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17.245 The Supreme Court, Civil Liberties, and Civil Rights  
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### Discussion 3: Judicial Review

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Constitutional distinction between law and politics:

Tribe and Rosen both argue that the Supreme Court will have to exercise judicial discretion with respect to emerging issues of 21<sup>st</sup>-century constitutional law; this will require the mixing of law and politics

- Rosen says leave decisions to the legislature.
- Tribe says we need to work carefully within the judicial system to be sure decisions are not too political

Judicial Review: the power of the court to determine whether a federal statute or action is consistent with the US Constitution

Where do you begin when looking for the origins of judicial review?

Typically constitutional scholars have pointed to Marbury vs. Madison

#### Discussion of Marbury vs. Madison

What is a justice of the peace?

Local officials who can perform legal measures such as marriage licenses, initiate a suit against a sheriff. They decide on local disputes such as property, use of force, etc.

What was happening in 1800 (leading up to Marbury vs. Madison)?

- Federalists in power, John Adams was the incumbent president.
- Election was John Adams (Massachusetts) vs. Jefferson (Virginia).
- Federalists appointed many last minute justices of the peace when they learned they would be leaving office.

#### Case Background

As the Federalists left office, Adams appoints a large number of new Federal justices, (including Marshall). William Marbury received one of these 11<sup>th</sup> hour appointments. The Federalists did not have time to deliver all of the last minute commissions to the appointed justices. Marbury's commission went undelivered, and when Jefferson took office, his Secretary of State, James Madison, refused to deliver the commission.

Madison's side argues that the commission was not completed, making the appointment null, and removing any responsibility for Madison to deliver the commission. This argument rests on the idea that the commission and the appointment are two distinct steps that must be completed for an appointment to be valid.

Marbury argues that failure to deliver the commission does not invalidate the appointment. Marbury says that the appointment and the commission are really only one step and the outstanding order to the Secretary of State from the President to deliver the commission must be obeyed.

Marshall wants to appear to be a minimalist—answer only the questions that absolutely need to be answered in order to get to the answer he wants. This is partially because he

does not want to de-legitimize his own appointment and the authority of the Supreme Court.

Considerations in the decision:

1. Does Marbury have a right to the commission?

- Marshall concludes that because the appointment was done using the appropriate procedure, Marbury does have a right to a commission
- Article II, Sections 2 and 3 of the Constitution give the president the authority to appoint and commission justices of the peace. Shall is interpreted to mean "must", therefore Marbury must have a right to the commission.
- Once the person is in office, the president is forbidden from removing the person from office. The appointment and commissioning was ordered and Jefferson has no right to remove him from office.
- The Constitution does distinguish the two processes of appointment and the commissioning, which indicates that each process could be independent and voluntary, but in this case they are combined into one order. Thus the mandate must follow.

2. Does Marbury have a right to a remedy?

Marshall says yes, there must be a right to a remedy.

What about when there is no practical way to provide a remedy?

Dissenting opinion in *Bush vs. Gore* says that we extend the deadline. Majority says there is no practical remedy; therefore the Court can't do anything.

Standing test: must be able to show there has been an injury that is concrete and particularized, and that there is a remedy the court can provide. If not, a litigant lacks standing.

Marshall concludes that once you establish that a right has been violated, the court is obligated to provide a remedy.

3. Is there a remedy that the Court can legally provide?

Marbury asks for a writ of mandamus ordering Madison to deliver the commission.

Writ of mandamus: an order to a government official to do something

Who can be the recipient of a writ of mandamus?

The 1789 Judiciary Act sets up the judicial system of inferior courts, and also gives the Supreme Court authority to issue 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" (*Marbury vs. Madison*). The Constitution says the Supreme Court has original jurisdiction only in cases dealing with "ambassadors, other public ministers and consuls, and those in which the state shall be a party."

Marshall says that Marbury cannot go directly to the Supreme Court with this issue because it does not have original jurisdiction in such cases, thus the statute giving the Supreme Court the authority to issue writs of mandamus contradicts the original jurisdiction clause of the Constitution.

Marshall makes a strategic move to protect the Court from a much more powerful Congress and Executive Branch by saying he does not have the power to help Marbury, but does have the power to override Congressional legislation.

Final thoughts on Marbury vs. Madison:

How can Marshall issue an opinion saying that he cannot constitutionally hear a case? Legal scholars believe that he broke up the three questions of the case in order to allow himself to establish judicial review.

## **McCulloch vs. Maryland Discussion**

Background

State of Maryland imposes a tax of \$15,000 per year on the Bank of the United States. McCulloch, a man in the cashier's office of the bank, refuses to hand over the tax. Maryland sues McCulloch to force him to pay the tax.

Why can Maryland sue McCulloch?

Maryland is a sovereign entity and can enforce rules within its boundaries. Rationale is that it has the right to tax within its boundaries.

What is Marshall's perspective?

States have agreed to give up part of their power for the purpose of executing federal interests through federal law and need to be able to do whatever is necessary and proper to execute those laws.

Article I contains the "necessary and proper" clause, which gives Congress the power to do whatever is necessary to execute its laws.

Under the Constitution, the US Federal Government has the power to tax individuals directly, an expansion of federal power from Articles of Confederation. This suggests that individuals now have a direct relationship with the Federal government. The state cannot, therefore, prevent the federal government from engaging in that direct relationship.

Necessary and proper clause would have no real meaning unless there are implied powers that extend from those powers specified in the Constitution (power of taxation, to raise an army, etc).

Final thoughts on McCulloch vs. Maryland

If the end is proper and Congress can identify a means, so long as it is reasonable, then Congress can do whatever is necessary to achieve that ends.

Decision reestablishes the Court's power of judicial review, in the context of an assertion of federal supremacy.