

MODULE 1

Introduction to Constitutional Law and the Power of Judicial Review

Constitutional Law · Fall 2026 · Tuesday / Thursday, Central Islip · 2h05

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Three sentences

The long first lecture is retired. This is what survives of it.

KNOW THYSELF

The Constitution is the first statement of what the national self is.

I KNOW NOTHING

Torts has had the same rule for 300 years. This subject turns 180 degrees, often.

WAR AND POLITICS

Politics is what we do instead. When it fails, we get the other thing.

That is the whole survey. We are going to argue instead.

A duty, not a device

Before any case — what this course is going to claim, and why you are stuck learning both.

“As a professor, I find myself with a duty to teach you what I feel are two different constitutions.”

CONSTITUTION ONE

The one the country has run on for a hundred years and more.

CONSTITUTION TWO

What the last ten years have made of it. Not the last two hundred and fifty.

The bar examines the first one. That is why you do not get to pick.

This is an argument, not a report. Feel free to argue back.

1800

The case makes no sense until you know who lost.

FEDERALISTS

John Adams — outgoing

Massachusetts

Commerce, banks, Hamilton

Pro federal power

REPUBLICANS

Thomas Jefferson — incoming

Virginia

Agricultural, “the People”

Pro state power

On the way out: new judgeships, created and filled in the last weeks. The commissions are signed and sealed on the final night. Some are never delivered.

Marbury v. Madison — the facts in four moves

Say out loud who held which office at each step.

1

Adams appoints Marbury

Outgoing President. Justice of the peace for D.C.

2

Marshall fails to deliver

Outgoing Secretary of State.

3

Jefferson and Madison refuse

New President. New Secretary of State.

4

Marbury sues Madison

Mandamus, original jurisdiction, § 13 of the Judiciary Act of 1789.

Chief Justice Marshall writes the opinion. He does not recuse. Hold that — in Martin he will.

The template you will use all semester

Right → remedy → jurisdiction. In that order, every time.

1

Is there a RIGHT?

Does Marbury have a right to the commission?

YES

2

Is there a REMEDY?

Does the law afford him a remedy?

YES

3

Is there JURISDICTION?

§ 13 confers it — and Article III is a ceiling

NO

Marshall answers the first two before deciding he has no power to answer any of them.

This is how you brief every case in this course.

And then Marshall flipped it

Jurisdiction comes first. He answered it last. That inversion is the case.

WHAT THE DOCTRINE REQUIRES

- 1 **Jurisdiction**
- 2 **Right**
- 3 **Remedy**

No power, no opinion. The court says so and stops.

WHAT MARSHALL DID

- 1 **Right**
- 2 **Remedy**
- 3 **Jurisdiction**

He tells the administration it broke the law — then says he cannot act.

Hamilton promised a branch with “neither FORCE nor WILL, but merely judgment.” Which one is this?

Everything he says about right and remedy is dictum — by a court that had just held it had no power to say it.

Why a constitution at all

The point of the enterprise, stated once, so that every failure later has a measure.

“The whole point of the Constitution is to stop violence from being the operational method of sharing power.”

Argue

Sue

Appeal

Legislate

Vote

At every rung there is a legitimate next move. The machinery exists to keep you on the ladder.

“When that breaks down, politics turns into war.”

England changed by beheadings. Some of the questions in this course are the questions that led to a civil war.

Which duties can a court touch?

The line is not the officer's rank. It is whether the law left him anything to decide.

MINISTERIAL

Peremptory.
The officer has no choice.

Vests an individual right.

→ **Legal remedy. A court may act.**

DISCRETIONARY

Political.
**The officer weighs
the national interest.**

Unreviewable.

→ **Political remedies only.**

If the only remedy is political — what is a political remedy?

Mandamus lies against the person holding the duty — not the office. Personal capacity; contempt attaches personally.

Where political remedies end

This is the stake of the whole distinction, and it is not abstract.

“When the court says something is a political question and refuses to exercise jurisdiction — no one decides.”

Vote



Lobby



Protest



Violence

“Political remedies become war, eventually.”

We have a Constitution in which we vote people out of office instead of chopping their heads off. That is the whole point of this endeavor.

Marshall's arguments, graded

Five reasons, in three tiers. He does not think they are worth the same — and neither should you.

STRONGEST

The judicial role

To decide a case is to say what the law is. Not a power claimed — a necessity described.

The grant of jurisdiction

Article III reaches cases arising under the Constitution — so a court must read it.

LOAD-BEARING

A written Constitution

A limit that cannot be enforced is not a limit. But it does not say who enforces it.

Democratic enactment

The people did not go to the trouble of ratifying a supreme law in order to get advice.

WEAKEST

The oath

Judges swear it. So does the President. So does every member of Congress. It proves departmentalism, not supremacy.

Five arguments, and not one of them says why the COURT rather than someone else.

Who should be the ultimate interpreter?

Run it as a genuine choice. The case for the Court is not obviously the strongest.

The People

No ultimate interpreter

Majorities crush minorities;
no uniformity; conflict
unresolved and ugly

President or Congress

Responds to the People

Too much power;
too much change;
sometimes one person

Each branch, for itself

Departmentalism

Whose reading governs
when they disagree?

The Court

Uniformity; consistency

Countermajoritarian:
unaccountable,
anti-democratic

Marshall picks the fourth. The objection to it has a name, and it never goes away.

What the Court actually has

Three branches. Count what each one can bring to a fight.

THE PRESIDENT

Soldiers.

CONGRESS

Money.

THE COURT, 1800

**Nothing. It has its
word.**

“The court lives and dies on its reputation and on its word.”

Which is why the charge that lands hardest is disingenuousness — pretending to do what it did before while doing something else.

A court with soldiers would not need to be candid.

The genius reading

He tells the President he broke the law, and issues no order anyone can refuse.

STEP 1

You have the right.

Marbury was appointed. The commission was signed and sealed.

STEP 2

The law gives a remedy.

Where there is a right there is a remedy, or it is not a right.

STEP 3

But not from us.

Section 13 gave us original jurisdiction Article III does not allow.

The President is told he broke the law — and handed nothing to defy.

Gives up a scrap of jurisdiction. Takes the power to say what the Constitution means. Best trade in American institutional history.

Remedy and jurisdiction, right now

Why Marbury is not a museum piece.

Trump v. CASA

6–3, Barrett, J.

Universal injunctions likely exceed the equitable power the Judiciary Act of 1789 conferred. Complete relief to the parties — not nationwide supervision.

Washington v. Trump

Cert. DENIED, June 30, 2026

Keeps a nationwide injunction anyway: nothing narrower gives mobile-population States complete relief. Bumatay, J., dissenting on standing.

Trump v. Barbara

5 for the constitutional holding · 6 for the judgment

Children born here to parents unlawfully or temporarily present are citizens. Six opinions. Kavanaugh concurs in the judgment and DISSENTS IN PART.

The power to say what the law is turns out to be inseparable from the fight over for whom a court may say it.

Marbury, Nixon, and now

Three moments, one question: is the office inside the law or above it?

1803 • MARBURY

The executive can be told, in writing, that it broke the law.

1974 • NIXON

Privilege is real — and it yields. He complies. He resigns.

2024 • TRUMP

There is conduct for which a former President may not be tried at all.

Between 1974 and 2024 the direction of travel is not toward accountability.

That the arc repudiates the project of 1776 is my argument, not the Court's holding. Argue back. And keep the hedge open — this Court overstates, then sometimes retreats.

What we have not settled

Carry these. They come back.

- 1 Should Marshall have recused — and does the answer change the opinion's authority?
- 2 Did § 13 confer what Marshall said it did — and is Article III a floor or a ceiling?
- 3 Does Marbury establish judicial review, or judicial supremacy?**
- 4 If the oath proves judges must interpret, why not the President too?
- 5 Is the ministerial / discretionary line stable, or does it collapse on contact?
- 6 After Trump v. United States, what evidence could ever rebut the presumption?
- 7 If political remedies end in force, what is a closed courthouse door actually deciding?**