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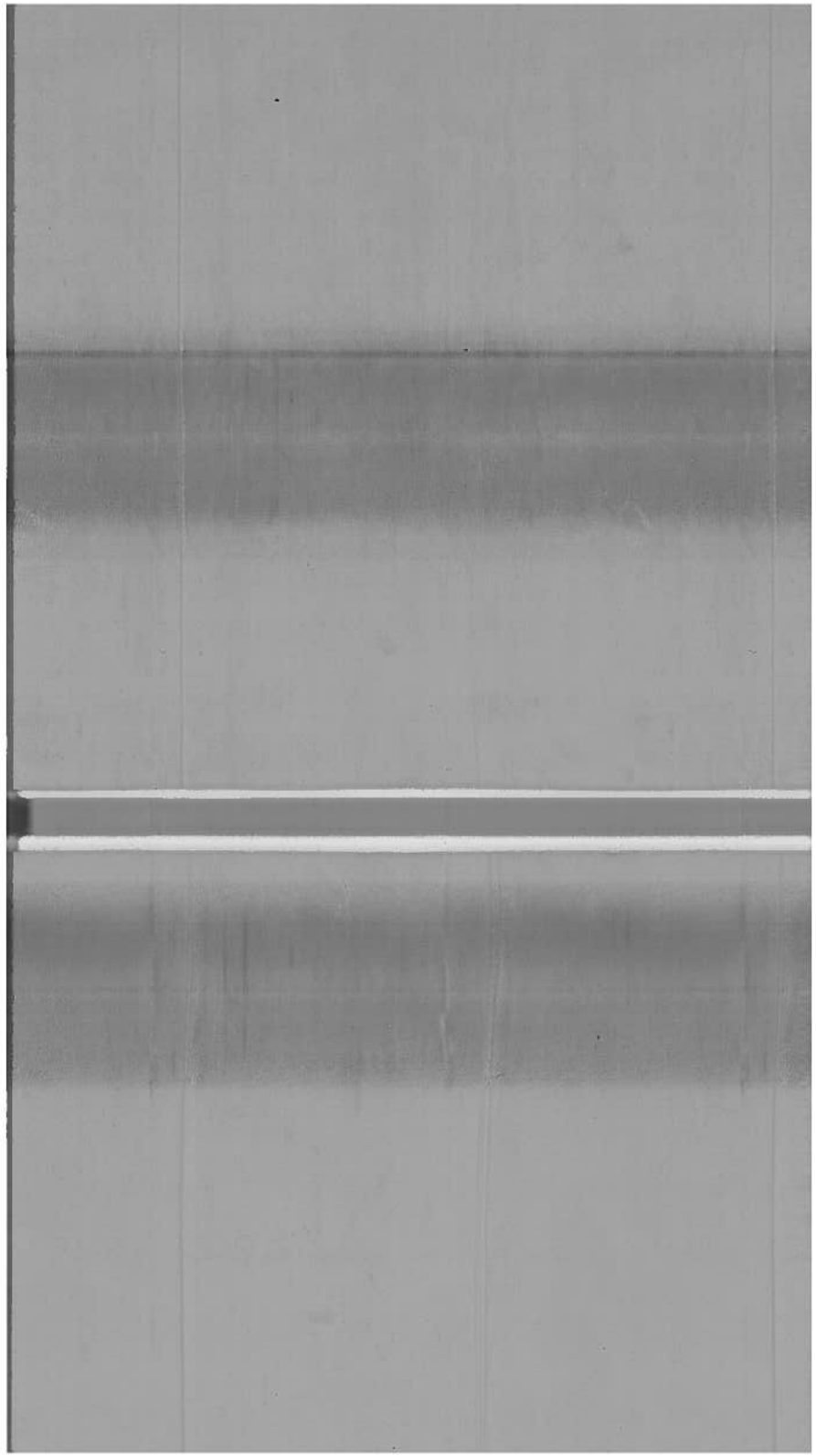
The Constitution Construed

Marbury v. *Madison* was the first case in which the Supreme Court exercised the right of "judicial review" over laws passed by Congress. In February 1803, Chief Justice John Marshall, a staunch Federalist, speaking for the majority of justices on the Supreme Court, announced his opinion in the case. William Marbury had been appointed justice of the peace for the District of Columbia by John Adams in the last hours of his administration. But because Marbury was a Federalist, James Madison, Jefferson's secretary of state, withheld the commission from him. Marbury appealed to the Supreme Court for a writ of mandamus, that is, a court order compelling Madison to deliver the commission.

Marshall did not believe that Madison was justified in denying Marbury his commission as justice of the peace. But in his opinion he declared that the Supreme Court could not force Madison to deliver the commission. The Constitution, he said, in defining the original jurisdiction of the Supreme Court, did not include the issue of writs to executive officers. Nonetheless, section 13 of the Judiciary Act of 1789 did give the Supreme Court the power to issue such writs, and it was under this law that Marbury had applied to the Court. Marshall, however, declared that section 13 of the Judiciary Act was unconstitutional and that therefore the Court could not render judgment. He then went on to assert the right of the Supreme Court to pass on the constitutionality of laws passed by Congress. "It is a proposition too plain to be contested," he declared, "that the constitution controls any legislative act repugnant to it" and that "a legislative act contrary to the constitution is not law." He added, "It is emphatically the province and duty of the judicial department to say what the law is." And he concluded that "a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." By claiming for the Court the duty of deciding whether acts of Congress were constitutional, Marshall upheld the prestige of the judiciary, even though he was unable to do anything for Marbury. But it was not until the *Dred Scott* case, more than half a century later, that the Supreme Court invalidated a congressional act for the second time.



Born in 1755 to well-to-do Virginians, John Marshall received little formal schooling. He studied law, however, and eventually became active in state politics. His service in the army during the American Revolution helped develop his nationalistic outlook. A distant cousin of Thomas Jefferson but a devoted Federalist nonetheless, Marshall served on a commission to France in 1797 and was elected to Congress in 1799. In 1801 President John Adams named him to the U.S. Supreme Court, where he served as chief justice for the next thirty-four years. Among his notable decisions besides *Marbury* v. *Madison* were *McCulloch* v. *Maryland* (1819), which protected federal agencies such as the Bank of the United States from state taxes; *Dartmouth College* v. *Woodward* (1819), which upheld the sanctity of contracts; and *Gibbons* v. *Ogden* (1824), which established federal authority over interstate and foreign commerce. In these and other cases Marshall sought to protect the rights of property, increase the power of the federal government, and raise the prestige of the federal judiciary. Personally convivial, gossipy, courtly with women, and generally reveling in the social life of the slaveholding gentry, Marshall in public remained a figure of controversy throughout his career. He died in Philadelphia in 1835.

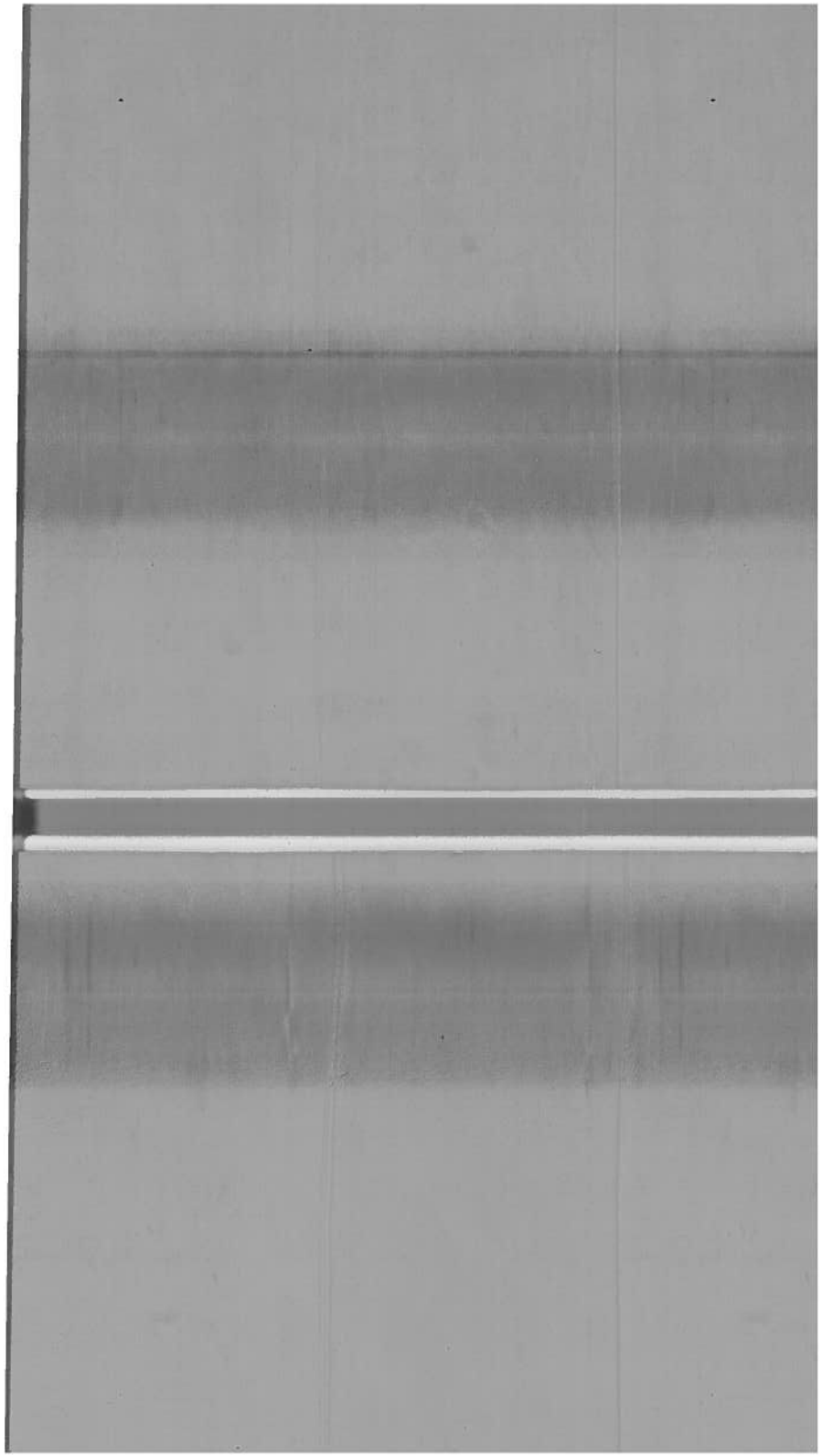
Questions to Consider. Why, according to Chief Justice Marshall, should the Constitution and its principles be considered permanent? How important was it to Marshall's argument that the U.S. Constitution was written? What alternative did he have in mind, and why did he feel compelled to assert the special character of a written document? Why did he single out the legislative branch as opposed to the executive (or judiciary) as the chief danger to the permanence of the Constitution and its principles? On what grounds, according to Marshall, did the judiciary become the final arbiter of constitutional quarrels with the right to annul legislation? Why was Marshall's decision seen as a victory for the Federalist party?

Marbury v. *Madison* (1803)

JOHN MARSHALL

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

1 *Craven* 137 (1803).



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 the legislature may alter the constitution by an ordinary act.

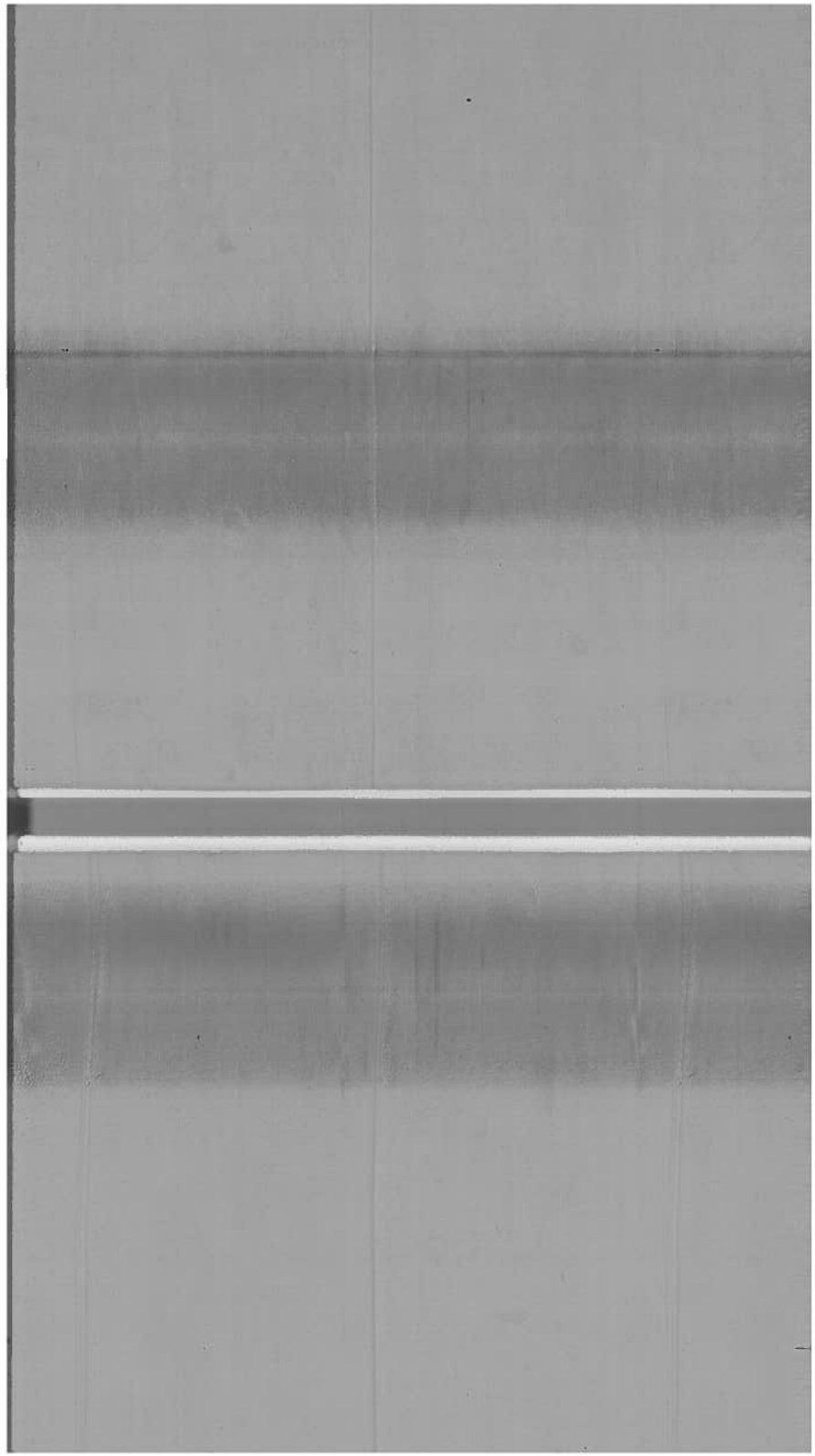
Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

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.

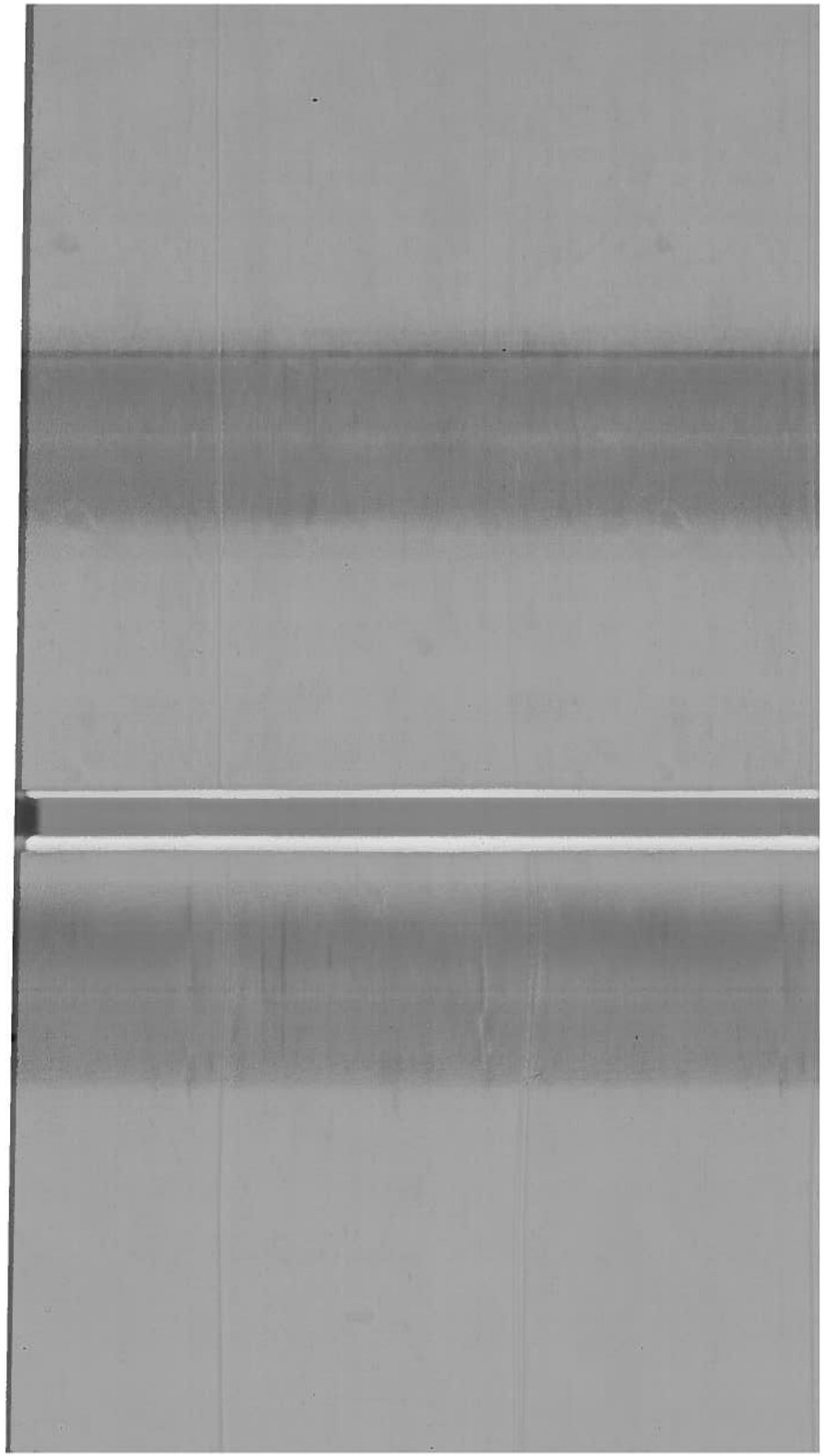
Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

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.