

Marbury vs. Madison: An introduction to Judicial Review

By Pat McLarty – Kathleen Senior High School

I. Lesson Plan Summary

Summary

In this activity, students will walk through the events leading to the landmark Supreme Court case *Marbury v. Madison*. First, students will complete a writing activity placing them in the roles of Jefferson, Madison, Marbury and Marshall. Next, the groups will examine the U.S. Constitution and the Judiciary Act of 1789 and analyze how these documents should be applied in this conflict. Then, the class will review the Majority decision in the case and the basis for that decision. Finally, by examining a series of Jefferson's correspondences, the class will learn of the effects of this decision.

Objectives

Curriculum Map Topic: The National Period – Political Events

Lesson's Essential Question: How did the election of Thomas Jefferson change the course of the nation?

SS.A.1.4.1 understands how ideas and beliefs, decisions and chance events have been used in the process of writing and interpreting history

SS.A.1.4.2 identifies and understands themes in history that cross scientific, economic and cultural Boundaries

SS.A.1.4.3 evaluates conflicting sources and materials in the interpretation of a historical event or episode

SS.A.1.4.4 uses chronology, sequencing, patterns and periodization to examine interpretations of an Event

SS.A.4.4.5 understands the significant political events that took place during the early national Period

SS.C.1.4.2 understands the ideas that led to the creation of limited government in the US

SS.C.1.4.3 understands how the overall design and specific features of the Constitution prevent the abuse of power by aggregating power at the national, state and local levels; dispersing power among different levels of government; and using a system of checks and balances (e.g. federalism)

U.S. History Event or Era

The Presidency of Thomas Jefferson (Judicial Review, *Marbury v. Madison* [1803])

Grade Level

Advanced Middle School through High School

Materials

Vocabulary words and definitions printed and then cut out (enough so each member of the class receives a slip of paper), Overhead Transparencies #1 – #5 prepared, class set of handouts, download mp3 conversation between Jefferson and Marshall, prepare "Jeopardy" assessment

Lesson Time

Primary lesson can be completed in two 90-minute or four 45-minute lessons. Extension activities would require additional class time.

II. Lesson Procedures

Procedures

1. Preview Activity – Journaling: Have each student write an answer to the following questions in pen: “You have been elected the new Mayor of [insert your town’s name here]. Before leaving office, the old mayor gave jobs to several of his political friends but the paperwork hasn’t made it to the personnel office yet.

- A. Should you 1) honor the jobs promised by the old mayor, or 2) cancel the jobs since they aren’t “officially” in the system yet?
- B. What are the possible negatives to denying these people their jobs? What are the possible positives to allowing them to take these jobs?
- C. Would it make a difference if the perspective employees had worked against you in the mayoral elections?

Once students have completed their writings, have them ball the paper (pencil rubs off – that’s why the assignment needed to be completed in pen) and toss the papers randomly around the room. Once “time” is called, students will pick a paper ball closest to them and then take turns reading a sampling of the answers. Discuss responses.

2. Provide a mini-lecture outlining the circumstances leading to the case, *Marbury v. Madison*. Provide vocabulary (Overhead Master #1) either embedded in the lecture or as a separate writing assignment.

3. Matching game to learn vocabulary: Randomly pass out slips of paper with one vocabulary word per slip to half the class and then pass out definitions to match those words to the other half of the class. Allow students to move about the room matching words and definitions, sitting down once they have a match. Repeat this process until most of the definitions are understood. If there are an odd number in the class, the last person can be the “grader” who must confirm the correct matches.

4. Review the key case questions as presented by John Marshall (Overhead Master #2). Answer those questions using the excerpts from the U.S. Constitution (Handout #1) and the Judiciary Act of 1789 (Handout #2). Review the questions provided on Overhead Master #3.

5. Read the majority report from *Marbury v. Madison* (Handout #3). Review the questions provided on Overhead Master #4. Compare the team’s conclusions to the conclusions of the Supreme Court. Use a visual organizer (T-chart or Venn diagram) to show this comparison.

6. Listen to a “conversation” between John Marshall and Thomas Jefferson at the conclusion of the court case. This conversation can be found at <http://www.imao.us/sound/Marbury.mp3>. Discuss as a class.

7. Read correspondences written by Thomas Jefferson concerning the outcome of the case (Overhead Master #5). Discuss his views.

8. Review how this case is still affecting the court system. Discuss *Brown v. Board of Education* and *Bush v. Gore* and their relationship to this decision.

III. Activities

OVERHEAD MASTER #1

Vocabulary for *Marbury v. Madison*

Uscourts.gov

Amicus curiae brief: A "friend of the court" brief filed by a third party not directly involved in the case. It is meant to inform and influence the Supreme Court about a particular perspective on the issues in the case.

Arbiter: Final decision-maker

Bill of Rights: First Ten Amendments to the Constitution (including the right to free speech, right to be protected from unreasonable searches and seizures, etc.) that establish the fundamental rights enjoyed by Americans.

Checks and balances: System of overlapping the powers of the Legislative, Executive, and Judicial branches to permit each branch to check the actions of the others.

Judicial review: The power of the Judiciary to review legislation or other governmental action in order to determine whether it complies with the U.S. Constitution or state constitutions.

Rule of law: Concept that citizens are governed by the law and institutions, not individuals. The law supercedes all else and is intended to be constant, predictable, and just.

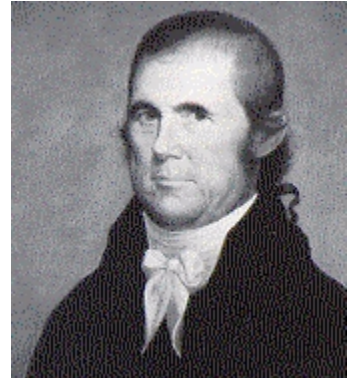
Separation of powers: A basic principle in American government that the Executive, Legislative, and Judicial powers are divided among three independent and co-equal branches of government.

Writ of mandamus: Court order directing an individual or agency to do or not do something, particularly, a judicial order directing a government official to carry out official duties of office or not do something in his/her official capacity.

John Marshall's Majority Opinion

In the order in which the court has viewed this subject, the following questions have been considered and decided:

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?



Questions to Consider after reading the Constitution and the Judiciary Act of 1789:

1. According to the Constitution, who has the authority to establish courts?
2. In Section 13 of the Judiciary Act of 1789, Congress extends the jurisdiction of the Supreme Court. What powers does it give to the Supreme Court that are NOT already provided in the Constitution?
3. According to Article III, Section 2, does the Congress have the authority to change the jurisdiction of the Supreme Court, as it has done in the Judiciary Act of 1789?
4. If the Constitution and an Act of Congress contradict one another, as they do in this case, which one should people obey? Why?
5. Based on your answers to the above questions, does the Supreme Court have the power to issue a *writ of mandamus*? What did this mean for Marbury?
6. In addition to determining whether or not the Court had the authority to issue a *writ of mandamus*, this case set an important precedent. When one branch of government, such as the Congress, does something that seems to go against the Constitution, how is the conflict resolved?

Questions to Consider after reading the opinion of the Supreme Court:

1. If the Supreme Court of the United States had issued the *writ of mandamus*, how could it have forced Madison to comply with the order? What would have happened if he had ignored it? (In other words, does the Court have enforcement power?)
2. In the Court's opinion, is Marbury entitled to his appointment?
3. According to the decision, does the Supreme Court of the United States have the authority to issue a *writ of mandamus* to force Madison to deliver the commission? Explain. Is there any way to reverse the Court's decision?
4. In this case, Chief Justice John Marshall and the Court "gave up some power in order to get more." Explain. What power did they give up? What power did they gain? Why did the Court do this?
5. Why does the judicial branch, as opposed to the executive or legislative branch, have the power of judicial review?
6. Imagine that Jefferson, rather than Adams, had appointed the Chief Justice of the Supreme Court. Would the outcome of this case, and the future of the country, have been different? Why?

<http://www.landmarkcases.org/marbury/majority.html>

Jefferson's Correspondences

<http://www.landmarkcases.org/marbury/jefferson.html>

"The question whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches."

—Thomas Jefferson to W. H. Tarrance, 1815. ME 14:303

"The Constitution . . . meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch."

—Thomas Jefferson to Abigail Adams, 1804. ME 11:51

"This member of the Government was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is, ad libitum, by sapping and mining slyly and without alarm the foundations of the Constitution, can do what open force would not dare to attempt."

—Thomas Jefferson to Edward Livingston, 1825. ME 16:114

The Constitution of the United States

Article III.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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 Land 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.

The Judiciary Act of 1789

September 24, 1789.

1 Stat. 73.

CHAP. XX. – *An Act to establish the Judicial Courts of the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

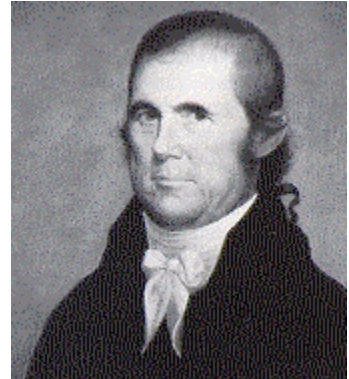
SEC. 13. *And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, 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.

APPROVED , September 24, 1789.

Chief Justice John Marshall delivered the opinion of the Supreme Court.

<http://www.landmarkcases.org/marbury/majority.html>

In the order in which the court has viewed this subject, the following questions have been considered and decided:



4. Has the applicant a right to the commission he demands?
5. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
6. If they do afford him a remedy, is it a mandamus issuing from this court?

• • •

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. . . .

Mr. Marbury . . . since his commission was signed by the president, and sealed by the secretary of state, was appointed. . . .

To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is, 2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . .

It is then the opinion of the Court, 1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace . . . and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether, 3. He is entitled to the remedy for which he applies. This depends on, 1. The nature of the writ applied for. 2. The power of this court. 1. The nature of the writ. . . .

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be . . . "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice . . . "

These circumstances certainly concur in this case. . . .

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "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." The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional. . . .

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. . . .

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction. . . ."

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. . . . If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. . . .

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . .

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. . . .

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . .

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

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . .

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. . . .

Who is Marbury? by Devin Bent

http://www.jmu.edu/madison/center/main_pages/madison_archives/era/judicial/plaintiff.htm

William Marbury had been appointed a Justice of the Peace of the District of Columbia by President John Adams under the Judiciary Act of 1800. When Thomas Jefferson became President in 1801, Marbury's commission had not been delivered, and Jefferson refused to have it delivered. James Madison, Jefferson's Secretary of State, was the person legally designated to deliver the commission and he entirely supported Jefferson. Since Madison was responsible for the delivery, Marbury sued him in the U.S. Supreme Court and thus their names are forever attached to the landmark Supreme Court case, *Marbury v. Madison* (1803).

Marbury was an ardent Federalist, active in Maryland politics and aligned with John Adam's wing of the party. He supported an effort to change the way the Electoral College electors were selected in Maryland; a change that might have defeated Thomas Jefferson and put John Adams back in the White House for another four years. It is entirely understandable that Jefferson and Madison were united against him and that they would not have delivered the commission even if ordered to by the Supreme Court.



Image Credit: U.S. Supreme Court

Extension Activities

Who is Marbury? Informative Reading (5 – 15 minute read aloud activity) – Supplemental Reading

Concentration review game (5 – 10 minute activity) – <http://quia.com/jg?207430.html>

Timeline activity (5 – 10 minute activity)– <http://www.quia.com/rd/8735.html>

Mock Trial (multi-day activity) - <http://www.uscourts.gov/outreach/resources/marburylessonplans05.pdf>

Assessment

Create a “Jeopardy!” review game using the template provided at http://www.graves.k12.ky.us/tech/jeopardy_instructions.htm and the review questions attached to this lesson (see next page) if you have the ability to project a computer image. If not, create a board on an overhead sheet and just mark out squares manually as they are answered.

IV. Assessment

“Jeopardy!” Challenge

http://www.classbrain.com/artteenst/uploads/marbury_v_madison_lp.pdf

The purpose of this activity is to review the key points of the case. Divide the class into small groups of 3-5. Ask each group to choose a team name that relates to *Marbury v. Madison* and to designate one representative who will raise his/her hand for the group. Ask for a volunteer to be the game show host who will call out the questions. Another student will keep time and decide which team representative raises its hand first. From the time the representative raises his/her hand, the team has 30 seconds to provide an answer. Whichever group answers the question correctly chooses the category and point value for the next question.

“Jeopardy!” Challenge Categories

Players

100 Point Question: Who was the Chief Justice of the Supreme Court of the United States who wrote the opinion in *Marbury v. Madison*? A: Chief Justice John Marshall.

200 Points: Who brought the case to the Supreme Court (who was the petitioner)? A: William Marbury.

300 Points: What President appointed Marbury to the justice of the peace position? A: John Adams.

400 Points: Who was President when Marbury brought his case to the U.S. Supreme Court? A: Thomas Jefferson.

500 Points: Who was the Secretary of State who failed to have Marbury’s commission delivered on time? A: James Madison.

Facts of the Case

100 Points: Name and define the key concept established in *Marbury v. Madison*. A: “Judicial review,” which allows the Supreme Court to declare unconstitutional acts of Congress and the President.

200 Points: Why did Marbury sue Madison? A: Secretary of State Madison, who was responsible for the delivery of justice of the peace commissions, did not have Marbury’s commission delivered. Marbury sued Madison to get the commission so that he (Marbury) could be a justice of the peace.

300 Points: Did the Supreme Court decide that Marbury had a right to the commission? A: Yes. The commission was properly signed and sealed. It did not have to be delivered to be official.

400 Points: If the Court found that Marbury had a right to the commission, why didn’t the Justices give it to him? A: Because the Court decided that it did not have the authority to remedy the situation. Although the Court concluded that Marbury was entitled to the commission, it declared unconstitutional the law (the Judiciary Act of 1789) that would have granted the Court the power to fix the problem.

500 Points: Explain the compromise crafted by Chief Justice Marshall in the decision. A: The Court decided that while Marbury was entitled to the commission, the Supreme Court could not – under the Constitution – take the action that would have made it possible. The effect of the Court’s decision was to 1) acknowledge that Congress has the authority to give the Judiciary certain powers; 2) limit the Court’s own powers.

Legacy

100 Points: What is the legacy of *Marbury v. Madison*? A: It made the Judiciary a co-equal branch of government with the Legislative and Executive branches. 2) It established the Supreme Court as the final arbiter of the Constitution. 3) It gave the Supreme Court the authority to declare unconstitutional acts of Congress and the President. 4) It established that the rule of law would govern Supreme Court decisions. 5) It established the neutrality and credibility of the Supreme Court.

200 Points: Name an 1857 case in which the Supreme Court asserted the power of judicial review on the issue of slavery? A: *Dred Scott v. Sanford*

300 Points: Name a 1954 case in which the Supreme Court asserted the power of judicial review on an issue of public school desegregation? A: *Brown v. Board of Education*.

400 Points: Name a case in 2000 in which the Supreme Court asserted the power of judicial review on an issue regarding the Presidential election? A: *Bush v. Gore*.

500 Points: Who made the following statement and in what Supreme Court case was it made? "The Constitution is superior to any ordinary act of the legislature ..." and "a law repugnant to the Constitution is void" "It is emphatically the province of the judicial department to say what the law is." A: Chief Justice John Marshall in *Marbury v. Madison*.

Concepts

100 Points: Summarize the concept of separation of powers. a. There are three independent and co-equal branches of government: Executive, Legislative, and Judicial.

200 Points: Summarize the concept of judicial review. A: The U.S. Supreme Court has the authority to declare unconstitutional acts of Congress and the President.

300 Points: Summarize the concept of rule of law. A: Legal conflicts are decided on the basis of laws, not the personal preferences of people in power.

400 Points: Summarize the concept that the Supreme Court is the final arbiter of the U.S. Constitution. A. Only the Supreme Court decides what is constitutional.

500 Points: What is a writ of mandamus? A. A court order compelling a public official to take an action or prohibiting a public official from taking an action.

Arguments

100 Points: State an argument in favor of judicial review. A: (See chart)

200 Points: State an argument in opposition to judicial review. A: (See chart)

300 Points: What is the role of the *amicus curiae*? A: To present its perspective on an issue before the Court in way that it hopes will be informative and persuasive.

400 Points: What did Marbury want the Supreme Court to do? Did he receive the remedy he wanted? A: Order Madison to give him the commission that would have made him a justice of the peace. No. The Supreme Court ruled that it did not have the authority to remedy the problem.

500 Points: Do the parties have to be present at the Supreme Court for oral arguments? A: No. However, Madison's decision not to appear was considered a protest statement.

Resources

(web links active as of June 3, 2007)

- Copies of primary source materials related to this and other landmark cases.
<http://www.landmarkcases.org/marbury/majority.html>
- Humorous IPOD of the conflict between Jefferson and Marshall's views
<http://www.imao.us/sound/Marbury.mp3>
- Excellent lesson plans and resource information on major court decisions
<http://www.uscourts.gov/outreach/resources/marburymadison.htm>