



Scholar Exchange: Article III—The Judicial Branch Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for [Article III: The Judicial Branch](#)

FRAMING QUESTIONS

- What is judicial review, and where did it come from?
- What is judicial independence, and why do we have it?
- How does a case get to the Supreme Court?
- How does the judicial nomination process work, and how does a Justice end up on the Supreme Court?
- What's the difference between judicial review and judicial supremacy?
- What are some of the important debates about judicial power throughout American history?

BIG IDEA

The Constitution's Article III establishes the national government's judicial branch—the federal judiciary. Within the national government, the judicial branch is responsible for interpreting the laws. Importantly, the Constitution also promotes the principle of judicial independence—granting federal judges life tenure (meaning that they serve until they die, resign, or are impeached and removed from office). Federal courts—including the Supreme Court—exercise the power of judicial review. This power gives courts the authority to rule on the constitutionality of laws passed (and actions taken) by the elected branches.

INTRODUCTION

[Article III](#) of the Constitution establishes the national government's judicial branch: the federal judiciary, headed by a single Supreme Court. The judicial branch is responsible for interpreting the laws.

Interestingly, the text of Article III is very short and doesn't lay out many details about the Supreme Court and how it works—or even what the federal judiciary as a whole should look like.

Furthermore, Article III can be a bit hard to understand without some background first. The basic ideas are pretty simple, but the language is a bit more technical than other parts of the Constitution.

That's what we're here for—to decode the Constitution's text for you!

But before we explore Article III’s text, let’s begin with a couple of key definitions. Today, we hear phrases like “judicial supremacy” and “legislating from the bench.” Critics use them to talk about the Court having too great a role in our lives. For purposes of this debate, it’s useful to contrast judicial review and judicial supremacy.

Definitions:

- *Judicial Review*: The Supreme Court has the power to review the constitutionality of acts of the national and state governments.
- *Judicial Supremacy*: The idea that the Supreme Court is the final voice on questions of whether actions by the national government or state governments are constitutional.

ARTICLE III, SECTION 1

With those definitions out of the way, let’s turn to Article III’s text and begin with [Article III, Section 1](#).

“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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

Article III begins with (what scholars refer to as) a Vesting Clause—vesting the **“judicial power of the United States”** in *one* Supreme Court and whatever inferior Courts Congress decides to establish.

In other words, *Congress* controls the details of the national court system and even the shape of the Supreme Court’s docket.

This also means that Congress has considerable authority to change the following:

- The size of the Supreme Court. (For instance, some of you might have learned FDR’s “court packing” plan.). The Supreme Court began at six Justices. Over time, there’s been a low of five Justices and a high of 10 (during the Lincoln presidency). Congress has altered the size of the Supreme Court *six* times. The last time was in 1869. The Republican Congress eliminated two seats when its political enemy—Andrew Johnson—was President. The Republican Congress then added one seat back for the new Republican President—Ulysses S. Grant. That’s how we got to the current number: *nine* Justices.
- Congress may also shape the jurisdiction of the federal courts—in other words, what cases federal judges can (*or must*) hear. And the details of the federal court system as a whole—in other words, how many federal judges, how many courts of appeals, how many district courts, etc.

Article III, Section 1, also tells us that federal judges—including Supreme Court Justices—hold their offices for life (**“during good behaviour”**).

This creates an independent judiciary—federal judges can’t be fired, fined, or otherwise controlled once confirmed to the federal courts.

The big constitutional principle here is *judicial Independence*: The idea that the federal courts must be independent from the control of the other branches.

This is done by giving judges and Justices life tenure and guaranteeing their salaries. The independence of the judiciary is a key element of the American constitutional system.

Judges can only be removed through the impeachment and removal process.

As to the Supreme Court, only one Justice has ever been impeached—Justice Samuel Chase by a Jeffersonian Congress during the Jefferson Administration! (But Chase wasn't removed!)

The Founders' vision of judicial independence grew out of the colonists' own experience under the British system. Judges were *not* independent within the British system. Instead, colonial judges were seen as officers of the Crown, who carried out the orders of the King and could be removed at his whim.

Not so under the new Constitution!

ARTICLE III, SECTION 2

What about [Article III, Section 2](#)?

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

This dense language defines the jurisdiction of the federal courts. So, what sorts of cases can the federal courts hear?

Federal courts are courts of limited jurisdiction. This means that there are only certain sorts of cases that can find their way into the federal courts. All others remain with the states.

Generally speaking, the federal courts only can hear cases if those cases involve people from two different states or if the case involves the Constitution or a national law (or regulation).

Article III, Section 2, also defines the original jurisdiction of the Supreme Court:

“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.”

This is a pretty obscure part of Article III, so no need to spend much time on it. These are instances in which cases begin at the Supreme Court.

So, these cases don’t have to go through all of the other courts before getting to the Supreme Court. This is rare. These cases usually involve conflicts between the states.

For instance, two different states say that they control part of a river.

Article III, Section 2, also grants the right to a jury trial in criminal cases.

Interestingly, Article III says very little about what a Supreme Court Justice actually does or how the Supreme Court should actually work on a day-to-day basis.

As we’ve already seen, Article III *does* tell us some information about the Supreme Court’s jurisdiction, but it leaves out many of the details.

As a result, the details of the job have been created over time by both Acts of Congress (starting with the Judiciary Act of 1789) and Supreme Court practice.

For the modern Court, perhaps the most important move by Congress was its passage of the Judiciary Act of 1925. Chief Justice (and former President) William Howard Taft was the driving force behind (what we refer to today as) the “**Judges Bill.**” But in many ways, Taft’s “Judges Bill” created the Supreme Court that we have today.

In short, it gave the Court broad control over the cases it hears. Before 1925, the Court had very limited control over the cases that came before it and it had to hear a ton of cases each term!

Now, not so much.

Today, the Supreme Court often takes fewer than 100 cases in a single term—even settling in with a little over 60 in recent years.

HOW DOES A CASE GET TO THE SUPREME COURT?

Let’s turn now to some of the nuts and bolts of how the Supreme Court works today—beginning with a basic question: *How does a case get to the Supreme Court?*

The Court’s term typically lasts from the first Monday of October to the end of June.

The Court sets oral arguments for cases, which usually run through April and occur the first two weeks of each month.

Opinions are released throughout the term, with the final opinions (often on the most important and controversial cases) coming at the end of June—although there’s no deadline because the Justices set their own docket (and schedule)!

Remember, all of this is not in the Constitution itself, but the result of over two centuries of Supreme Court practice.

So, how *does* a case get to the Supreme Court?

Most constitutional cases start with a simple argument: *The government has violated the Constitution*. It may be a law passed by Congress, by a state legislature, or by a town council. Or it may be an action taken by the President or the Governor or some other government official—whether it’s an arrest, a new government regulation, or whatever—you name it. But someone—often a single ordinary American—comes to Court and argues that a law or arrest or regulation violates the Constitution. Constitutional cases often begin with “We the People.” Or even “Me the individual.”

The Supreme Court receives about 10,000 petitions a year.

The Justices use the “Rule of Four” to decide if they will take the case. If four of the nine Justices feel that the case has value, they will issue a writ of certiorari. This is a legal order from the high court for the lower court to send the records of the case to them for review.

When all is said and done the Supreme Court will hear about 65-70 cases a year.

This tells us that most petitions are denied. Why? It’s not the Supreme Court’s job to hear every case. Article III tells us that only certain cases can be heard there.

And as we mentioned at the outset, since 1925 (and thanks to Chief Justice Taft!), the Justices themselves have had almost total control over which cases they decide to hear each year.

But how *does* a case end up before the Supreme Court?

So, here’s how nearly every case works its way up the national court system. In nearly every case, someone brings a new case in (what’s called) a **district court**. This is the lowest level of court in the national courts system.

There are 94 district courts in the United States. It’s where nearly every case starts—and where most of them end!

A single judge presides over (or manages) the case. And the case is decided by either a judge or a jury. Someone wins, and someone loses.

The loser might decide to appeal the district court’s ruling by having the next level of court (the **court of appeals**) take a look at the case.

There are 13 Circuit Courts of Appeals. Twelve geographic circuits, and the Federal Circuit.

Unlike the Supreme Court, the court of appeals doesn’t control which cases it hears. If someone appeals their case to this court, the judges have to decide it.

Generally speaking, they have two options: (1) say that the district court got it right; or (2) say that the district court got it wrong—and then explain why and reach a new decision.

Again, someone wins, and someone loses. And it doesn't have to be the same people as the first time! Finally, the loser in the court of appeals might try to get the Supreme Court to decide her case. The fancy (lawyerly) words for this is that they can "**petition for a writ of certiorari.**" Or even if you want to sound like a real insider: "**file for cert.**"

This simply means that the loser (in the court of appeals) wants the Supreme Court to take their case and decide it. But that isn't very likely!

The Supreme Court has nearly total control over which cases it takes and it says no to nearly every petition.

How many Justices does it take to get your case heard?

Today, there are nine Justices on the Supreme Court.

The Justices read the challenger's "**cert. petition**"—asking the Court to take the case and again, *four* of the Justices must vote to take a case before they decide to hear it.

Again, this is the "**The Rule of Four.**" So, that's four out of nine Justices—so, just short of a majority.

Again, if you want to sound like a real insider: When the Court takes a case, we generally call that "**granting cert.**" But again, the Supreme Court rejects nearly every petition.

The Court accepts only 60-70 of the more than 7,000 cases (some years over 10,000!) that it's asked to review each year.

Generally speaking, the Court will sometimes take cases that involve questions of national significance. But the main reason it takes a case is usually a "**circuit split.**"

This is when the lower courts can't agree on how to interpret the law involved and/or when different lower courts have interpreted the law differently.

Why does the Supreme Court care about circuit splits?

When the lower courts decide cases differently, it can lead to confusion. By taking a case that involves an issue that has led to differing opinions in the lower courts, the Supreme Court creates a precedent that every court in the country has to follow.

This ensures that the laws are applied equally to all people, no matter where they live.

In other words, by settling circuit splits, the Supreme Court looks to promote the value of legal uniformity—throughout the nation.

WHAT HAPPENS AFTER THE SUPREME COURT TAKES A CASE?

Finally, what happens after the Court takes a case?

The winner and loser from the court of appeals file briefs before the Supreme Court.

These are little books that lawyers write—presenting the constitutional arguments on their side of the case.

Others affected by the case can also write briefs—known as "**Friend of the Court**" or "**amicus**" briefs—explaining why the Court should choose one side as the winner over the other.

These briefs can come from all sorts of people—ordinary Americans, government officials (at the national, state, and local levels), scholars, businesses, various organizations/groups, etc.

The Justices then read the briefs in the case and then, the Supreme Court holds oral argument. This is when the lawyers on each side get to state their case and the Justices get to ask questions. These arguments usually last under two hours—so, the lawyers don't get a lot of time!

The Justices then get together once or twice a week to vote on the cases. This is known as the Justices' "**Conference**"—and these conferences are held in secret. No one but the Justices are allowed in the room.

At conference, the Justices discuss the cases heard at oral argument, decide by vote which cases to take, and each justice is allowed to speak to their views on the cases before the Court.

The Justices give their votes on conference by seniority, starting with the Chief Justice. If the Chief Justice is in the majority, he/she assigns who writes the majority. The Chief Justice can always assign himself/herself an opinion. This is where a lot of the Chief Justice's authority lies!

And if the Chief Justice is in the minority (the dissent), then the most senior Justice (the Justice serving the longest) in the majority assigns which Justice writes the majority.

The Justices then spend months writing their opinions in the case.

In nearly every case, one Justice writes a **majority opinion**—which has the support of a majority of the Justices.

In some cases—often the most closely watched cases—one or more Justices might write a **dissenting opinion**, explaining why they disagree with the majority and why they would decide the case differently.

And finally, one or more Justices might write a **concurring opinion**—often agreeing with the majority on who should win the case, but offering some additional thoughts on how to think about the constitutional issue in the case.

After the Justices finalize their opinions and finalize their votes in the case, the Court's decision is then released to the public.

SUPREME COURT NOMINATION PROCESS

So, that's how a case gets to the Supreme Court—and how the Court decides it. How does a person end up as a Supreme Court Justice, in the first place?

Article II, Section 2, sets out the Appointment Power.

The President has the power to nominate someone to fill a Supreme Court seat.

And the Senate has the power to confirm or reject the person that the President chooses. (The "**Supreme Court nominee.**")

To serve on the Supreme Court, a President's nominee must receive the approval of the Senate.

The Senate has to say "**yes.**"

Here’s Article II’s Text: **The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”**

But that’s all that the Constitution’s text says about the Supreme Court nomination process.

The judicial nomination process today—the hearings, the questions, how qualified nominees must be, etc.—don’t come from the Constitution’s text. They’re a product of norms created over time and the actions of Congress.

Generally speaking, here are the steps in that process today:

A seat on the Supreme Court opens up.

So, a Justice retires or dies.

The President considers a number of potential people for the position—reading about them, asking for advice from others (advisors, Members of Congress, scholars, political leaders, interest groups, etc.), interviewing potential choices, etc.

The President selects someone.

That person accepts the nomination.

The Senate Judiciary Committee—the Senate group in charge of the Supreme Court nomination process—holds confirmation hearings.

The President’s nominee shows up at the Senate. The Senators ask their questions. The nominee answers them. The Committee votes on whether to recommend confirmation to the rest of the Senate. The nomination is then sent to the full Senate.

The full Senate debates the nominee and votes on her confirmation: **“yes”** or **“no.”** If she wins Senate approval, she then becomes a Supreme Court Justice. If not, then the whole process starts all over again! Of course, there are exceptions to this general process, but this is how it usually works.

ORIGINS OF THE FEDERAL JUDICIARY

With Article III’s text and some detail about how the Supreme Court works out of the way, let’s return to the beginning of the Supreme Court story: Where exactly *did* the Framers get the idea for a Supreme Court? Why did they think it was important?

Americans first began experimenting with a judicial branch in their early state constitutions.

And this experience with state constitutions drew many of the Framers to the need for a strong (and independent) judiciary.

Many early state constitutions were radical in their embrace of legislative supremacy and critics—including Thomas Jefferson, John Adams, and James Madison—began calling for new checks on legislative power. As the eminent historian Gordon Wood writes, the primary beneficiary of this **“new, enlarged definition of separation of powers was the judiciary.”**

Under the Articles of Confederation—our nation’s first framework of government—there was no separate national court system.

But through their experiences under their state constitutions and the Articles of Confederation, many in the Founding generation began to push for a stronger judiciary.

By the 1780s, several state judiciaries—for instance, those in New Jersey, Virginia, New York, Rhode Island, and North Carolina—began experimenting with judicial review.

Still, for many early Americans, vesting judges with the authority to declare laws unconstitutional was unwise. A strong judiciary ran counter to the British tradition—and its powerful commitment to legislative sovereignty. Furthermore, Americans generally had an intense fear of judicial power.

For instance, as late as 1787, John Dickinson still could say of judicial review that **“no such power ought to exist.”**

And some thought that an executive veto was enough of a check on the abuses of legislative power—and one more consistent with free government.

What about the Constitutional Convention?

The delegates spent little time discussing the federal judiciary or the issue of judicial review.

But many delegates assumed that the federal judiciary would exercise judicial review in some form. And James Madison (among others) looked for a variety of ways to curb legislative power—including his idea of a Council of Revision.

This proposal would give the President and the federal judiciary together a limited—but not final—veto over **“unwise and unjust measures”** passed by Congress.

Madison didn’t find many takers.

How might we summarize the debate over judicial power at the Founding? On the one hand, many had grown worried about legislative supremacy and thought that an independent judiciary could help check the excesses of Congress.

Furthermore, proponents of a fairly strong judiciary valued a federal judiciary’s ability to:

- Settle certain constitutional issues.
- Promote the uniform application of national law.
- Check an abusive Congress (and President).
- And promote the idea of the Constitution as the supreme law of the land—created by the people (not Congress) and enforcing the fundamental law over ordinary laws passed by Congress.

On the other hand, many in the Founding generation also thought that judicial review—even if permitted—should rarely be exercised and that the judiciary should normally differ to the popularly elected branches. And critics of a stronger federal judiciary argued that judicial review was in tension with democracy.

They feared that the federal judiciary—and judicial review itself—might help usher in an aristocratic national government. One that would grow stronger by taking powers away from the states and the people. And consolidating all political power at the national level. Needless to say, this debate didn't disappear after the Founding. It remains with us today.

JUDICIAL REVIEW AND THE FEDERALIST PAPERS

Alexander Hamilton made, perhaps, the most powerful defense of judicial review in his essay [Federalist No. 78](#).

Hamilton's essay, titled "The Judicial Department" was published May 28, 1788.

In it, he famously defined the judiciary as the "**weakest**" of the three branches. But he also emphasized the importance of judicial review and an independent judiciary to our constitutional system as a whole.

Other than the landmark Supreme Court case [Marbury v. Madison](#) itself—which we'll turn to in a little bit—Hamilton's essay is probably the most famous defense of judicial review in American history.

And the essay itself served as the basis of many of Chief Justice Marshall's arguments in *Marbury* itself. It's a big deal.

In *Federalist No. 78*, Hamilton emphasized the duty of the courts to declare "**all acts contrary to the manifest tenor of the Constitution void.**"

Here's Hamilton: "**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.**"

Importantly, Hamilton connected the power of judicial review to the principle of popular sovereignty. "**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.**"

In Hamilton's view, the elected branches *may* claim to speak for "We the People." But no branch of government has a legitimate claim to speak as the perfect voice of the American people.

All branches speak in an imperfect popular register. Only the Constitution itself is an authentic expression of the American people's voice.

The Constitution itself—its very legitimacy—is rooted in popular sovereignty. And Article VI's Supremacy Clause makes it the supreme law of the land.

So, the federal judiciary has a special duty to heed the people's commands and protect their rights—sometimes using judicial review to check the actions of the elected branches.

At the same time, Hamilton argued that the federal judiciary *would* be the weakest branch of government. The Anti-Federalists—those who opposed the new Constitution—railed against the powers (and dangers) of the new federal judiciary.

Hamilton disagreed. Here’s the famous quote that everyone always reads—and for good reason!:

“In a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

MARBURY V. MADISON

The early Supreme Court looked very different from the Supreme Court today and the job of a Justice was very different.

The Supreme Court was in the basement of Congress. The Justices lived together in cramped spaces for the brief periods in which the Court met. (Usually only two months out of the year.)

And otherwise, the Justices rode circuit—meaning that each Justice was assigned to oversee a federal circuit and literally had to ride out to it to attend court sessions.

This was hard work! That’s why John Jay preferred being Governor of New York to Chief Justice of the United States!

Today, the Court has a beautiful building of its own. The Justices don’t have to ride circuit, and they can choose which cases they want to take.

It’s a great job!

In one of its first actions, the First Congress established the federal judiciary with the Judiciary Act of 1789. The Act was largely written by Connecticut’s Oliver Ellsworth.

Remember, Article III left the details of the federal judiciary largely to Congress. The First Congress quickly took up this task.

The Judiciary Act created:

- The federal courts system itself.
- The system of circuit riding.
- The various judicial districts.
- The Office of the Attorney General.
- The offices of the U.S. attorneys and U.S. marshals in each judicial district.

- And finally, the Supreme Court itself—with its six Justices: one Chief Justice and five Associate Justices.

The key point is that in these early years, the federal judiciary wasn't particularly powerful. But the Supreme Court *did* begin to build up its power—in fits and starts.

This brings us to the landmark case of *Marbury v. Madison*. Many students often learn that *Marbury* established judicial review.

This is a bit too simplistic, but it's a useful shorthand. Let's begin with some background about the case.

Marbury v. Madison

The year is 1803.

The Federalist (and former Adams Secretary of State) John Marshall is the Chief Justice of the United States.

Marbury itself arises from a controversy in the waning days of the Adams Administration—his so-called “midnight appointments.”

The Election of 1800 was close—and hotly contested. Thomas Jefferson won. John Adams was despondent.

And there was a long lame duck period between the November election and the inauguration of a new president.

In December 1800, Congress met.

And Adams's Federalists would control Congress until the new Jefferson Administration (and Jeffersonian Congress) took office on March 4, 1801.

During this lame duck session, the Federalist Congress passed the Judiciary Act of 1801. This Act created circuit courts of appeal much like they are today—with many new judges to be appointed by Adams—the outgoing President!

The Act relieved the Justices of their obligation to “ride circuit.” Adams immediately appointed 16 new judges to these courts—all Federalists. And they were all confirmed by the outgoing Federalist Senate.

On February 27, 1801—just days before Jefferson was to take office—Congress passed another bill: The Justices of the Peace Act.

This Act provided Adams with the opportunity to appoint 42 new justices of the peace to five-year terms in Washington and Alexandria.

Most of Adams's nominations went to deserving Federalists, and all were confirmed by the Senate.

William Marbury—of *Marbury v. Madison* fame—was one of those appointed by Adams in the waning days of his Administration.

Who was William Marbury?

He was born in Maryland and grew up on a tobacco plantation. He achieved great success as a financier. He had strong ties to the Federalists. And he had become quite prominent in Washington.

The problem?

Marbury's commission was signed and sealed by President Adams.

But it was never delivered to Marbury—in this case, by John Marshall's own brother, who was a newly commissioned judge in D.C.

When Jefferson became President, the new President then ordered his Secretary of State James Madison to not deliver the commissions.

Marbury brought a lawsuit to compel Madison to deliver his commission. He wanted his new job! He asked the Supreme Court to issue a writ of "mandamus."

This was an order directing Madison (but really Jefferson) to carry out his lawful and non-discretionary duty to deliver Marbury's commission.

The Supreme Court got this power from the Judiciary Act of 1789. John Marshall wrote the Supreme Court's opinion in *Marbury* for a unanimous Court.

As to this specific case, the Court exercised the power of judicial review and declared the relevant part of the Judiciary Act unconstitutional. Marshall concluded that the Supreme Court did *not* have the power to force Madison to deliver Marbury his commission.

So, William Marbury was out of luck. But how did Marshall reach this conclusion? What did he say?

First, by signing the commission of the Mr. Marbury, President Adams appointed him a justice of peace for D.C. This gave Marbury a legal right to the office for five years.

Second, that having the legal title to this office, Marbury also had a right to the commission and the refusal to deliver it was a plain violation of that right.

Third, that Marbury was entitled to the remedy for which he applied. He *should* get the job!

However, fourth, and finally, the Supreme Court itself didn't have the power to provide that remedy. The Court itself didn't have the power to give him the job!

This was a clever move by Marshall.

Marshall says that Marbury clearly has the right to his commission and to hold office. (So, he's able to jab the Jefferson Administration!)

But Marshall also denies that the Supreme Court itself has the power to grant the writ of mandamus because the relevant part of the Judiciary Act is unconstitutional.

This permits Marshall to exercise the power of judicial review—establishing an important precedent at the Supreme Court. At the same time, by sidestepping Marbury’s challenge, Marshall avoids a direct conflict with the Jefferson Administration.

As with Hamilton in *Federalist* No. 78, Marshall roots his decision in popular sovereignty.

The people had an original right to establish a government based on such principles as would **“conduce to their own happiness.”**

These principles—as enshrined in the U.S. Constitution—are fundamental and supreme.

Thus, the **“original and supreme will”**—the American people themselves—organize the government, assign powers to different departments, and establish limits on this basis.

For Marshall, essential to all written constitutions was the principle that **“a law repugnant to the Constitution is void”** (echoing Hamilton) and that **“courts, as well as other departments, are bound by that instrument.”**

This is where judicial review comes in—to enforce the principles (and limits) that the American people wrote into the U.S. Constitution.

Federal judges swear an oath to administer justice and to faithfully and impartially discharge their duties **“agreeably to the constitution and laws of the United States.”**

As a result, they are bound by that constitutional oath and the Constitution’s commands.

Finally, Marshall famously notes, **“It is emphatically the province and duty of the judicial department to say what the law is.”** (As posted in the Supreme Court’s halls!).

And if two laws conflict with one another, the courts must decide on the operation of each—enforcing the U.S. Constitution as the supreme law of the land.

Debates over the scope of judicial power—and the power of judicial review—continue all the way up to today. On the one hand, virtually everyone accepts the legitimacy of *Marbury* today. Instead, the debate is primarily about judicial review versus judicial supremacy. That is, whether or not the Supreme Court should be the final arbiter of constitutional questions in our system.

The debate continues!