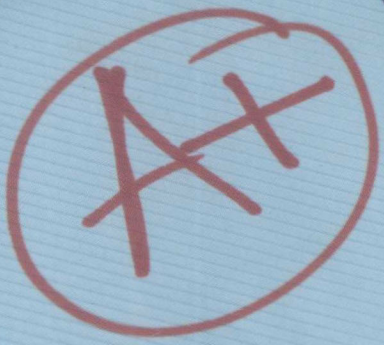

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Russell L. Weaver
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Constitutional Law

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Russell L. Weaver

Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law

Steven L. Friedland

Professor of Law
Elon University School of Law

Catherine Hancock

Geoffrey C. Bible and Maria H. Bring Professor of Constitutional Law
Tulane University School of Law

Donald E. Lively

Vice-President for Academic Affairs, InfiLaw and Professor,
Phoenix School of Law

Series Editor
A. Benjamin Spencer

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To Laurence, Ben and Kate, with love, RLW

For Jen, Adin, and Tylie, with love, SIF

For Elizabeth, Caitlin, Margaret and Peter, with love, CH

To Pam, Rico and Rika, the "aces" of my life, DEL

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CHAPTER ONE

Judicial Review

The doctrine of judicial review provides the judiciary with the power to interpret the Constitution and invalidate actions of the other branches of government (and, in some instances, the actions of state officials). With the Constitution offering only limited guideposts on the boundaries of the doctrine, the judiciary has been left to chart the nuances of its jurisdiction in constitutional matters.

The Origins. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is the seminal decision on judicial review. In addition to the fact that *Marbury* serves as the foundation to most judicial review issues, the overwhelming majority of law school Constitutional Law courses use *Marbury* as the initial case. The decision by Chief Justice John Marshall established the proposition that the United States Supreme Court can declare an act of Congress unconstitutional.

Marbury is best viewed in historical context. After John Adams, a Federalist, was defeated in the 1800 presidential election, but before Thomas Jefferson assumed the Presidency, the Federalists attempted to stack the court system with new federal judgeships and fill them with Federalist appointees. One of these appointees was William Marbury, who was confirmed as a magistrate in the District of Columbia. Marbury's commission was signed by President Adams and sealed by the Secretary of State. Unfortunately for Marbury, his commission was not delivered before Jefferson as-

sumed office. The newly inaugurated President Jefferson ordered his Secretary of State, James Madison, to withhold all undelivered commissions, including Marbury's. Marbury then sought a *writ of mandamus* to compel delivery through an original action in the United States Supreme Court. The action was based on § 13 of the Judiciary Act of 1789 which gave the Court the "power to issue *writs [of] mandamus*, in cases warranted by the principles and usages of law, to [any] persons holding office, under the authority of the United States."

The *Marbury* Court divided its analysis into several parts. First, the Court decreed that Marbury was entitled to the commission because it became a "vested legal right" when it was signed by the President and sealed by the Secretary of State. Second, the Court held that the law should afford Marbury a remedy for the deprivation of his right. Finally, the Court concluded that ordinarily a *writ of mandamus* (ordering the Executive to deliver the commission) would be an appropriate remedy for the deprivation.

The issue that remained, however, was whether Marbury was entitled to invoke the original jurisdiction of the United States Supreme Court. The Court examined the Judiciary Act of 1789 which had been interpreted as authorizing it to issue *writs of mandamus* Article III of the United States Constitution gives the United States Supreme Court original jurisdiction only in "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." In other cases, the Court is only allowed to exercise appellate jurisdiction.

Chief Justice Marshall ruled that the proposed interpretation of Article III (giving the court original jurisdiction over *Marbury's* case, was unconstitutional). He began by declaring that the Constitution forms the "fundamental and paramount law of the nation, and consequently that an act of the legislature repugnant to the constitution is void." In addition, he rejected the notion that the judiciary is bound by the legislature's conclusions regarding the legitimacy of a law, stating: "[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." Finally, he articulated the concept of judicial review: "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."

Marshall then emphasized that the Constitution requires judges to take an oath to support its provisions and affirmed the Constitution's supremacy: "[T]he 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." Because the Judiciary Act had been interpreted as giving the court jurisdiction in cases not provided for in Article III, the proposed interpretation was invalid.

Over the last two hundred years, the power of judicial review has been broadly used by the courts to invalidate the actions of federal officials as well as of state and local officials. Judicial review is not an unlimited power, however, because the federal courts depend on the willingness of the other branches to voluntarily comply with their orders. Moreover, the executive and legislative branches have various means at their disposal for controlling a wayward judiciary. These means include impeachment, prosecutorial decisions, briefs and arguments before the courts, and executive constructions of texts. The President also can alter the Court's composition and perhaps its decision-making through the appointments power.

Marbury v. Madison's Progeny: Expanding and Reaffirming Judicial Review. *Marbury* dealt with the limited question of the Court's power to refuse to apply a federal legislative enactment. More difficult questions arose when courts attempted to impose their interpretations of the United States Constitution on state officials.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), was the first case in which the Court struck down a state law. In *Fletcher*, the Supreme Court held that the Georgia legislature's attempt to void a Georgia land grant was an unconstitutional attempt to void a valid contract. *Fletcher* was followed by *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). In *Martin*, the Virginia Court of Appeals refused to comply with a mandate of the United States Supreme Court, and the Supreme Court decided it had the power to review a judgment of a Virginia state court when federal constitutional issues are involved. The Court reasoned that the Framers intended for the federal courts to exercise uniform appellate jurisdiction over both federal cases and state cases.

In another case, *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court dealt with the supremacy issue again. *Cooper* involved resistance to the United States Supreme Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), prohibiting the states from segregating public schools. The Governor of Arkansas and state officials took a number of steps to prevent desegregation. When local school board officials continued with their desegregation plans, the Governor dispatched units of the Arkansas National Guard to prevent black children from entering previously white schools. Faced with a confrontation, school board officials filed a petition to delay desegregation noting the "extreme public hostility." *Cooper* rejected the notion that desegregation could be postponed by states or state officials. Relying on the Supremacy Clause, the Court concluded that the Constitution is the "Supreme Law of the Land."

Limits on Supreme Court Jurisdiction. As *Marbury* reveals, the Court's original jurisdiction is limited to cases in which ambassadors or other public ministers or consuls or vice counsels of foreign states are parties; cases between the United States and a state; and cases brought by a state against citizens of another state or aliens. Other cases can only be heard by appeal or arrive at the Court by *certiorari*, a discretionary writ. The Court generally considers only important federal questions that should be decided by the Court, cases that involve conflicts between the federal circuits, or conflicts between state courts of last resort. Also, under the so-called *Rule of Four*, the Court will hear a case only if four justices vote to hear it.

The overwhelming majority of cases arrive at the Court through *certiorari* rather than appeal, leaving the state courts to decide many cases. Note that the only remaining route of "appeal" to the Court is from a three-judge court, and the number of three judge courts has been significantly curtailed.

The Court treats even its "mandatory" appellate jurisdiction as discretionary. For example, whereas there were 51 cases on the Court's docket in 1853, the number rose to 8,000 cases by the mid–1990s. The Court is only able to hear a very small percentage of the cases presented to it, leaving much of the decision-making to the lower federal courts and the state courts. In fact, the number of cases actually heard and decided by the Court on the merits has been declining as evidenced by the fact that the Court issued 145 signed opinions in 1986, but only 75 signed opinions in 1995. II JOAN BISKUPIC & ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 494 (3rd ed. 1996).

In addition, the justices try to avoid deciding constitutional issues unnecessarily. One technique used by courts is to adopt a construction of an ambiguous statute or other law that avoids constitutional difficulties, rather than a construction that presents constitutional concerns. Likewise, if a state court has decided a case on a federal constitutional grounds, but also has decided it on "adequate and independent" state grounds, the Court might refuse to hear the case on the ground that the state court could reach the same result on state grounds anyway. As a result, there is no need for the federal courts to resolve the federal constitutional issue, and a federal opinion would provide nothing more than an advisory opinion.

Congressional Control Over Jurisdiction of the Courts. One restraint on federal judicial authority is provided for in the Constitution itself: Congress' right to control the jurisdiction of the United States Supreme Court and the lower federal courts.

Article III, § 2, cl. 2, gives the Supreme Court limited original jurisdiction and appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." Given that some significant cases arrive at the Court by appeal, Congress'

control over the Court's appellate jurisdiction represents a potentially significant restraint on the Court's power.

Given the Court's constitutional role, questions have arisen regarding the scope of Congress' "jurisdiction stripping" power, particularly in controversial subject areas, such as school busing and abortion. In perhaps the most famous case on this subject, *Ex Parte McCardle*, 74 U.S. 506 (1868), the Court upheld Congress' attempt to deprive the Court of jurisdiction. In that case, McCardle was charged with libel for publishing newspaper articles about the post-Civil War military government in Mississippi. After he sought a writ of habeas corpus from a federal court, and the writ was denied, he appealed to the United States Supreme Court. While the case was pending, Congress passed an act repealing the Court's jurisdiction to hear the case. In upholding the act and dismissing the appeal, the Court refused to inquire into Congress' motives, emphasizing that "the power to make exceptions to the appellate jurisdiction of this court is given by express words" which must be given effect. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

McCardle was qualified by the Court's holding in *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). In *Yerger*, the Court suggested that the repealing act (at issue in *McCardle*) was intended only to prevent cases from going to the United States Supreme Court by appeal, and was not intended to prevent the Court from exercising certiorari jurisdiction. In other words, it was not Congress' intent to prevent both the United States Supreme Court and the lower federal courts from hearing the case.

McCardle was further qualified, if not overruled, by the Court's subsequent decision in *United States v. Klein*, 80 U.S. 128 (1871). Congress passed a statute declaring that a presidential pardon shall not be admissible in the Court of Claims to support a claim for recovery and that under certain circumstances appellate jurisdiction in the United States Supreme Court shall cease. The United States Supreme Court ruled the statute unconstitutional, stating, "Its great and controlling purpose is to deny to pardons

granted by the President the effect which this court had adjudged them to have." In other words, Congress could not meddle with substantive outcomes through its procedural control power.

Today, some read the "exceptions" clause literally, allowing Congress to make those exceptions it wants. Others argue that Congress cannot "destroy the *essential role* of the Supreme Court in the constitutional plan." This issue is unresolved.

Justiciability: The Requirements for Courts Exercising Judicial Power. Justiciability is the term used to describe the prerequisites to a federal court's exercise of judicial power. Since federal courts are courts of limited jurisdiction, with the Constitution requiring that the courts hear only "cases and controversies," plaintiffs are not always granted automatic entry into the judicial system.

Political Questions. The political question doctrine precludes the federal courts from hearing so-called "political questions." The doctrine is applied in instances when the other branches of government are intended to resolve issues by the Constitution, as well as when these other branches are more suited to resolve issues than the judiciary, and therefore the courts should leave those issues to them.

The leading political question decision is *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the Tennessee Legislature refused to apportion legislative districts for more than six decades so that Tennessee's electoral districts became severely unbalanced with respect to population. Plaintiffs sued, claiming a violation of equal protection of the laws and seeking reapportionment. The Court concluded that the Tennessee case was justiciable because the subject had not been "committed by the Constitution to another branch of government" and that "judicially manageable standards" were available under the Equal Protection Clause.

Political question issues have arisen in a variety of other contexts. For example, *Baker* was preceded by what appeared to be a simple trespass action in *Luther v. Borden*, 48 U.S. 1 (1849). Following the American Revolution, Rhode Island continued to function under a royal charter issued by Charles II in 1663. In the

1840s, Rhode Island citizens called a constitutional convention to draft a state constitution. Although the resulting constitution was ratified by the people of Rhode Island, and elections were held, the charter government refused to recognize the constitution or the officials elected under it and instead declared a state of martial law. The charter government used force to put down the "rebellion," and sent soldiers to search Martin Luther's house. Luther sued for trespass. When the soldiers defended on the basis that they were acting pursuant to governmental authority, the Court held that the Guaranty Clause (guaranteeing the people a republican form of government) did not contain judicially manageable standards and therefore presented a political question. The Court also emphasized the need for finality, and the lack of criteria by which the courts could determine which form of government was "republican."

The Court also has considered political question issues in the context of political gerrymandering, combat operations, and recognition of foreign governments. For example, in *Davis v. Bandemer*, 478 U.S., 109 (1986) when Democrats argued that Indiana's reapportionment scheme unconstitutionally diluted their votes, the Court rejected claims of non-justiciability, and concluded that the dilution claim was justiciable. As with *Baker*, the Court relied on the equal protection clause in finding justiciability.

In general, the Court has been unwilling to consider the legality or constitutionality of combat operations. The Court has treated such cases as non-justiciable because control over most foreign policy issues is textually committed to Congress and the President.

The judiciary also has been unwilling to involve itself in disputes regarding the recognition of foreign governments and most foreign affairs issues. *Goldwater v. Carter*, 444 U.S. 996 (1979), concerned President Carter's decision to terminate a treaty with Taiwan and recognize instead the People's Republic of China. Members of Congress sought declaratory and injunctive relief challenging the President's decision. A divided Court refused to hear the case and remanded with directions to dismiss.

Nevertheless, the Court sometimes directly confronts one of the other branches of the federal government. In *Powell v. McCormack*, 395 U.S. 486 (1969), after Adam Clayton Powell, Jr., was duly elected to the United States House of Representatives, the House refused to seat him because he had allegedly engaged in misconduct. The House of Representatives claimed that the question of whether to seat was a political question. In the House's view, the Constitution made a textually demonstrable commitment of the issue to the House, through Art. I, § 5, which provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The Court did *not* find a political question that the House can only exclude based on the grounds set forth in Art. I, § 5. As a result, while Congress is the "Judge. . . . of the qualification of its members," (Art. I, § 5.) those qualifications were set at the time of Mr. Powell's election and could not be changed after the fact.

The Case or Controversy Requirement. Article III, § 2, contains perhaps the most important limitation on the judicial power: the case or controversy requirement. That doctrine provides that the federal courts may not hear just any matter, but instead are restricted to hearing "cases" and "controversies," meaning concrete issues only. The case or controversy limitation has produced various doctrines restricting the scope of judicial authority including the prohibition against advisory opinions, the ripeness and mootness doctrines, and the standing requirement.

The Prohibition Against Advisory Opinions. The case or controversy requirement of Article III has led courts to avoid acting as an advisor to the executive or legislative branches. In various cases, courts have dismissed actions that were insufficiently concrete or did not provide redress to the parties involved in the suit.

Ripeness. The "case and controversy" requirement also precludes the federal courts from hearing cases that are not ripe for consideration. A case that is brought too early is not "ripe" if it prematurely involves the courts in a matter.

Many ripeness cases arise when an administrative agency threatens to take some action against an individual or company or

threatens to withhold governmental benefits. In *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), a federal statute (the Hatch Act) made it illegal for federal employees to engage in certain political activities including political campaigns. Appellants, who wished to engage in prohibited activities, sought injunctive relief preventing enforcement of the Act. The Court held that the case was not ripe because plaintiffs had stated their claims in vague terms, and had not clearly indicated what they intended to do. Noting that a "hypothetical threat is not enough," the Court refused to "speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication."

United Public Workers' narrow view of ripeness is not reflected in the Court's later decisions. For example, *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), another administrative case, involved amendments to the Federal Food, Drug, and Cosmetic Act which required manufacturers of prescription drugs to print the "established name" of the drug "prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug," on labels and other printed material. The Court held that the case was ripe for review. In deciding whether a case is ripe, courts consider two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." The Court concluded that Abbott Laboratories satisfied this test, noting that the issue was a "purely legal one" and that "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage."

Mootness. The mootness doctrine involves a claim that may have been ripe at one point, but is now "moot" in that there is no longer a case or controversy. In essence, the parties are "too late," and the Court again avoids entangling itself in abstract or hypothetical disagreements.

The mootness doctrine is illustrated in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In that case, DeFunis, who claimed that he