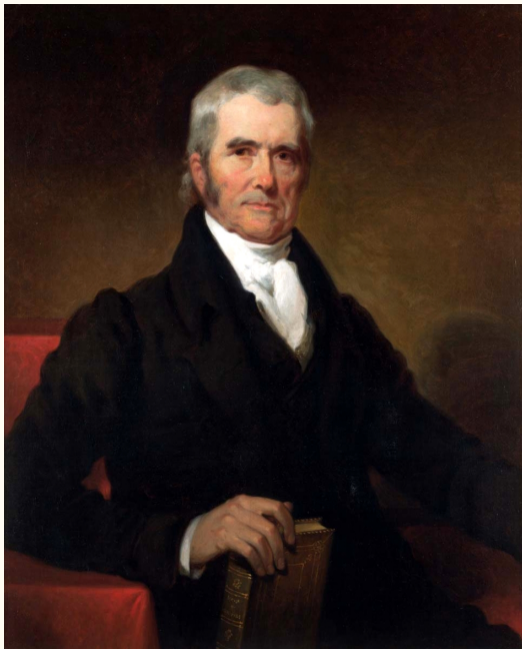


John Marshall and the U.S. economy

Jesús Fernández-Villaverde¹

September 14, 2023

¹University of Pennsylvania



Charles Evans Hughes (1928)

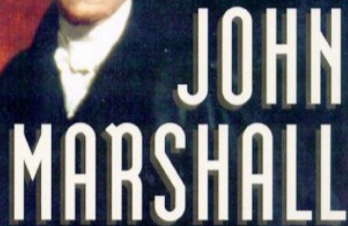
Marshall's preeminence was due to the fact that he was John Marshall.

How was John Marshall?

- John Marshall (1755-1835), was the 4th Chief Justice of the United States between February 4, 1801, and July 6, 1835.
- Marshall had as big of an impact on the political-economic development of the U.S. as James Madison, Alexander Hamilton, and Thomas Jefferson and only behind George Washington.
- He made the Supreme Court into a central element of the U.S. constitutional arrangement.
- Paradoxically, he did so as a Federalist in an era of Democratic-Republican dominance.
- However, Marshall is less known and appreciated than other Founding Fathers.

A New York Times Notable Book of 1996

"A wholly satisfying modern biography
that immediately establishes itself as the
authoritative life." —Joseph J. Ellis,
The New York Times Book Review



JOHN MARSHALL

DEFINER OF A NATION

JEAN EDWARD SMITH

"[A] deeply felt
and penetrating biography."
—THE WALL STREET
JOURNAL



WITHOUT PRECEDENT

Chief Justice John Marshall
AND HIS TIMES

JOEL RICHARD PAUL
AUTHOR OF Unlikely Allies

THE MAN WHO
MADE THE
SUPREME COURT



JOHN MARSHALL

RICHARD BROOKHISER

AUTHOR OF JAMES MADISON

The work of John Marshall

- Marshall's brilliance as a jurist is hard to overstate (also, soldier, historian, and politician).
- In the English-speaking world, he is at par with Sir Edward Coke and Sir William Blackstone.
- I would dare to say he compares with Gaius, Ulpian, Bartolus de Saxoferrato, Grotius, and Von Ihering.
- Marshall delivered 519 of 1100 majority opinions (36 of 62 in constitutional cases) and dissented only 8 times (1 in constitutional cases: *Ogden v. Saunders*, 1827).
- Marshall forged an incredible degree of consensus among the justices (even in terms of living arrangements while at Washington!).
- Constitutional time bombs: judicial review, necessary and proper clause, commerce clause.
- But let's read first Article III of the Constitution.

Article III of the Constitution, 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 Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Article III of the Constitution, 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.

Fundamental cases for political-economy

- Five cases that frame the United States economic regulatory framework:
 1. *Marbury v. Madison* (1803): principle of judicial review.
 2. *McCulloch v. Maryland* (1819): extent of “necessary and proper” clause.
 3. *Dartmouth College v. Woodward* (1819): Sanctity of contracts.
 4. *Cohens v. Virginia* (1821): supremacy of federal law.
 5. *Gibbons v. Ogden* (1824): extent of commerce clause.
- Many other famous cases we do not need to discuss, such as *Barron v. Baltimore* (1833) and the doctrine of (non) incorporation or *Worcester v. Georgia* (1832) and the doctrine of tribal sovereignty.

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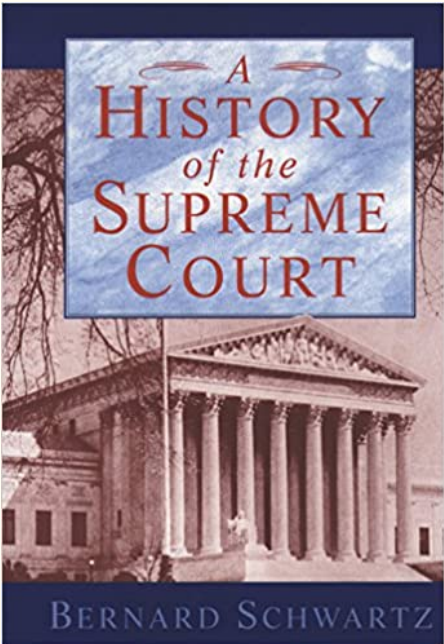


Supreme Court Cases Everyone Should Know

Foreword by Dean Erwin Chemerinsky



Wolters Kluwer



A
HISTORY
of the
SUPREME
COURT

BERNARD SCHWARTZ

Marbury v. Madison (1803)

William E. Nelson

Marbury v. Madison

The Origins and Legacy
of Judicial Review

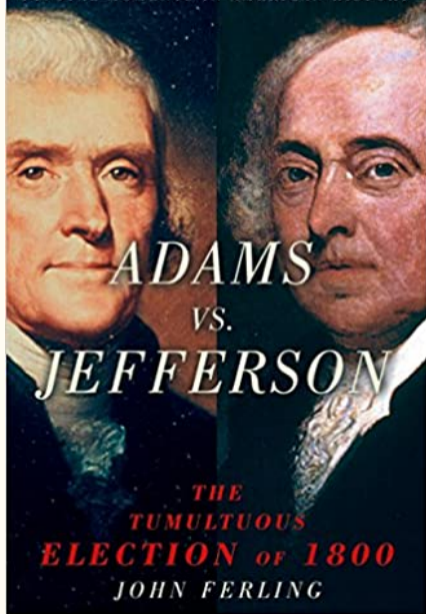


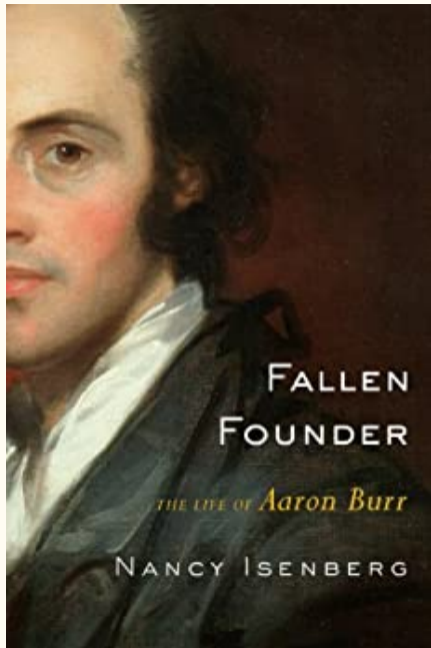
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Marbury v. Madison (1803): facts, I

- Contentious 1800 election:
 1. Partisan animosity between Jefferson and Adams.
 2. Bad constitutional design (before the Twelfth Amendment, 1804): Jefferson and Burr get the same number of electoral votes.
 3. Election is thrown to the House: vote by states.
 4. Jefferson is elected on the thirty-sixth ballot after Alexander Hamilton switches his support toward Jefferson.

PIVOTAL MOMENTS IN AMERICAN HISTORY





Marbury v. Madison (1803): facts, II

- The lame-duck Federalist Congress enacts the Judiciary Act (1801), which creates 42 federal judgeships, just 19 days before Adams' term ends.
- With two days of the term left, John Adams nominates staunch Federalists to fill many of these positions and, next day, the Federalist-controlled Senate confirms these “midnight judges” en masse.
- With only a few hours left, John Marshall (Secretary of State at the time, even if just recently confirmed as Chief Justice) fails to deliver several of the commissions, including William Marbury's, who had been nominated as a Justice of the Peace in the District of Columbia.
- Marbury files suit in the Supreme Court against James Madison, the new Secretary of State, for a *writ of mandamus* to deliver his commission.
- The new Democratic-Republican Congress repeals the Judiciary Act of 1801 and cancels the 1802 term. So Marbury v. Madison is not decided until 1803.



Marbury v. Madison (1803): judgement

- Marshall (“forgetting” that he was part of the case, as the last Secretary of State of John Adams) writes the decision, joined by Paterson, Chase, and Washington.
- “Opinion of the court,” instead of *seriatim*.
- Three parts:
 1. Does Marbury have the right to his commission? Yes. Delivery of the commission is a mere formality.
 2. Is Marbury entitled to a legal remedy in the courts? Yes. Delivery of the commission is a ministerial task, not a political question and, *ubi ius, ibi remedium*.
 3. Can the Supreme Court issue a *writ of mandamus* to deliver his commission? No. Section 13 of the Judiciary Act of 1789, which gives the Supreme Court the power to issue *writ of mandamus*, is unconstitutional. Marshall argues that a *writ of mandamus* can only be issued by a court of original jurisdiction, but the Supreme Court is an appellate jurisdiction.

Key passages

The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written....

It is emphatically the province and duty of the Judicial Department to say what the law is...

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...

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply...

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.

Marbury v. Madison (1803): implications, I

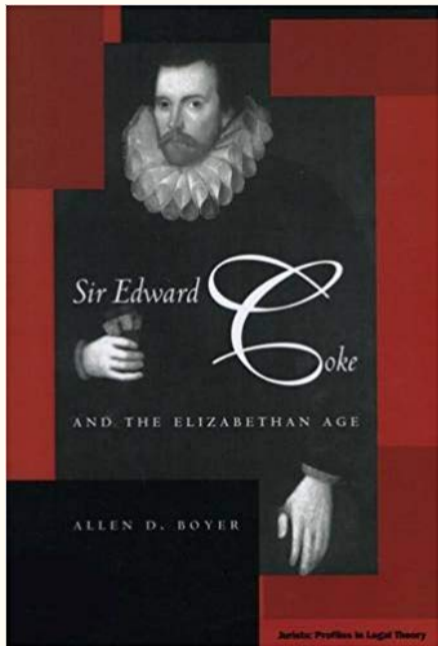
- The sheer brilliance of Marshall's legal reasoning is breathtaking.
- Democratic-Republicans (including Jefferson) cannot complain.
- And the Supreme Court power is strengthened (note: Marshall uses "duty," not "power.")
- Principle of judicial review becomes central in the U.S.
- Paradoxically despite (or perhaps because) not exercised again against a Federal statute until *Dred Scott v. Sandford* in 1857.
- However, judicial review is used against state statutes.

Marbury v. Madison (1803): implications, II

- In particular, judicial review is extended in:
 1. *Fletcher v. Peck* (1810) to the judicial reviews of State laws (also sanctity of legal contracts).
 2. *Martin v. Hunter's Leese* (1816) to the decision of the State supreme courts.
- Why? Because Marshall (and Madison) understand the Constitution as a creation of the people (“We the People of the United States,...”), not of the states.
- Of course, the issue of State powers will come back later in U.S. history (nullification, right of secession, etc.).
- Marshall always thought the doctrine of nullification and secession were preposterous.

Did Marshall “invent” judicial review? I

- Contrary to some claims, he did not.
- There were precedents:
 1. English common law.
 2. Existing case law in North America:
 - 2.1 *Holmes v. Walton* (NJ 1780, disputed due to insufficient documentation).
 - 2.2 *Commonwealth v. Caton* (VA 1782) and Council of State in VA, February 20, 1783.
 - 2.3 *Rutgers v. Waddington* (NY 1784).
 - 2.4 *Ware v. Hylton* (1796): treaties take precedence over state law under the U.S. Constitution (John Marshall argues the case as an attorney).
 - 2.5 *Hylton v. United States* (1796): a carriage tax was not a direct tax.



Dr. Bonham's Case, 1610

- *Thomas Bonham v. College of Physicians* decided in 1610 by the Court of Common Pleas in England
- Seriatim opinion:

Coke's opinion I

“And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and somtimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void.”

Coke's opinion II

“The Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or judgment; Ministers to make summons; and Parties, to have the moyety of the forfeiture, quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sui rei esse judicem: and one cannot be Judge and Attorney for any of the parties.”

Law, Liberty, and Parliament



*Selected Essays on the Writings of
Sir Edward Coke*



Edited and with an Introduction by Allen D. Boyer

COMMON-
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LIBERTY

RETHINKING AMERICAN
CONSTITUTIONALISM

JAMES R. STONER, JR.

Peter Charles Hoffer

Rutgers v. Waddington

Alexander Hamilton, the End of
the War for Independence, and
the Origins of Judicial Review



“TO SAVE
THE PEOPLE FROM
THEMSELVES”

*The Emergence of
American Judicial Review
and the Transformation
of Constitutions*



ROBERT J. STEINFELD

Did Marshall “invent” judicial review? II

- There was much previous discussion among theorists, jurists, and politicians: E.g., Oliver Ellsworth, James Wilson, John Stevens Jr.
- Constitutional convention.
- Ratification conventions.
- Federalist No. 78.
- At the same time, the Supreme Court refused to intervene when other branches of government asked for its advice on non-judicial matters.



This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap this limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.

Federalist No. 78

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

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. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Opposition to judicial review?

- Many were (and are) opposed to judicial review (or, at least, to its strongest forms).
- Thomas Jefferson.
- John Taylor of Caroline: **Construction Construed and Constitutions Vindicated** (1820).
- John Bannister Gibson's dissent in *Eakin v. Raub* (S.C. Pa. 1825), the decision that set up judicial review within Pennsylvania.
- Richmond Junto (Thomas Ritchie, Spencer Roane, ...).
- Defenders of nullification: John C. Calhoun and Robert Y. Hayne.





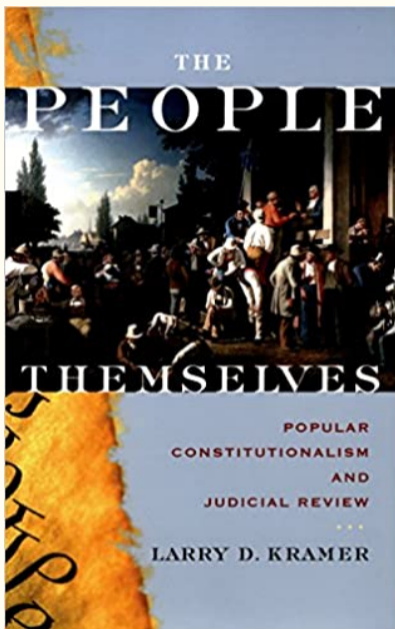




REPUGNANT LAWS

JUDICIAL REVIEW
OF ACTS OF CONGRESS
FROM THE FOUNDING
TO THE PRESENT

KEITH E. WHITTINGTON




Comparison

- Most other countries have a system of constitutional jurisdiction.
- Created in 1919 by the constitution of the German-Austrian republic.
- The most famous (and influential) is the *Bundesverfassungsgericht* in Germany.
- Standing doctrine very different.
- For instance:
 1. Abstract constitutional control. Compare with test cases in the U.S. (Scopes Trial in 1925).
 2. Advisory questions (this could have been different in the U.S., and in fact it could still change if justices were willing to do so).



The Constitutional
Jurisprudence of
the Federal Republic
of Germany

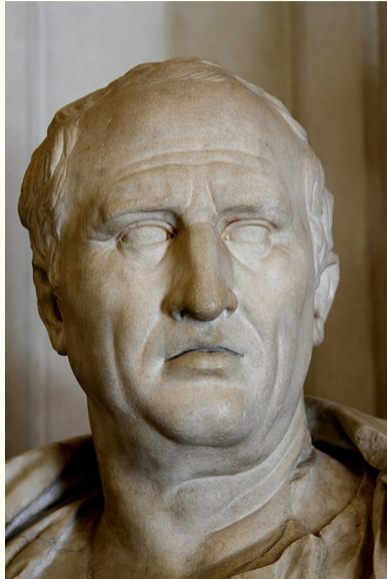
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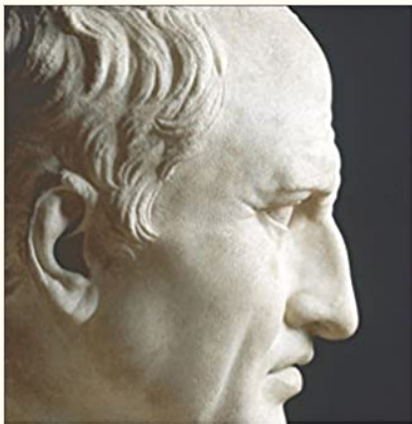


Donald P. Kommers and Russell A. Miller
With a New Foreword by Justice Ruth Bader Ginsburg

- Three views about the origins of law:
 1. Natural law and/or natural rights.
 2. Positivism.
 3. Legal realism.

Marcus Tullius Cicero





Cicero

The Republic and The Laws

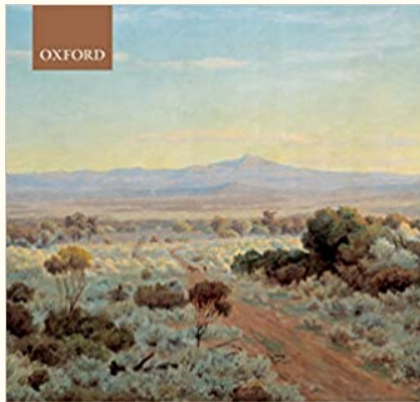
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JOHN FINNIS

Natural Law &
Natural Rights

Second Edition



Natural law and the Constitution

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

- Members of the Constitutional Convention are inspired by ideas of natural law and thought that the Constitution was never intended to displace natural law.
- **The Founders' Unwritten Constitution** by Suzanna Sherry (1987).

Cambridge Studies in Law and Christianity



Common Law and Natural Law in America

From the Puritans to the Legal Realists

Andrew Forsyth

CAMBRIDGE

Uses of natural law in the Supreme Court case law, I

Justice James Wilson in *Chisholm v. Georgia* (1793)

“the principles of general jurisprudence.”

Justice Samuel Chase in *Calder v. Bull* (1798)

“An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority... ...a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B... ...It is against all reason and justice, for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it.”

The *Antelope* (1825)

“The African slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations.”

Uses of natural law in the Supreme Court case law, II

- Marshall repeatedly cited Grotius, Vattel, Burlamaqui, and von Pufendorf, and talked about how rights are not give by society, but are brought into it (see, for example, his dissenting vote in *Ogden v. Saunders*, 1827).
- Justice Joseph Story uses natural law extensively in his **Commentaries on the Constitution**.
- Views only changed among jurists in the 1820s.
- By the times of Oliver Wendell Holmes Jr. (1841-1935), natural law is considered a naive belief.
- However, the idea of a “higher law” survives among some people, in particular as a tool to oppose slavery and discrimination.

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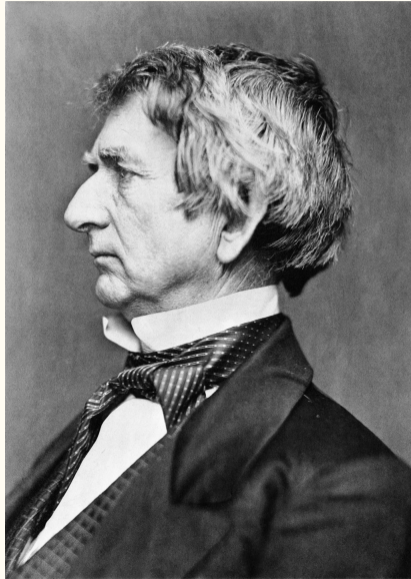


NATURAL LAW
IN COURT

A HISTORY OF LEGAL THEORY
IN PRACTICE

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William H. Seward and “a higher law than the Constitution”

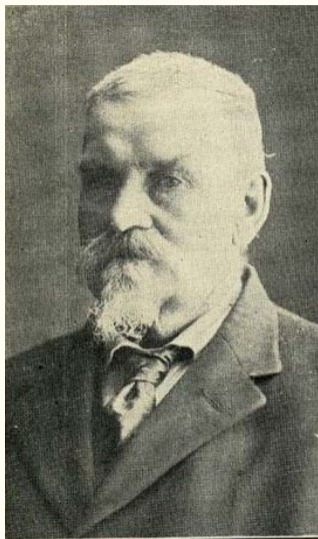


Letter from a Birmingham Jail, April 16, 1963, by Martin Luther King Jr.

One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality...

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself.



JOHN AUSTIN

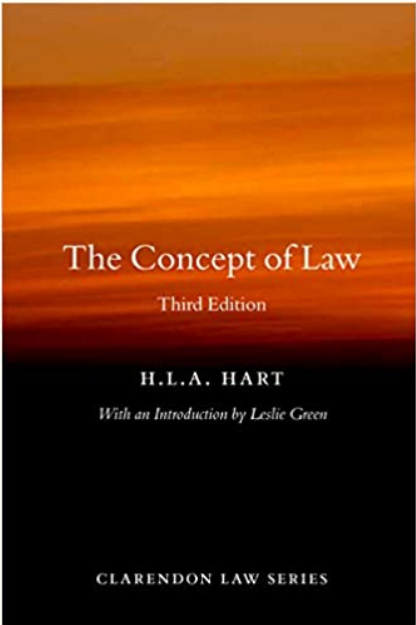


HANS
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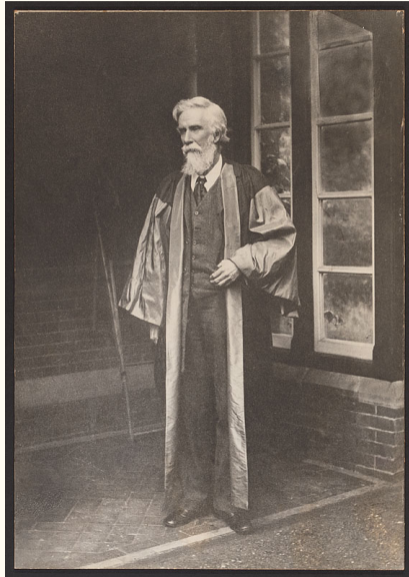
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A Real Mind

*The Life and Work of
Axel Hägerström*

 Springer

- What is the rule of law?
- Different Interpretations:
 1. Thin interpretation.
 2. Thick interpretation.
 3. Intermediate positions (Lon Fuller's 8 criteria of legality).



Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1885)

Two features have at all times since the Norman Conquest characterised the political institutions of England...

The second of these features, which is closely connected with the first, is the rule or supremacy of law.

This peculiarity of our polity is well expressed in the old saw of the courts, "*La ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera.*"

This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise.

Dartmouth College v. Woodward

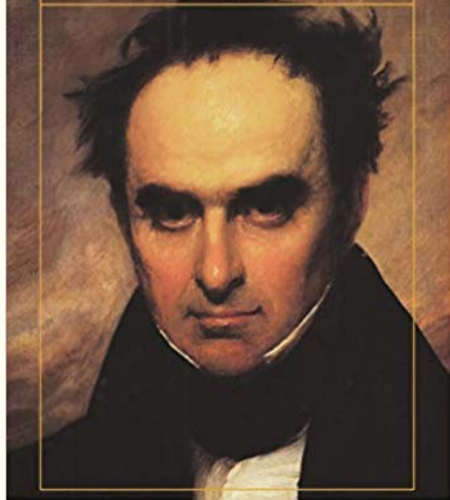
Dartmouth College v. Woodward (1819)

- Dartmouth College is created in 1769 by a charter of King George III.
- In 1816, John Wheelock, the president of Dartmouth College (and son of the founder, Eleazar Wheelock) is deposed by the trustees.
- The Democratic-Republican-controlled legislature of New Hampshire changes the charter of Dartmouth to reinstate the College's president, adding new trustees, and creating a state board of visitors with veto power over trustee decisions.
- For all practical purposes, New Hampshire is “nationalizing” Dartmouth and transforming it into Dartmouth University.
- Dartmouth's trustees hire Daniel Webster, an alumnus (also, later on, of the Webster-Hayne debate).
- The Supreme Court rules in favor of the trustees: the College's corporate charter is as a contract between private parties (the King and the trustees), with which the legislature could not interfere.

Daniel Webster

→ *The Man and His Time* ←

ROBERT V. REMINI



Webster's closing arguments

It is the case not merely of that humble institution; it is the case of every college in our land. ? It is more. It is, in some sense, the case of every man who has property of which he may be stripped,?for the question is simply this: Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit?...

Sir, you may destroy this little institution. It is weak. It is in your hands! I know it is one of the lesser lights in the literary horizon of the country. You may put it out. But if you do so, you must carry through your work. You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land. It is, Sir, as I have said, a small college, and yet, there are those who love it.

Key passages

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it... Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand... By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being... It is no more a state instrument, than a natural person exercising the same powers would be.

Cohens v. Virginia

Cohens v. Virginia (1821)

- Congress passed a bill to establish a National Lottery, to raise money for the District of Columbia.
- Virginia, however, had its state lottery, and prohibited the sale of out-of-state lottery tickets.
- On June 1, 1820, Philip and Mendes Cohen are charged in Norfolk with selling tickets for the National Lottery in Virginia.
- Court decides that all cases arising under federal law are within the Constitution's grant of appellate jurisdiction, even if individual states are parties to the cases.
- The decision allows for uniformity of federal law interpretation.
- However, the Supreme Court upholds the Cohen brothers' conviction: defenders of Virginia's rights win the battle but lose the long-run constitutional war.
- Precedence in *Wilson v. Mason* (1801).



Key passages

That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one, and the government, which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation, and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared that, in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire – for some purposes sovereign, for some purposes subordinate.

Opposition

- Decision creates strong opposition.
- Spencer Roane (1762-1822), justice of the Virginia Supreme Court, stated: “zenith of despotic power” and “negatives the idea that the states have a real existence.”
- Start of a complex legal construction of “state rights.”
- Nullification crisis of 1832-1833.
- Notice, however, that Roane agrees with many of the judicial ideas of Marshall but just as applicable to Virginia, not the U.S.

IRRECONCILABLE
FOUNDERS



SPENCER ROANE
JOHN MARSHALL
AND THE NATURE OF AMERICA'S
CONSTITUTIONAL REPUBLIC

DAVID JOHNSON

Gibbons v. Ogden

Gibbons v. Ogden,

Law, and
Society in the
Early Republic



THOMAS H. COX

Gibbons v. Ogden (1824): facts

- Robert R. Livingston and Robert Fulton get a monopoly to operate steamboats in the State of New York in 1808.
- Connecticut and New Jersey pass retaliatory legislation: extremely tense situation between the three states.
- Gibbons starts operating a steamboat (piloted by Cornelius Vanderbilt) between Elizabeth (NJ) and New York City under a 1793 law regulating the coasting trade.
- Aaron Ogden, a former Gibbons' partner, fills a complaint in the Court of Chancery of New York asking the court to restrain Thomas Gibbons from operating the steamboat. Superior courts in New York agree.
- Much bad previous blood between Gibbons and Ogden (including the challenge to a duel!).

Gibbons v. Ogden (1824): arguments

- Ogden's lawyers, Thomas Addis Emmet and Thomas J. Oakley, argue that states have fully concurrent power with Congress on matters concerning interstate commerce and that navigation was not commerce.
- Gibbons' lawyer, Daniel Webster, replies that Congress had exclusive national power over interstate commerce according to Article I, Section 8, Clause 3 of the Constitution.

Article I of the Constitution, Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

...

Gibbons v. Ogden (1824): judgement

- Marshall sides with Webster.
- In a sweeping decision, Marshall gives the United States broad regulatory powers.
- Dormant Commerce Clause.
- Number of steamboats multiplies and, paradoxically, helps making New York City the economic capital of the nation.
- Compare with Jefferson and Virginia in the previous cases: they won the battle, but lost the war, while New York lost the battle and won the war.

Key passages I

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse... The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior...

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

Key passages, II

which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant...

Gibbons v. Ogden (1824): consequences

Chief Justice Harlan Fiske Stone (1872-1946)

“it will be the judgement of history that the Commerce clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation.”

- Key for the creation of a unified national market.
- However, discussions about the commerce clause has not finished:
 1. *A.L.A. Schechter Poultry Corp. v. United States* (1935).
 2. *West Coast Hotel Co. v. Parrish* (1937).
 3. *Wickard v. Filburn* (1942).
 4. *United States v. Lopez* (1995).
 5. *National Federation of Independent Business v. Sebelius* (2012).

THE COMMERCE CLAUSE UNDER
MARSHALL, TANEY, AND WAITE

FELIX FRANKFURTER

