executive, because that would contradict the basal assumption. In my view, giving effect to the basal assumption drives the answer firmly towards the judiciary. That conclusion is then confirmed when one notes that the essence of what judges do is to decide legal and factual questions which arise in controversies brought before them and then notes that article 3 of the constitution confers judicial power under the Constitution on the Supreme Court.

Contemporary relevance

88 We know, of course, that the decision is no mere relic of legal history. Judicial review is alive and well in the United States and, indeed, in Australia. But as the focus of this paper is on the Supreme Court the United States, I will limit by remarks to that country.

89 The most famous recent examples of the contemporary relevance of *Marbury v Madison* concern the litigation which has arisen consequent upon certain executive orders issued by President Trump which are said to be unconstitutionally directed towards Muslim immigrants. Although there have been two subsequent cases argued at Circuit Court of Appeals level, they have not yet been determined. As the final task of this lecture, let me briefly take you to the decision of the Ninth Circuit Court of Appeals and demonstrate its debt to *Marbury v Madison*.

90 The case is *Washington v Trump* 847 F.3d 1151 (2017). You will recall that President Trump had signed an executive order suspending refugee admissions and entry of aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. The States of Washington and Minnesota challenged the Executive Order as unconstitutional and violative of federal law, obtained a temporary injunction, and the matter came before the Court on an application by the Government for stay of that injunction, pending an appeal. The Court denied that motion, concluding, amongst other things, that the Government had not shown a sufficient likelihood of success on the merits of its appeal.

91 Only one part of the decision is relevant for present purposes.

92 The Government had contended that the court below had lacked authority to enjoin enforcement of the Executive Order because of a contention that the President had "unreviewable authority to suspend the admission of any class of aliens." The Court observed (emphasis added):

> … **the Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections**. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.

93 The Court rejected such an extravagant proposition in no uncertain terms. It held (citations omitted, emphasis added):

> **There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy**. See *Boumediene v. Bush*, (rejecting the idea that, even by congressional statute, Congress and the Executive could eliminate federal court habeas jurisdiction over enemy combatants, because the "political branches" lack "the power to switch the Constitution on or off at will"). **Within our system, it is the role of the judiciary to interpret the law**, a duty that will sometimes require the "[r]esolution of litigation challenging the constitutional authority of one of the three branches." *Zivotofsky ex rel. Zivotofsky v. Clinton* (quoting *INS v. Chadha*)… We are called upon to perform that duty in this case.

> **Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context**.

94 Although *Marbury v Madison* was not expressly cited, the identification of the role of the judiciary in relation to the law plainly derives from it. And the passage from the majority judgment in *Boumediene v. Bush*, part of which was expressly cited, was in these terms (emphasis added):

> **Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another**. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. **The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."** ***Marbury v. Madison***, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

95 The truth is that the tension between those who seek to exercise executive and legislative power, and those in whom reposes the function of determining and enforcing the constitutional limits on that exercise, will always be on-going in a vibrant constitutional democracy. And, when the former become more, shall we say, adventurous, than normal, that tension can become quite elevated, as the continuing clashes between the Trump administration and the judiciary demonstrate.

96 Power does not enjoy being thwarted.

97 I will not speculate on the way in which the cases will eventually be resolved by the Supreme Court, save to say that I would be very surprised if the Court accepted the extravagant proposition that the subject executive action was unreviewable even if it contravened constitutional rights and protections. The constitutional principle established by Chief Justice John Marshall in *Marbury v Madison* would be an insurmountable obstacle to such a notion.

John Bond, 25 May 2017

<u>Principal sources consulted</u>:

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