

# ESSAY 13

## Marbury v. Madison

Most history books identify *Marbury v. Madison* (1803) as the first landmark Supreme Court decision in United States history. *Marbury*, it is taught, ushered in the age of judicial review, greatly increasing the power of the Judiciary. Judicial review is commonly defined as the ability of courts to declare acts of either the executive branch or the legislative branch unconstitutional. *Marbury* was the first Supreme Court decision that declared an act of Congress to be unconstitutional. According to Congressional Research Services' *The Constitution of the United States, Analysis and Interpretation, 2013 Supplement*, between 1803 and 2013, the Supreme Court has used this power to rule 176 Acts of Congress as unconstitutional. (Thomas, 2013)

In this paper, I will discuss what the case was about, as well as why the decision has had a major effect on our country. Additionally, I will evaluate the arguments for and against the decision and evaluate the changes that it helped to bring. Finally, I will discuss its relevance today.

### What the Case was about

William Marbury was appointed to be a Justice of the Peace in the District of Columbia by the outgoing President, John Adams. In the 1800 election, Adams had lost his reelection bid to Thomas Jefferson. Marbury was a lame duck appointment (the appointment was made in between the time of the election and the inauguration of the new President). The commission was not delivered before the inauguration and President Jefferson ordered his Secretary of State, James Madison, not to deliver the commissions to the Federalist appointees which

## ESSAY 13

kept them from taking office. Marbury insisted that he was entitled to the commission and that he had every right serve. Marbury had therefore filed suit before the Supreme Court invoking its original jurisdiction granted to it by the Judicial Act of 1789 (Levinson & Balkin, 2003). Marbury was hoping that the Supreme Court would order Secretary Madison to deliver his commission which would allow him to serve as Justice of the Peace.

The Supreme Court ruled in a unanimous (4-0) decision that Marbury was entitled to the commission and that Madison should have delivered it. However, the Court also ruled that they did not have jurisdiction in the case because the Judicial Act of 1789 violated Article III of the United States Constitution, therefore the law was deemed unconstitutional. Marbury was never able to serve as a Justice of the Peace, and the concept of judicial review was established, making the Supreme Court the final decider of what is constitutional.

In hindsight, it appears that this was nothing more than a petty dispute between a Democratic-Republican (Monroe), and a Federalist (Marbury). But to totally understand the case one must consider the time in which it occurred. During this time in American history political parties were just beginning to be formed. The Framers of the Constitution did not think there would or should be political parties. They identified political parties with factions, which were dangerous to the health of democratic institutions (Levinson & Balkin, 2003). They designed a Constitution that was supposed to work without the creation of such factions. Nonetheless, within a short time the first two political parties were formed: the Federalists, led by Alexander

# ESSAY 13

Hamilton, and the Democratic-Republicans, led by Thomas Jefferson. *Marbury v. Madison* arose out of a dispute between the two new political parties. It was against this backdrop of mutual distrust and contempt that one must consider this landmark decision.

Today, we take for granted that Democrats and Republicans will battle it out every four years for the Presidency and that, after a hard fought campaign, power will be peacefully exchanged between the parties. This is common in our day, but not in 1801. The election of 1800 posed a real crisis for the new republic. This marked the first time that the power was changing from one party to another, and there were serious doubts that it could be done peacefully (Levinson & Balkin, 2003). The *Marbury* decision, was instrumental in ensuring the peaceful transition of power because it validated that three equal branches of government can act as checks and balances against one another.

## Why did this decision have a major effect?

The introduction of judicial review and the accepted theory that the judicial branch would decide the constitutionality of legislative and executive actions has played a significant role in the history of our nation. The *Marbury* decision would also be used by later courts to increase judicial power through the expansion of the concept of judicial review.

An example of judicial review being used to dramatically impact the country would be the Supreme Court's rulings regarding the Fourteenth Amendment. During the Civil Rights era, many southern states passed laws that infringed on the rights of African Americans. These laws

# ESSAY 13

were in violation of federal law and the constitution. The Fourteenth Amendment Enforcement Clause states:

*“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

Cases were brought to the Supreme Court regarding the constitutionality of these state laws that were believed to violate the Enforcement Clause. The Court held that the enforcement authority of the Fourteenth Amendment was only intended to allow Congress to overrule those state laws that the Court already considered in violation of the Fourteenth Amendment. In other words, the courts would determine whether a state law was unconstitutional, and only then would Congress have the authority to act. The Court was clear that, under its responsibilities of judicial review, it was the body that would determine whether a state law was unconstitutional (Thomas, 2013). These rulings had a dramatic impact on the overturning of discriminatory state laws and helped to improve our country by realizing the goals of the Civil Rights movement.

## Arguments for the decision

The Chief Justice of the Supreme Court during the *Marbury* case was John Marshall, the former Secretary of State who authored the majority decision. Marshall is credited with playing a significant role in developing the American legal system as we know it today. Marshall served as Chief Justice for 34 years, making him the longest serving Chief Justice in U.S. history.

Alexander Bickell, biographer of John Marshall wrote regarding the *Marbury* case:

# ESSAY 13

*“Marbury, for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law under the constitution. Marshall resolved to go still further. He would announce from the Supreme Bench rules of procedure which the executive branch of the Government must observe (Casale, 2015).”*

Marshall’s argument essentially stated that the people have active and ultimate authority to interpret and enforce their constitutions. But the people have appointed agents to govern for them, including courts, which have been assigned responsibility for adjudicating legal disputes. If an unconstitutional law comes before a court in the course of litigation, the court must recognize its unconstitutionality and overturn it (Kramer, 2004). The argument for this interpretation is that the Supreme Court acts on behalf of the people which removes the need for the community to organize in opposition to every unconstitutional law.

## Arguments against the decision

Though the history books say *Marbury* established judicial review, the facts show something different. The Supreme Court’s own history shows that judicial review was not established in *Marbury*, and that Chief Justice Marshall was not the first to claim it. Eleven years before *Marbury* was decided, the Supreme Court unanimously agreed that a provision of the Invalid Pension Act of 1792, which provided compensation to revolutionary war veterans, violated the constitution by requiring the judiciary to issue advisory opinions to the Secretary of War (Casale, 2015). The Justices’ asserted their power to rule this piece of legislation unconstitutional. In other words, the justices invoked the power of judicial review. There was no dispute from the Congress and the ruling created no controversy. There were other pre-*Marbury*

# ESSAY 13

cases in which the Supreme Court used judicial review to overturn legislation because it was considered to be a necessary part of the judicial process. Because of this, some historians argue that *Marbury* did not establish the power of judicial review since that power was widely accepted prior to the ruling and, as such, the *Marbury* decision should not be considered as a landmark.

Those who oppose judicial review would argue the job of passing laws was assigned to the legislature, not the courts. When courts interfere by weighing in on the constitutionality of legislation, they exceed their authority (Kramer, 2004). The people, it is argued, have the power to remove their elected officials if they find their actions to be going against the constitution.

Additionally, some argue that allowing the Supreme Court to strike down acts of the legislature is exactly what the Framers would have considered to be an overreach of judicial authority. Giving a court the power broadly to interpret the meaning of laws and determine the soundness of presidential action was not a role that the Framers were willing to give to the judiciary. It is important also to note that a large part of the discussion about the role of the judiciary both during and after the Constitutional Convention was devoted to concerns about the potential for overreaching on the part of the judges (Harrington, 2011). There was great distrust of Judges based off of the Framers memories of what the judiciary was like prior to the Revolutionary War.

## Changes resulting from the decision

Chief Justice Marshall's real innovation was in his assertion of the power to "say what the law is." As a result, *Marbury* expanded the role of the judiciary far beyond anything conceived of by the Framers and set the stage for increased judicial authority (Harrington, 2011). This power that the court gave itself has expanded greatly over the past two centuries, leading to what some today have referred to as judges legislating from the bench.

# ESSAY 13

Perhaps the biggest legacy of the *Marbury* case was John Marshall's expanding the role of judicial review to give the judiciary the exclusive power to broadly interpret the meaning of the Constitution itself. In so doing, Marshall transformed the power of the judiciary. After *Marbury*, judicial review became the tool by which the Supreme Court became the final decision maker on all constitutional questions, excluding the legislative and executive branches (Harrington, 2011).

## Relevance Today

*Marbury* is such a foundational case of American public law because of its role in the development of the doctrine of judicial review (Bamzai, 2016). It is important to remember that the theory of judicial review that achieved acceptance in the early 1800's was not the modern theory of judicial review. Judges did not say they were uniquely equipped to decide constitutional questions, nor did they claim that courts had any special authority to do so (Kramer, 2004). The judges were simply acting as the agents of the people and were responsible for identifying laws and actions that were in violation of the Constitution.

Modern judicial review, many argue, is nothing more than activist judges forcing their will on the American people. On the other hand, judicial review as practiced by Chief Justice Marshall consisted of good-faith, conscientious efforts to interpret the Constitution as a legal document (Nagel, 2003). This extensive power of the Supreme Court to determine what is law is the reason why the appointing of Justices is so vital to the political parties. By winning the White House, the victorious President can have a tremendous impact on the make-up of the court for decades to come. Republicans nominate conservative justices, while Democrats nominate liberal justices. Today the court is split 5-4, with Republican appointed Justices having the advantage. If the next Justice to retire or die while in office is a liberal, it could have a

# ESSAY 13

tremendous impact on future decisions as they would most likely be replaced by a conservative. The reason why this is so important is because of the Courts power of judicial review.

Although some believe that *Marbury v Madison* was not the first court decision to use judicial review, and therefore should not be considered a landmark case, it helped create what our legal system is today. It was a prime example of the judicial branch deciding what is constitutional. Marshall produced the standard of basing judicial review on unbiased interpretation of the Constitution. One of the results of the *Marbury* decision that can be seen today is the expansion of power of the judicial branch. Some people consider justices as activists and feel that the judicial branch has overstepped their role. Those people would say that judges are creating laws instead of interpreting the law. Either way one looks at the decision of the *Marbury v Madison* case, it is clear to see that a case that was made over 200 years ago is still relevant today, being one of the most controversial and important cases in the history of the Supreme Court.



# ESSAY 13

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