

# ESSAY 8

## Marbury vs Madison and Judicial Review

During the early republic, the Supreme Court did not have the great, reaching impact on American government that it has today. Founded explicitly as an arbiter of the decisions of the lower courts, the court did not assume its implicit authority to review acts of legislation until the Marbury vs Madison case. This case was not a direct question of the power of the Supreme Court to review an act of legislation, but rather a conclusion added to the decision of a question on the power of the Supreme Court to enforce its directives. Due to the newfound power of judicial review, the Marbury vs Madison decision allowed the Court to fight unconstitutional acts, potentially slowing and moderating the Democratic-Republican agenda. No other early decision of the Supreme Court was more central to protecting the separation of powers and the power of the Constitution in American law than Marbury vs Madison.

### **Early Support for Judicial Review**

While the power of Judicial Review was not explicitly used by the Supreme Court until Marbury vs Madison, the concept of judicial review was favored by early advocates of the Constitution and its provisions for a republican government to prevent a democratic tyranny. These advocates favored a government which could exert a strong enough authority to prevent the weaknesses inherent in a confederacy without the tyrannical abuses of power that would be possible in a pure democracy without said republican protections. Such was the opinion of Alexander Hamilton who sought a strong central government that would allow the United States to become a world power while maintaining its founding values.

To support this, Alexander Hamilton (along with James Madison and John Jay) wrote the Federalist Papers, a collection of essays defending the new Constitution. Among these, Federalist Seventy-Eight was devoted to the Judiciary, aptly titled "The Judiciary

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Department". In this, Hamilton describes: "that the courts were designed to be an intermediate body between the people and the legislature". Therefore, the Constitution would allow the legislature to rule the body politic, but be held tightly to the Constitution which gives them their power and to be limited by the Judiciary in the scope and strength of their power. Indeed, Hamilton follows that the Constitution provides for the courts to keep "[the Legislature] within the limits assigned to their authority." Furthermore, the courts act to protect the constitutional rights of the people: "[W]here 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."

The courts are provided this authority not because those who serve on it are inherently more knowledgeable on the Constitution, but because they are the weakest of the three branches and therefore need to be protected from the abuses of the others. Hamilton came to this conclusion from Baron de Montesquieu's assertion that "Of the three powers [...], the judiciary is next to nothing." (It is Montesquieu we have to thank for the very concept of different branches of government with defined roles and powers that can check and balance one another.) Additionally, the Judiciary should be granted this authority as it has no interest or ability in making its own statutes, nor may it enforce them.

## **History**

During the administration of President John Adams, support for the majority Federalist party waned as the government grew increasingly (or at least seemingly) more authoritarian and intrusive, according to Alan Brinkley in *American History*. With this, popular support shifted towards the Democratic-Republicans who favored smaller government and stronger states' rights. In the election (or 'revolution', as some historians term it) of 1800, Thomas Jefferson was elected President. Knowing his party would soon be out of

power, John Adams sought to appoint as many Federalist officials to the government bureaucracy as possible (many of these became known as midnight appointments, as they were appointed on the final night of the administration) (Brinkley 178).

According to James Q. Wilson and John J. DiIulio, Jr. in *American Government*, these appointments sought to prevent the Democratic-Republicans from weakening the federal government. Secretary of State John Marshall was appointed Chief Justice of the Supreme Court so as to maintain a position of prominence in government. Seventeen of these appointments, however -- William Marbury being one of them -- were not given their positions as the commissions had not been delivered before the beginning of the Jefferson administration (Wilson and DiIulio 434). Seeking his commission, Marbury requested it from the new State of State, James Madison. Upon Madison's refusal, Marbury (along with three others) appealed to the Supreme Court in a suit against James Madison.

### **Marbury vs Madison**

In *Marbury vs Madison*, the plaintiff (William Marbury) argued that the defendant (James Madison) had failed to uphold the duty of his office in delivering the appointments. Furthermore, the plaintiff argued that the Supreme Court had the ability, per the Judiciary Act of 1789, to issue a writ of mandamus, demanding Madison deliver the commissions. The defendant, however, argued that he had no duty to deliver the commissions and that the Supreme Court had no ability to require him to do so (Wilson and DiIulio 435).

In its decision, John Marshall led the Supreme Court unanimously in the opinion that *Marbury vs Madison* contains three essential questions: "(1.) Has the applicant a right to the commission he demands? (2.) If he has a right, and that right has been violated, do the laws of his country afford him a remedy? (3.) If they do afford him a remedy, is it a mandamus issuing from this court?" (Marshall 154). The Supreme Court answered that Marbury does indeed have a right to his commission (1) and that it is the duty of Secretary of State James

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Madison to deliver that commission (2) according to Gordon S. Wood in *Empire of Liberty*. However, the Supreme Court does not have the authority or ability to demand that Madison deliver this commission to Marbury and, therefore, that Marbury cannot take his position due to the current administration's ability to refuse a writ of mandamus.

Seemingly, this is a defeat for the Federalists and a victory for the Democratic-Republicans, but this would require overlooking the historically significant way that Chief Justice John Marshall reasoned his decision. Not only was the Supreme Court unable to require Madison to deliver the commission, but a statute allowing the Supreme Court to require him to do so would be unconstitutional (Brinkley 196). Such a statute did exist: The Judiciary Act of 1789. Effectively, *Marbury vs Madison* overruled this act as unconstitutional. Marshall continued that Congress had no right to expand the power of the Judiciary and that in cases in which a statute of Congress conflicted with the Constitution, the Constitution would always be treated as the law and the statute would be unenforceable as it is unconstitutional, writing "The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written" (Marshall 176) and "an act of the Legislature repugnant to the Constitution is void." (Marshall 177).

This act on its own reduced the powers of the Judiciary, but in a larger context, it created a much stronger, prominent Judiciary in American politics and law. While the Court could not require the delivery of commissions (due to the unconstitutionality of the Judiciary Act), it could declare acts of the other branches unconstitutional by reviewing cases in which said acts interfere with Constitutional rights or operate counter to the American government as established in the Constitution.

## **Effects on Early American Politics**

This newly empowered Judiciary would be of great significance in controlling the Democratic-Republican agenda of the Legislative and Executive branches during the

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leadership of Chief Justice John Marshall. During this crucial moment of our early republic, a Judiciary that staunchly sought to preserve the Constitution helped maintain our grounding in the republican principles of the Constitution rather than in the democratic, political urgings of the Legislature and the Executive. This is reflected in John Marshall's opinion for *Marbury vs Madison* "Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court." (Marshall 170). By keeping this delicate balance Marshall was able to carve out the potential for Judicial activism within the limits of the Constitution and a political atmosphere hostile to the Judiciary.

Hostility towards the Judiciary is most apparent in the attempted impeachment of Associate Justice Samuel Chase. An often partisan and controversial Federalist, opponents of Chase, including President Thomas Jefferson, sought his removal (Brinkley 197). As Chase had not committed any clear crime, Democratic-Republicans argued that Congress could impeach Chase on political grounds. These proceedings passed the House but failed in the Senate. After this trial, never again is a Justice of the Supreme Court tried for political reasons.

The above example of political discontentment towards the Judiciary is provided not only for political context, but also to show how -- despite such attacks -- the Supreme Court maintained a firm grasp on its constitutionally-vested powers. This has had an enduring effect on how the Supreme Court has used and understood its power. While the Marshall Courts did not declare any other acts of Congress unconstitutional, the threat thereof was certainly present in the acts of the Democratic-Republican governments following *Marbury vs Madison*. Seemingly insignificant cases such as *Marbury vs Madison* could be of great significance in making sweeping changes to American law.

## **Effects on Constitutional Law**

The power of Judicial Review, as asserted in *Marbury vs Madison*, is not that the Supreme Court may directly strike down a statute as soon as it is written, but that the Court may refuse to uphold any act of the legislation due to its interpretation of the Constitution. While this was not explicitly stated in Article III of the Constitution (which grants the Supreme Court its authority), it may be interpreted from Article III, Section II which states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States [...]" In other words, being that the power of the Judiciary (and all branches of government, for that matter) is based in the Constitution, the Judiciary would be undermining its own authority by enforcing unconstitutional legislation and therefore, by doing so, it is asserting its power to protect the Constitution.

Protecting the Constitution is essential to the function of the Supreme Court and is central to its power to decide cases of law (as all laws are based in the Constitution or created under its authority). To return again to *Federalist Seventy-Eight*, Hamilton defined this power as not a privilege of the Judiciary, but as a duty: "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." Thus, the Supreme Court must always protect the Constitution and never side with an unconstitutional statute, otherwise it would have failed its central directive.

## **Judicial Review Today**

The concept of judicial review continues to be debated and misunderstood. It is a common misconception that the Supreme Court's central role is to decide, when a statute is passed, whether or not a bill may become a law. This is not the role of the Supreme Court and the Supreme Court has never actively engaged in deciding this. Instead, the Supreme Court protects all parties of our pluralistic democracy from unconstitutional laws by providing a

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platform to argue for or against the enforcement of a statute and then allowing the Supreme Court to rule on a case basis. In this context, it is indeed "the province and duty of the judicial department to say what the law is" as John Marshall wrote in his *Marbury vs Madison* opinion (Marshall 137). The decision of the Supreme Court is final and superlative to that of other federal or state courts according to Alexander Bickel in *The Least Dangerous Branch* due to original jurisdiction. This makes their decisions on the constitutionality of statutes all the more important.

## **Conclusion**

In understanding the significance of *Marbury vs Madison*, it is important to consider not only the base, objective decision, but the context and implications thereof. While the Supreme Court did not side with *Marbury*, it did side with the Constitution. In doing so, the Supreme Court was able to maintain and strengthen the original jurisdiction of the Court as found in the Constitution and laid the groundwork for the Court to declare an act of Congress unconstitutional. Protecting the Constitution has henceforth been the greatest objective of the Supreme Court and our nation has been securely established and long enduring for it.

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