If anything could do this, it would he ceding to us the island of New ıns and the Floridas. This would cer- y, in a great degree, remove the causes arring and irritation between us, and ıps for such a length of time, as might uce other means of making the measure ıanently conciliatory to our interests friendships. It would, at any rate, relieve rom the necessity of taking immediate ures for countervailing such an opera- by arrangements in another quarter. But we should consider New Orleans and the das as no equivalent for the risk of a rel with France, produced by her age.

ıave no doubt you have urged these considerations, on every proper occasion, with the government where you are. They are such as must have effect, if you can find means of producing thorough reflection on them by that government. . . . Every eye in the United States is now fixed on the affairs of Louisiana. Perhaps nothing since the revolutionary war, has produced more uneasy sensations through the body of the nation. Notwithstanding temporary bickerings have taken place with France, she has still a strong hold on the affections of our citizens generally. I have thought it not amiss, by way of supplement to the letters of the Secretary of State, to write you this private one, to impress you with the importance we affix to this transaction. . . .

108. THE CESSION OF LOUISIANA
April 30, 1803

(Malloy, ed. *Treaties, Conventions, etc.*, Vol. I, p. 508 ff.)

ıe Treaty of Fontainebleau of 1762, France Louisiana west of the Mississippi to Spain. ihepherd, "Cession of Louisiana to Spain", *Sci. Qt.*, Vol. XIX, p. 439. By the secret y of St. Ildefonso, Spain ceded this ter- back to France. This substitution of a rful for a weak neighbour along the Mis- pi and at New Orleans caused consterna- in the West and to Jefferson and his ad- s. Congress appropriated $2,000,000 for the ıase of New Orleans, and Jefferson dis- ed Monroe to co-operate with Livingston gotiate the purchase. For reasons primarily rned with the critical military situation on Continent, Napoleon decided to sell to the d States the whole of Louisiana, and the n was accordingly made. By a convention ril 30, 1803, the United States agreed to pay million francs for Louisiana. The most ugh history of the negotiations is, H. Adams, *ry of the United States*, Vol. I, chs. xiv–xvii, II, chs. i–vi. See also, E. W. Lyon, *Louisiana nch Diplomacy, 1759–1804;* A. P. Whitaker, *Mississippi Question, 1795–1803;* J. K. Hos- *The Louisiana Purchase;* S. F. Bemis, ed. *ican Secretaries of State*, Vol. III, p. 9 ff. he Louisiana Boundary, T. M. Marshall, *ry of the Western Boundary of the Louisi- Purchase*. For the constitutional questions, *merican Insurance Co. v. Canter*, Doc. No. and E. S. Brown, *Constitutional History of ouisiana Purchase.*

T. I. Whereas, by the article the third ıe treaty concluded at St. Idelfonso, the 1st October, 1800 between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows: "His Catholic Majesty promises and engages on his part, to cede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other states." And *whereas,* in pursuance of the Treaty, and particularly of the third article, the French Republic has an incontestible title to the domain and to the possession of the said territory:—The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned Treaty, concluded with his Catholic Majesty.

ART. II. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property.—The Archives, papers, and documents, relative to the domain and sovereignty of Louisiana, and its dependencies, will be left in the possession of the Commissaries of the United States, and copies will be afterwards given in due form to the Magistrates and Municipal officers, of such of the said papers and documents as may be necessary to them.

ART. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the Religion which they profess. . . .

ART. VII. It has been agreed between the contracting parties, that the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said Colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her Colonies, shall be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandize, or other or greater tonnage than that paid by the citizens of the United States. . . .

109. MARBURY v. MADISON
1 Cranch, 137
1803

Original proceeding for mandamus. Under the authority of the Judiciary Act of February 27, 1801, the President appointed one William Marbury justice of the peace; because of the negligence of Secretary of State Marshall the commission was not delivered, and President Jefferson instructed his Secretary of State Madison not to deliver the commission. Marbury sued for a writ of mandamus requiring Madison to deliver his commission. Marshall's opinion embraced two questions: the ethics of withholding the commission, and the right of the Supreme Court to issue a writ of mandamus. On the first question Marshall declared, in what is generally considered *obiter dicta,* that the President had no right to withhold Marbury's commission. On the second, Marshall decided that the provision of the Judiciary Act of 1789 authorizing the Supreme Court to issue a writ of mandamus, was contrary to the Constitution and therefore void. This is the first case in which the Supreme Court held a law of Congress void: not until the Dred Scott decision did the Court hold another act of Congress void. On this famous case see, A. Beveridge, *Life of John Marshall,* Vol. III, ch. iii; E. S. Corwin, *The Doctrine of Judicial Review;* A. C. McLaughlin. *The Courts, The Constitution and Parties,* ch. i; L. B. Boudin, *Government by Judiciary,* Vol. I, ch. x; C. Warren, *The Supreme Court in United States History,* (1928 ed.) Vol. I, ch. v.

MARSHALL, C. J. . . . The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. . . .

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

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court? . . .

The first object of enquiry is,

Has the applicant a right to the commission he demands? . . .

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. . . .

Mr. Marbury, then, since his commission was signed by the President, and sealed by

the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

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

2. This brings us to the second enquiry: which is,

If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. . . .

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. . . .

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . .

It is, then, the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington in the district of Columbia; 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.

2dly. 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 enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on

1st. The nature of the writ applied for, and

2dly. The power of this court. . . .

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

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, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

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. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

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. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. 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.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it. . . .

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; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established, to decide it.

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can it nor ought it to be frequently repeated. The principles therefore so established are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

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.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court as one of the fundamental principles of our society. It is

not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

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.

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.

Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it, ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to *the constitution* and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

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.

[Mandamus denied.]

110. JEFFERSON'S MESSAGE ON THE BURR CONSPIRACY

January 22, 1807

(Richardson, ed. *Messages and Papers*, Vol. I, p. 412 ff.)

On November 27, 1806, Jefferson had issued a proclamation warning citizens of the Burr conspiracy. The message below contains a more detailed account of the information upon which this proclamation was issued. Burr had surrendered to the acting Governor of Louisiana Territory January 17, 1807, but subsequently attempted to escape, only to be apprehended and sent on to Richmond for trial on the charge of treason. Two different interpretations of the Burr conspiracy are in H. Adams, *History of the United States*, Vol. III, chs. x–xiv, xix, and W. F. McCaleb, *Aaron Burr Conspiracy*. An account of the trial is in A. Beveridge, *Life of John Marshall*, Vol. III, chs. vi–ix. For Burr, see J. Parton, *Aaron Burr*.

JANUARY 22, 1807.

To the Senate and House of Representatives of the United States:

Agreeably to the request of the House of Representatives communicated in their resolution of the 16th instant, I proceed to state, under the reserve therein expressed, information received touching an illegal combination of private individuals against the peace and safety of the Union, and a military expedition planned by them against the territories of a power in amity with the United States, with the measures I have pursued for suppressing the same. . . .

Some time in the latter part of September I received intimations that designs were in agitation in the Western country unlawful and unfriendly to the peace of the Union, and that the prime mover in these was Aaron Burr, heretofore distinguished by the favor of his country. The grounds of these intimations being inconclusive, the objects uncertain, and the fidelity of that country known to be firm, the only measure taken was to urge the informants to use their best endeavors to get further insight into the designs and proceedings of the suspected persons and to communicate them to me.

It was not till the latter part of October that the objects of the conspiracy began to be perceived, but still so blended and involved in mystery that nothing distinct could be singled out for pursuit. In this state of