Federal Court Practice

CLASS #1 – THE LEAST DANGEROUS BRANCH

JANUARY 14, 2010

THE DICKINSON SCHOOL OF LAW
PENNSYLVANIA STATE UNIVERSITY

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Roadmap

1. **> Course Grading**
2. Article III
3. The Federalist – Anti-Federalist Debate
4. Marbury v. Madison

Course Grading

- Term Paper (52%)
  - 20 Page Paper on any topic dealing with federal courts
  - Optional, but recommended, topic approvals
- Assignments (32%)
  - Each team will submit 5 written assignments
- Mooting Sessions (16%)
  - Each team will participate in 4 mooting sessions
- Class Participation
  - Final grade may be increased or decreased by 1/3 based on participation
  - Be prepared, but no need to memorize and outline cases
  - Understand the topics in context of federal court litigation

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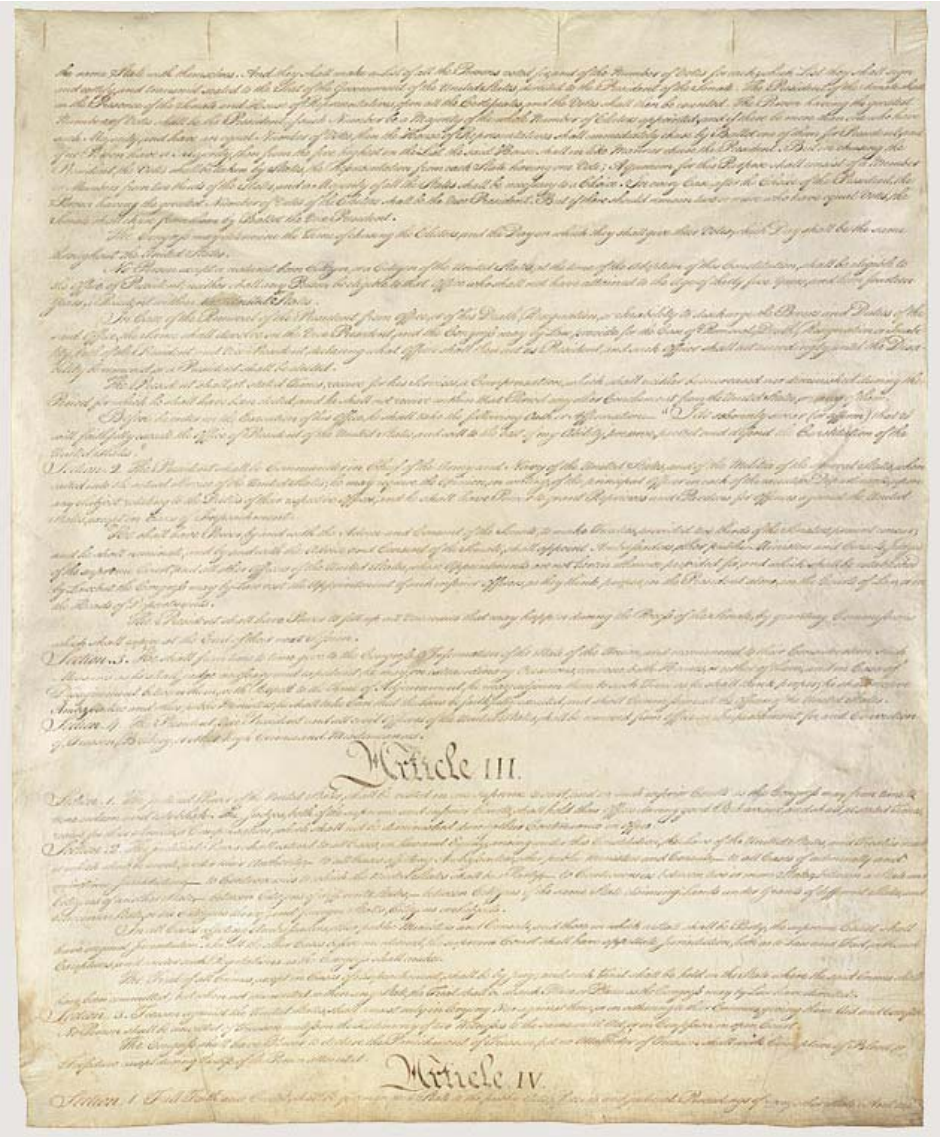
2. **> Article III**
3. The Federalist – Anti-Federalist Debate
4. Marbury v. Madison



Article III – The Creation of the Courts

- "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."
- "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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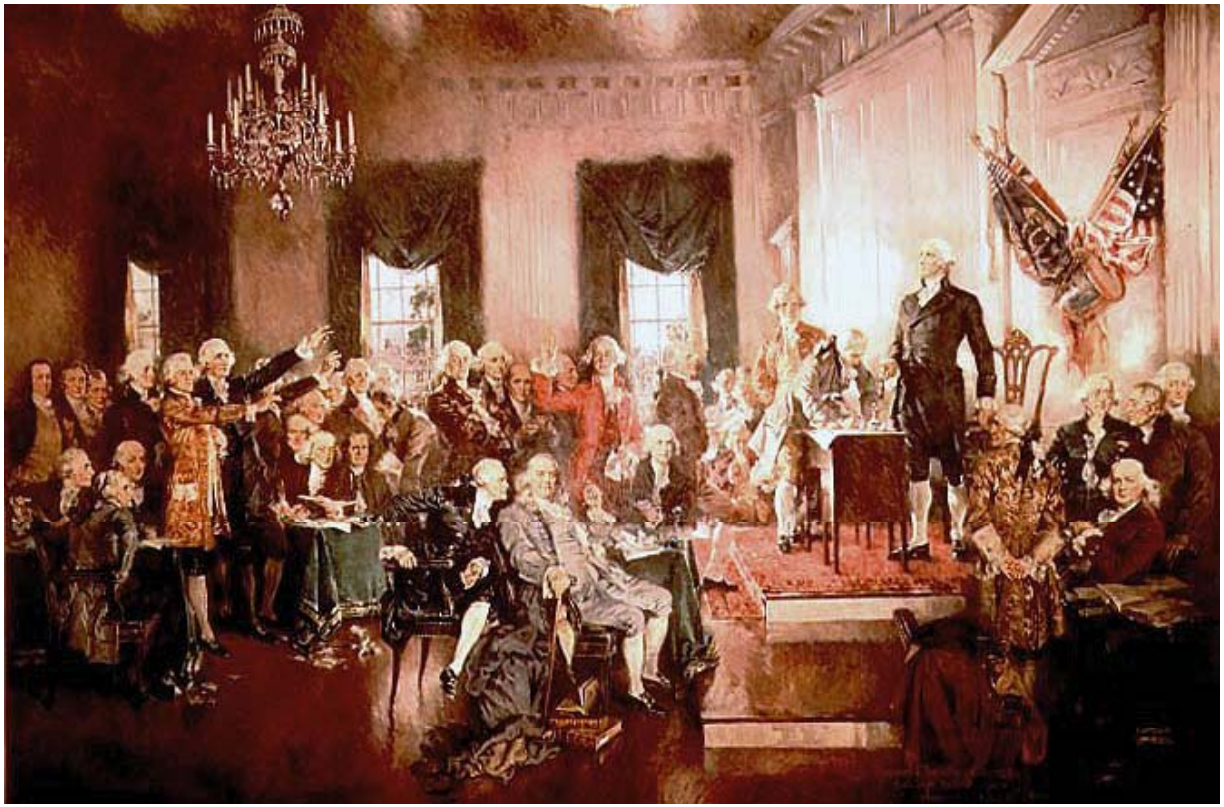

The Federalist – Anti-Federalist Debate

1. **Judicial Independence v. Judicial Accountability**
2. **Judicial Review v. Legislative Supremacy**
3. **Sovereignty of States v. Supremacy of Federal Jurisdiction**

Judicial Independence v. Judicial Accountability

Federalist	Anti-Federalist
• Good Behavior, Fixed Compensation • "Least Dangerous Branch" • No influence on sword or purse	• Judges cannot be removed for error • Not subject to legislative oversight

Why Tenure During Good Behavior?

- Federalist 78: “If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”
- Brutus XI: “No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.”

Are Judges Too Independent?

- Brutus XV: "There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. **Men placed in this situation will generally soon feel themselves independent of heaven itself**"
- Federalist 51: "**If men were angels, no government would be necessary**. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Least Dangerous Branch?

- Federalist 78: “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**.”
- Brutus XV “If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.”

How to Remove a Federal Judge?

- Article II, Sec. IV: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."
- Brutus XV: "By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors. — Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges commited the error from wicked and corrupt motives."
- 14 Judges, including Associate Justice Samuel Chase, have been impeached by the House of Representatives.
- Only 6 Judges, all District Court Judges, have been convicted by the Senate and removed from office.

- **Is Impeachment an effective check?**

Judicial Review v. Legislative Supremacy

Federalist	Anti-Federalist
• Statute is will of Congress, while Constitution, enforced by Courts, is will of the people • Dr. Bonham's Case and History of Judicial Review	• Blackstone- Parliament- "absolute," "despotic," "without control" • Interpret according to "Spirit of the Law"

No Review of the Supreme Court

- Brutus XI- “The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them.”

- **Who should be above the Supreme Court? The Legislature? The Executive?**

Legislative or Judicial Supremacy?

- Brutus XV- “The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.”
- House of Lords (Highest Court in England) part of Parliament
- In 1765, English jurist **SIR WILLIAM BLACKSTONE** described "the power of Parliament" to make laws in England as "absolute," "despotic," and "without control.“

Do the Courts Express the Will of "We the People?"

- Federalist No. 78: "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where 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."

- **Do Judges reflect the will of the People more than the Legislature?**

Constitutional Interpretation v. Construction

- Federalist 78: “It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of **construction**, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law.”
- Brutus 11- 1st. They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a **legal construction**, or to explain it according to the rules laid down for construing a law. — These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.

- **Is Judging possible without providing a construction?**

The Spirit of The Law

- Brutus XI- “The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity. By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”
- Federalist 81- “In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments.”

Do Courts Look to the Spirit of the Law?

- Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)
  - "It is a familiar rule that a **thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers**. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."
- "The problem with spirits is that they tend to reflect less the views of the world whence they come than the view of those who seek their advice." Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) (Kennedy, J., concurring).
- "*Church of the Holy Trinity is cited to [the Supreme Court] whenever counsel* wants [the Court] to ignore the narrow, deadening text of the statute, and pay attention to the lifegiving legislative intent. It is nothing but an invitation to judicial lawmaking" Scalia, Matter of Interpretation.

- **Was Brutus right?**

State Sovereignty v. Supremacy of Federal Jurisdiction

Federalist	Anti-Federalist
• Concurrent Jurisdiction • Uniform Interpretation of Federal law • Cases Between States, where United States is a Party, and Diversity Jurisdiction • Matters Affecting Foreign Nations	• Federal Judges favor Federal Government and not States • Subvert State Courts • Review by SCOTUS of findings of state juries

Uniformity of Federal Law

- Federalist 80: "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

- Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 312 (2005) (noting that federal jurisdiction provides "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.")

Are the State Judges Biased towards Federal Law?

- Federalist 80: "But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers . . . the most discerning cannot foresee how far the **prevalency of a local spirit** may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be **too little independent** to be relied upon for an inflexible execution of the national laws."
- Brutus XI- "That the judicial power of the United States, will lean **strongly in favour of the general government**, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations."

Subversion of the State Judiciaries

- Brutus XI- “I shall yet attempt to trace some of the leading features of it, from which I presume it will appear, that they will operate to a total subversion of the state judiciaries, if not, to the legislative authority of the states.”
- Brutus XII- “Now to make a union of this kind perfect, it is necessary to abolish all inferior governments, and to give the general one compleat legislative, executive and judicial powers to every purpose. The courts therefore will establish it as a rule in explaining the constitution to give it such a construction as will best tend to perfect the union or take from the state governments every power of either making or executing laws.”

Concurrent Jurisdiction Between State and Federal Courts

- Federalist 82: "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth."
- Brutus XI: "The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: — I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted."

Concurrent Jurisdiction Between State & Federal Courts, and Appeal to SCOTUS

- Federalist 82:
  - What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States.
  - Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor . . . Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE.
  - The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

Are the State Court Bound by the Supreme Court?

- Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (Story, J.)
- Virginia Supreme Court interpreted U.S. treaty, and upheld confiscation of land of Loyalist
- On appeal, SCOTUS reversed Virignia Supreme Court, and remanded
- Virginia Supreme Court said SCOTUS lacked authority to review case originating in state court
- On appeal, Story, J. reversed, federal questions within its jurisdiction, established supremacy of SCOTUS
  - Article III, Sec. 2, Cl. 2, "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction"
  - Article VI, Sec. 2, "Constitution, and the Laws of the United States ... shall be the supreme Law of the Land."
  - Not concerned about bias of state judges, but demand for "uniformity" of federal law
- What if Virginia Supreme Court ignored SCOTUS?
- In many ways, *Dredd Scott* was about diversity jurisdiction. Was Scott a citizen for purposes of Art. III ("between citizens of different states")
- **Trivia**: Chief Justice Marshall recused himself because he had interest in land. But, he did not recuse himself in *Marbury v. Madison*, even though he failed to deliver commission to Marbury.

Who was right? Who is right?

- Federalist 78- “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. “
- Brutus XI- “The power in the judicial, will enable them to mould the government, into any shape they please.”

- **Which side was right in 1789?**
- **Which side is correct in 2010?**

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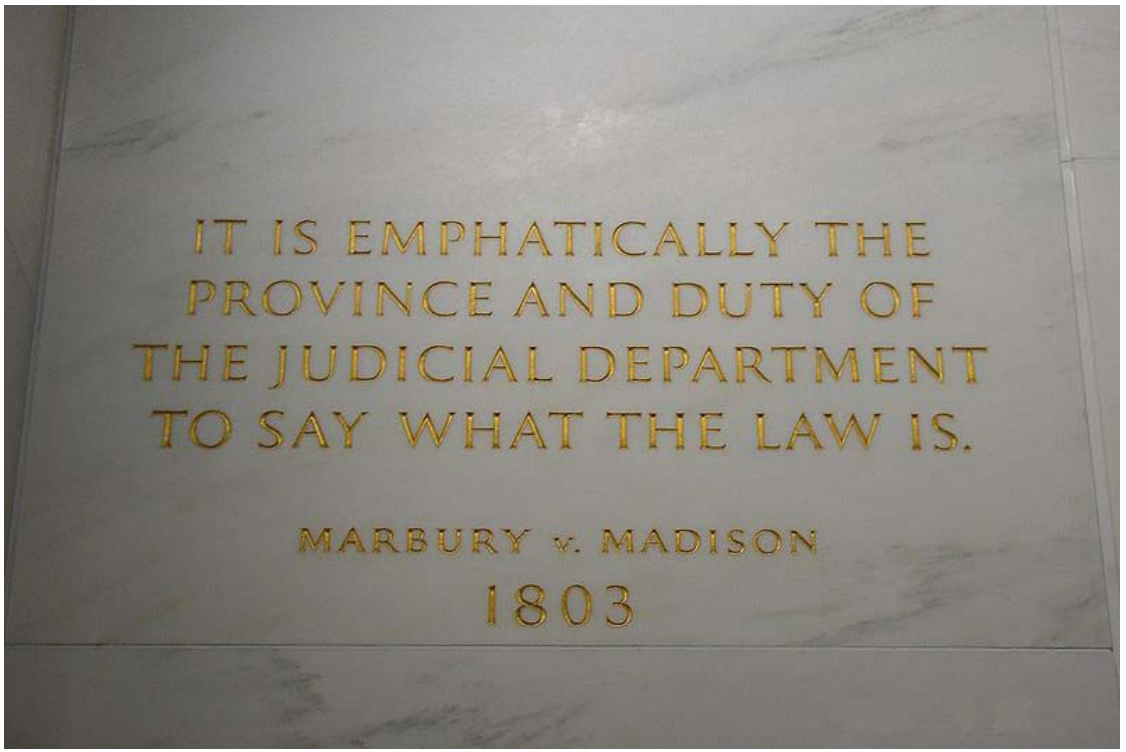

The Untold Story of *Marbury v. Madison*

- Marshall was Adams's Secretary of State (at the same time he was Chief Justice), and personally failed to deliver Marbury's comission (appointment as Justice of the Peace).
  - "but the commission has never reached the person for whom it was made out." (*one of the most egregious uses of the passive voice in SCOTUS history*)
- Marshall should have recused
- Case began in 1801, but not decided until 1803 because Republicans suspended 1802 Term of the Supreme Court
- Marbury sued for writ of mandamus (court order to President to deliver comission)
- President Jefferson, who ordered Secretary of State James Madison not to deliver the commission that Marshall failed to deliver, did not send counsel to argue case on behalf of Madison
  - "These principles have been, on the side of the applicant [not the respondent], very able argued at the bar."
- Jefferson said he would not obey Marshall, and was already eying impeachment of Justice Chase
- Marshall had to write opinion where Jefferson won, but didn't win in the long term

Did Marshall Invent Judicial Review?

- Dr. Bonham's Case, 8 Co. Rep. 107a, 114a C.P. 1610 (Coke, J.): "And it appears in our books, that in many cases, the common law will controul 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 controul it, and adjudge such act to be void."
- *Day v. Savadge*, Hob. 84 (K.B. 1614) (Hobart, J.) an act of parliament made against natural EQUITY, as to make a man judge in his own cause, is void in itself" (as quoted in American General Insurance Co. v. FTC, 589 F.2d 462 (9th Cir. 1979))
- Federalist 78. "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."
- Federalist 78: "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."

Federal Judicial Review

- "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 recognise certain principles, supposed to have been long and well established, to decide it. "
- "**It is emphatically the province and duty of the judicial department to say what the law is**. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."
- "An act of the legislature repugnant to the constitution is void."
- "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."

Political Questions v. Constitutional Questions

- "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 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."
- "The province of the court is, solely, to decide on the rights of individuals, not to inquire 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."

Article III Eight "Heads" of Federal Jurisdiction

- "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;--

1. to all cases affecting ambassadors, other public ministers and consuls;--
2. to all cases of admiralty and maritime jurisdiction;--
3. to controversies to which the United States shall be a party;--
4. to controversies between two or more states;--
5. between a state and citizens of another state;--
6. between citizens of different states;--
7. between citizens of the same state claiming lands under grants of different states,
8. and between a state, or the citizens thereof, and foreign states, citizens or subjects.

- Note. These heads of Jurisdiction are different, and necessarily broader, than jurisdiction provided by the Judiciary Act of 1789.

Congress Cannot Expand the Original Jurisdiction of the Supreme Court

- Article III, Sec. 2:
  - Original Jurisdiction: "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."
  - Appellate Jurisdiction: "In all the other cases before mentioned [**8 heads of federal jurisdiction**], 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."
- Judiciary Act of 1789, Sec. 13: "The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have [**original jurisdiction**] power to issue writs of prohibition to the district courts [...] 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."

- **Why list specific instances of original jurisdiction if Congress could add to the original jurisdiction "under such regulations as the Congress shall make"? Why not simply write that Congress can add jurisdiction as it sees fit? This would be "mere surplussage."**
- **Can Congress Add the Issuance of Writs of Mandamus in the Supreme Court's Original Jurisdiction? No.**

Next Week – January 21, 2010

- **Jurisdiction of the Federal Courts I**
  - Venue and Diversity Jurisdiction
- **We will be selecting teams next week, so start thinking about partnering**
- **Instructors will be at Carlisle campus**