783 F.3d 156
United States Court of Appeals,
Third Circuit.

SHALOM PENTECOSTAL CHURCH; Carlos Alencar
v.
ACTING SECRETARY UNITED STATES DEPARTMENT OF HOMELAND SECURITY; Director United States Citizenship and Immigration Services; Director of the California Service Center of Uscis; Director United States Citizenship and Immigration Services Administrative Appeals Office, in their official capacity, Appellants.

No. 13–4434.
|
Argued: Sept. 8, 2014.
|
Opinion filed April 7, 2015.

Synopsis

Background: Church and alien brought action challenging denial by Citizenship and Immigration Service (CIS) of church's petition for special immigrant religious worker visa. The United States District Court for the District of New Jersey, Renee Marie Bumb, J., entered summary judgment in plaintiffs' favor, and government appealed.

Holdings: The Court of Appeals, Krause, Circuit Judge, held that:

[1] alien had standing under Article III to bring action;

[2] alien had statutory standing to bring action; and

[3] regulation that added requirement that alien have performed work in "lawful immigration status" was invalid.

Affirmed in part, reversed in part, and remanded.

OPINION OF THE COURT

KRAUSE, Circuit Judge.

The Immigration and Nationality Act (INA) enables an immigrant to obtain a visa as a "special immigrant religious worker" if the immigrant meets certain statutory criteria, including that he has been "carrying on" religious work for at least the two years preceding the filing of the visa petition. This case presents the question whether a requirement imposed in the relevant regulation that this religious work have been carried on "in lawful immigration status" crosses the line from permissible statutory interpretation by the responsible agency to *ultra vires* regulation contrary to the clear intent of Congress. None of our sister Courts of Appeals have yet weighed in on this issue, but the District Court here concluded that the regulation is *ultra vires* because it contradicts the plain language of the INA. *Shalom Pentecostal Church v. Beers*, No. 11–4491, 2013 U.S. Dist. LEXIS 185091, at *19 (D.N.J. Sept. 16, 2013). For the reasons set forth below, we agree. We therefore will affirm the District Court's order as to the invalidity of the regulation but will reverse and remand for further fact-finding on the remaining visa criteria.

I. Factual Background and Procedural History

A. Alencar's Visa Application

None of the material facts in this case are disputed. Appellee Carlos Alencar, a Brazilian national, travelled with his family to the United States on a B–2 nonimmigrant tourist visa in June 1995. The visa ***159** authorized Alencar to stay in the United States until December 1995, but he has remained in the United States unlawfully since the visa expired. Alencar was not authorized to work under the terms of his B–2 visa, nor did he otherwise obtain employment authorization.

Alencar has been seeking legal immigration status as a special immigrant religious worker since 1997, when he first petitioned for an I–360 visa petition, which would eventually qualify him to seek permanent residency status. That petition and a second petition filed by Alencar in 2001 were both rejected by the United States Citizenship and Immigration Service (CIS). Nonetheless, Alencar began working as a senior pastor for the Shalom Pentecostal

Church (the "Church") in 1998 and continued in that capacity through the filing of this appeal.

The I–360 petition at issue here was filed by the Church on Alencar's behalf in 2009. CIS again denied the petition and, in this instance, did so on the sole ground that the Church had failed to establish, pursuant to newly promulgated 8 C.F.R. 204.5(m)(4) and (11) (the "Regulation"), that Alencar had been "performing full-time work in *lawful immigration status* as a religious worker for at least the two-year period immediately preceding the filing of the petition." (App. 90 (emphasis added).) The CIS Administrative Appeals Office dismissed the Church's appeal, concluding, consistent with the Regulation, that Alencar's "religious employment in the United States during the qualifying period was not authorized under United States immigration law." (App. 66.)

In 2011, Alencar and the Church filed a complaint in the United States District Court for the District of New Jersey, challenging the denial of the I–360 petition on several grounds, including that the Regulation was *ultra vires* to the INA.[1] The District Court denied the Government's motion to dismiss and subsequently granted plaintiffs' motion for summary judgment, invalidating the Regulation on the grounds that the statutory language was unambiguous and that the Regulation's addition of the "lawful status" requirement was inconsistent with the statutory scheme.[2] The District Court further held that any remand would be futile and ordered CIS to grant Alencar's I–360 petition.

B. The Visa Petition Process

The INA provides for preference in the issuance of visas to five categories of workers: (1) priority workers, (2) aliens with advanced degrees or of exceptional ability, (3) skilled workers and professionals, (4) special immigrants, including religious workers, and (5) foreign investors. 8 U.S.C. § 1153(b)(1)-(5). The subcategory at issue in this case—the special immigrant religious worker program—permits ministers and nonminister religious workers to immigrate in legal status to the United States to perform religious work. 8 U.S.C. § 1101(a)(27)(C). In order to ***160** become a legal permanent resident (LPR) through the special immigrant religious worker program, an alien or his prospective employer must complete two steps. First, the applicant must successfully petition CIS for an I–360 visa. 8 C.F.R. § 204.5(a), (c), (m)(6). If granted that visa, the alien may apply to the Attorney General for permanent adjustment of status. 8 U.S.C. § 1255.[3]

This case focuses on the first step of this process. The INA requires that, in order to qualify for an I–360 visa as a special immigrant religious worker, the immigrant must meet three criteria: (1) membership in a religious denomination with a bona fide nonprofit religious organization in the United States for two years immediately preceding the petition, (2) intent to enter the United States or change status within the United States solely for the purpose of working as a minister or in another religious vocation, and (3) the "carrying on" of such religious work continuously for at least the two years before applying. 8 U.S.C. § 1101(a)(27)(C)(i)-(iii).[4]

As it is authorized to do under 8 U.S.C. § 1103(a)(3), CIS has promulgated regulations elaborating on these statutory qualifications. Under the regulations, the visa petition procedure begins when either an alien or a person on the alien's behalf applies for an I–360 visa. That visa, if granted by CIS, classifies an alien as a special immigrant religious worker. The filer must present evidence that the alien meets the statutory requirements as expounded by the regulations. For example, while the statute requires that the alien seek to enter the United States "solely for the purpose of carrying on the vocation of a minister," 8 U.S.C. § 1101(a)(27)(C)(ii)(I), the regulations specify that the intended religious work be both full time and compensated. 8 C.F.R. § 204.5(m)(2).

In 2008, CIS amended 8 C.F.R. § 204.5(m) to require that an alien have worked "either abroad or in *lawful immigration status* in the United States, and ... continuously for at least the two-year period immediately preceding the filing of the petition" to be eligible for classification as a special immigrant religious worker. 8 C.F.R. § 204.5(m)(4) (emphasis added). The amendments also added that "[q]ualifying prior experience ... if acquired in the United States, must have been authorized ***161** under United States immigration law." 8 C.F.R. § 204.5(m)(11). The Regulation thus disqualifies applicants like Alencar who did "carry on" otherwise qualifying religious work during the two years before they filed a visa application but did so without lawful status.

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III. Discussion

The Government raises two issues on appeal. First, it contends that Alencar and the Church lack standing to challenge the denial of the I–360 petition. Specifically, the Government contests: (1) the constitutional standing of

both Alencar and the Church, (2) Alencar's standing under CIS regulation 8 C.F.R. § 103.3(a)(1)(iii)(B), and (3) Alencar's right to sue under the INA. Second, the Government argues that the District Court erred in ruling that the Regulation is *ultra vires*. We address these issues in turn.

A. Standing

[Discussion omitted]

B. Validity of the Regulation

In addressing the validity of the Regulation, we apply the two-step analysis articulated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If Congress has directly and clearly spoken to the question at issue, our *Chevron* analysis is complete at step one, and Congress's unambiguous intent controls. *Id.* at 842–43, 104 S.Ct. 2778. However, if the statute is "silent or ambiguous," or "[i]f Congress has explicitly left a gap for the agency to fill," we proceed to the second step and determine whether the agency's construction of the statute is reasonable. *Id.* at 843, 104 S.Ct. 2778.

In the first step of the *Chevron* analysis, we carefully scrutinize the plain text of the statute and apply traditional tools of statutory construction. *Bautista v. Att'y Gen.*, 744 F.3d 54, 58–68 (3d Cir.2014). Mindful of the Supreme Court's mandate that "[a] court must ... interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (internal citation and quotation marks ***165** omitted), we also may consider the broader statutory context and examine other parts of the governing statute to determine if the statutory language is silent or ambiguous. *See, e.g.*, *Scialabba*, 134 S.Ct. at 2204–05 (2014).

[7] Here, the statute defines a special immigrant religious worker as an "immigrant" who has been "carrying on such vocation, professional work, or other work continuously for at least the 2–year period" preceding the application. 8 U.S.C. § 1101(a)(27)(C)(iii). The term "immigrant"—defined by the INA, with certain exceptions, as "every alien"—by its plain terms includes aliens in both legal and illegal immigration status. 8 U.S.C. § 1101(a)(15).

Because the term "carrying on" is not defined by the INA, we look to its ordinary meaning. Black's Law Dictionary defines "carry on trade or business" as "to conduct, prosecute or continue a particular avocation or business as a continuous operation or permanent occupation." Black's Law Dictionary 214 (6th ed.1991). Similarly, other dictionaries define "carry on" as "to manage" or "to conduct." OED Online (December 2014), *available at* http://www.oed. com/view/Entry/28252; The American Heritage Dictionary 286 (4th ed.2009); Webster's Third New International Dictionary 344 (1993). None of these definitions includes a requirement of lawfulness of the action or lawful status of the actor.

[8] Moreover, a court should interpret a statute so as to "give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). The Regulation's requirement that qualifying work under § 1101(a)(27)(C)(iii) be "in lawful immigration status" would render another section of the INA, 8 U.S.C. § 1255(k)(2), largely, if not entirely, superfluous. That is, in providing that a specified number of days of unauthorized work will not disqualify special immigrant religious workers from applying for permanent resident status, § 1255(k)(2) necessarily assumes that some such workers will have engaged in prior unauthorized employment. Under the Regulation, on the other hand, a special immigrant religious worker could not obtain an I–360 visa—a prerequisite to applying for adjustment of status under § 1255(k)—if that worker had engaged in even a single day of unauthorized work during the two years preceding such worker's I–360 visa petition. The Regulation, in effect, would make § 1255(k)(2)'s exemption for unauthorized work meaningless in most circumstances.[8]

Furthermore, in *Russello v. United States*, the Supreme Court observed that "[w]here Congress includes particular language in one section of a statute but omits it from another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Section 1101(a)(27)(C)(iii) states that an alien must "carry on" his religious work "continuously" but makes no mention of "lawfully." Elsewhere within §§ 1101 and 1153, in contrast, Congress specified no less than six times when it intended to require lawful ***166** status as a prerequisite to the grant of certain status or relief. *See* 8 U.S.C. § 1101(a)(6) (defining a "border crossing identification card" as a document that can be issued only to an alien who is "lawfully admitted" for permanent residence); 8 U.S.C. § 1101(a)(27)(A) (creating a category

of special immigrants for immigrants "lawfully admitted" for permanent residence who are returning from a temporary visit abroad); 8 U.S.C. § 1101(i)(2) (permitting aliens who are the victims of severe human trafficking to engage in employment during the period they are in "lawful temporary resident status"); 8 U.S.C. § 1153(a)(2)(A), (B) (alloting visas to the spouses, children, and unmarried sons and daughters of aliens "lawfully admitted" for permanent residence); 8 U.S.C. § 1153(b)(5) (making visas available for qualified immigrant entrepreneurs whose businesses will create full time employment for, among others, aliens "lawfully admitted" for permanent residence or "lawfully authorized" to be employed in the United States).

Yet there can be no doubt Congress was well aware that special immigrant religious workers may have worked illegally before applying for legal status: An alien seeking permanent adjustment of status under 8 U.S.C. § 1255, for example, generally is ineligible if he has "continue[d] in or accept[ed] unauthorized employment prior to filing an application for adjustment of status," 8 U.S.C. § 1255(c)(2), or "was employed while the alien was an unauthorized alien," 8 U.S.C. § 1255(c)(8). For special immigrant religious workers who are present in the United States pursuant to lawful admission at the time of the application, however, the INA specifically carves out an exception to allow for adjustment of status—even if the alien engaged in unauthorized employment—so long as that unauthorized employment did not exceed 180 days in the aggregate. *See* 8 U.S.C. § 1255(k)(2). Against this backdrop, Congress's decision to specify in § 1101(a)(27)(C)(iii) that immigrants carry on their religious work "continuously," but not "lawfully," is particularly significant.

We are unswayed by the line of decisions from the Court of Appeals for the D.C. Circuit declining to apply *Russello* in the administrative agency context and observing that "a congressional mandate in one section and silence in another" may simply reflect a decision "to leave the question to agency discretion." *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C.Cir.2009) (quoting *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C.Cir.1990)). We have not adopted this reasoning, and, to the contrary, we have concluded that "we must read the statute as written," giving meaning to distinctions between statutory provisions, rather than rely on implicit assumptions of intent. *Hanif v. Att'y Gen.*, 694 F.3d 479, 486 (3d Cir.2012).

Section 1255(k)(2) also puts to rest the Government's arguments that § 1101(a)(27)(C)(iii) must be read in connection with the statutory ban on employers hiring unauthorized aliens and that the overall structure and purpose of the INA require lawful work absent an explicit exception. *See* 8 U.S.C. § 1324a(a)-(b). Indeed, the argument proves too much, for Congress carved out just such an exception for the adjustment of status of special immigrant religious workers who engaged in unauthorized employment for an aggregate period of up to 180 days and otherwise satisfy § 1255(k). 8 U.S.C. § 1255(k)(2).

Nor are we persuaded that, when Congress directed CIS to issue regulations specific to fraud in the special immigrant *nonminister* religious worker program (the "Nonminister Program"), it thereby acknowledged ambiguity in the work qualifications ***167** for ministers. Special Immigrant Nonminister Religious Worker Program Act, Pub.L. No. 110–391, 122 Stat. 4193 (2008); *see* 8 U.S.C. § 1101(a)(27)(C)(ii)(II), (III). The Government submits that CIS adopted the Regulation as part of an agency rule intended to improve its "ability to detect and deter fraud," and that the Regulation therefore necessarily was authorized by Congress. *See* Special Immigrant and Nonimmigrant Religious Workers, 73 Fed.Reg. 72,276–01 (November 26, 2008). Some parts of this rule were clearly designed to address fraud in the administration of the program, such as the provision authorizing CIS to perform an on-site inspection of a petitioning religious organization, presumably to confirm, where relevant, that the alien is actually carrying on the specified religious work, as well as to ascertain the organization's bona fides. *See, e.g.*, 8 C.F.R. § 204.5(m)(12). That purpose is not apparent, however, in a requirement that such work, actually having been performed, was performed while the alien was in a particular immigration status. Nor could that requirement, to the extent it is imposed on ministers, conceivably be aimed at fraud in the Nonminister Program.

The Government also argues that Congress indicated its acquiescence to the Regulation by reauthorizing the Nonminister Program four times since DHS adopted the Regulation.[9] However, the canon of ratification, *i.e.*, that "Congress is presumed to be aware of an administrative ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), has little probative value where, as here, what is re-enacted is a different subsection of the statute. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n. 4, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). It has even less bearing when it is contradicted by clear and unambiguous evidence of Congress's intent, reflected here in the plain language of § 1101(a)(27)(C)(iii).

In sum, by its plain terms and consistent with *Russello* and applicable canons of statutory construction, the INA authorizes an alien who engaged in religious work continuously for the two years preceding the visa application and who meets the other statutory criteria to qualify for an I–360 visa as a special immigrant religious worker. As the statute is clear and unambiguous and the Regulation is inconsistent with the statute, the Regulation is *ultra vires* and we do not reach the second step of the *Chevron* analysis.

IV. Remedy

[9] Having struck down the Regulation, the District Court concluded that remand would be futile and ordered CIS to grant the petition because it had offered no alternative ground for denial of Alencar's petition. Given the outcome dictated by the Regulation, however, CIS had no occasion to consider whether Alencar meets the other requirements for the special immigrant religious worker program. When further fact-finding is necessary to resolve an issue, a court of appeals "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *INS v. Ventura*, 537 U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) ***168** (per curiam) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)). Accordingly, we will reverse the order granting the petition and will remand to the District Court with instructions to remand to the agency to address in the first instance whether Alencar satisfies § 1101(a)(27)(C)'s remaining criteria.

* * *

For these reasons, we will affirm that portion of the District Court's order granting summary judgment and striking 8 C.F.R. §§ 204.5(m)(4) and (11) as *ultra vires*, will reverse the portion granting Alencar's petition, and will remand to the District Court for proceedings consistent with this opinion.

All Citations

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1 Cranch 137
Supreme Court of the United States

William MARBURY
v.
James MADISON, Secretary of State of the United States.

Feb. 1803.

Opinion

MARSHALL.

The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive—Semb. A commission is only *evidence* of an appointment.

At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term.

. . .

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;

1st. Whether the supreme court can award the writ of mandamus in any case.

2d. Whether it will lie to a secretary of state in any case whatever.

3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper

redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is "a command issuing in the king's name from the court of king's bench, and directed to any *person*, corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty*, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance."*

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, "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."

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

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The opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

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 inquired 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.

* * * * * * * * *

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."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

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.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

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

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

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. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to ***176** appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

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 enquire 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 as 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 favour 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.

The rule must be discharged.

582 N.W.2d 231
Supreme Court of Minnesota.

Elli LAKE, et al., pet., Appellants,
v.
WAL–MART STORES, INC., et al., Respondents.

July 30, 1998.

OPINION

BLATZ, Chief Justice.

Elli Lake and Melissa Weber appeal from a dismissal of their complaint for failure to state a claim upon which relief may be granted. The district court and court of appeals held that Lake and Weber's complaint alleging intrusion upon seclusion, appropriation, publication of private facts, and false light publicity could not proceed because Minnesota does not recognize a common law tort action for invasion of privacy. We reverse as to the claims of intrusion upon seclusion, appropriation, and publication of private facts, but affirm as to false light publicity.

Nineteen-year-old Elli Lake and 20–year–old Melissa Weber vacationed in Mexico in March 1995 with Weber's sister. During the vacation, Weber's sister took a photograph of Lake and Weber naked in the shower together. After their vacation, Lake and Weber brought five rolls of film to the Dilworth, Minnesota Wal–Mart store and photo lab. When they received their developed photographs along with the negatives, an enclosed written notice stated that one or more of the photographs had not been printed because of their "nature."

In July 1995, an acquaintance of Lake and Weber alluded to the photograph and questioned their sexual orientation. Again, in December 1995, another friend told Lake and Weber that a Wal–Mart employee had shown her a copy of the photograph. By February 1996, Lake was informed that one or more copies of the photograph were circulating in the community.

Lake and Weber filed a complaint against Wal–Mart Stores, Inc. and one or more as-yet unidentified Wal–Mart employees on February 23, 1996, alleging the four traditional invasion of privacy torts—intrusion upon seclusion, appropriation, publication of private facts, and false light publicity. Wal–Mart denied the allegations and made a motion to dismiss the complaint under Minn. R. Civ. P. 12.02, for failure to state a claim upon which relief may be granted. The district court granted Wal–Mart's motion to dismiss, explaining that Minnesota has not recognized any of the four invasion of privacy torts. The court of appeals affirmed.

Whether Minnesota should recognize any or all of the invasion of privacy causes of action is a question of first impression in Minnesota. The Restatement (Second) of Torts outlines the four causes of action that comprise the tort generally referred to as invasion of privacy. Intrusion upon seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns * * * if the intrusion would be highly offensive to a reasonable person." Appropriation protects an individual's identity and is committed when one "appropriates to his own use or benefit the name or likeness of another."[3] Publication of private facts is an invasion of privacy when one "gives publicity to a matter concerning the private life of another * * * if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." False light publicity occurs when one "gives publicity to a matter concerning another that places the other before the public in a false light * * * if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

I.

This court has the power to recognize and abolish common law doctrines. The common law is not composed of firmly fixed rules. Rather, as we have long recognized, the common law:

> is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of

> right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs.

As society changes over time, the common law must also evolve:

> It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.

To determine the common law, we look to other states as well as to England.

The tort of invasion of privacy is rooted in a common law right to privacy first described in an 1890 law review article by Samuel Warren and Louis Brandeis. The article posited that the common law has always protected an individual's person and property, with the extent and nature of that protection changing over time. The fundamental right to privacy is both reflected in those protections and grows out of them:

> Thus, in the very early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Although no English cases explicitly articulated a "right to privacy," several cases decided under theories of property, contract, or breach of confidence also included invasion of privacy as a basis for protecting personal violations. The article encouraged recognition of the common law right to privacy, as the strength of our legal system lies in its elasticity, adaptability, capacity for growth, and ability "to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong."

The first jurisdiction to recognize the common law right to privacy was Georgia. In *Pavesich v. New England Life Ins. Co.*, the Georgia Supreme Court determined that the "right of privacy has its foundation in the instincts of nature," and is therefore an "immutable" and "absolute" right "derived from natural law." The court emphasized that the right of privacy was not new to Georgia law, as it was encompassed by the well-established right to personal liberty.

Many other jurisdictions followed Georgia in recognizing the tort of invasion of privacy, citing Warren and Brandeis' article and *Pavesich.* Today, the vast majority of jurisdictions now recognize some form of the right to privacy. Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts. Although New York and Nebraska courts have declined to recognize a common law basis for the right to privacy and instead provide statutory protection, we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the "right to be let alone" is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction.

Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Here Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection. Therefore, without consideration of the merits of Lake and Weber's claims, we recognize the torts of intrusion upon seclusion, appropriation, and publication of private facts.

Accordingly, we reverse the court of appeals and the district court and hold that Lake and Weber have stated a claim upon which relief may be granted and their lawsuit may proceed.

TOMLJANOVICH, Justice (dissenting).

I respectfully dissent. If the allegations against Wal–Mart are proven to be true, the conduct of the Wal–Mart employees is indeed offensive and reprehensible. As much as we deplore such conduct, not every contemptible act in our society is actionable.

I would not recognize a cause of action for intrusion upon seclusion, appropriation or publication of private facts. "Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy." *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975). As recently as 1996, we reiterated that position. *See Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn.1996).

An action for an invasion of the right to privacy is not rooted in the Constitution. "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Those privacy rights that have their origin in the Constitution are much more fundamental rights of privacy—marriage and reproduction. *See Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (penumbral rights of privacy and repose protect notions of privacy surrounding the marriage relationship and reproduction).

We have become a much more litigious society since 1975 when we acknowledged that we have never recognized a cause of action for invasion of privacy. We should be even more reluctant now to recognize a new tort.

In the absence of a constitutional basis, I would leave to the legislature the decision to create a new tort for invasion of privacy.

STRINGER, Justice.

I join in the dissent of Justice TOMLJANOVICH.

