HISTORICIZING JUDICIAL SCRUTINY

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I. INTRODUCTION

The practice of judicial scrutiny of legislation and executive action challenged on constitutional or other legal grounds has long been understood to be a necessary corollary of the principle of judicial review. But judicial scrutiny stands in a curious position in contemporary constitutional scholarship. On the one hand, anyone who teaches or writes about constitutional law recognizes that, at least since the 1930s, the decision by a majority of Supreme Court justices to apply a particular level of scrutiny to constitutionally challenged actions of the other branches is an essential first step in the Court's analysis of the constitutionality of that action, and often the crucial factor driving the analysis. Moreover, constitutional law specialists recognize that the scrutiny level decision, once made, brings a set of doctrinal baggage with it. Levels of scrutiny come with their own doctrinal tests for evaluating legislation; those tests come with their own refinements. The scrutiny level decision, in sum, spawns a complex web of formulas and judicial guidelines for the levels' application that takes up a lot of the doctrinal space in modern constitutional law. It seems not much of an overstatement to say that the Supreme Court's constitutional jurisprudence for the last sixty-odd years has been consistently preoccupied with what level of judicial scrutiny to afford constitutionally challenged actions by other branches of government.

Nonetheless, there has been very little discussion among commentators—and most of that attenuated—about how or why the Court's scrutiny levels jurisprudence emerged. There has been ample discussion of the particular scrutiny level choices Court majorities have made and some effort to instruct the Court about the


2. This preoccupation may be underrecognized because Court opinions often do not openly acknowledge the scrutiny levels decision but instead merely employ a particular doctrinal framework associated with the level. But opinions in which the scrutiny levels decision is contested (which have consistently surfaced) reveal that the scrutiny level decision drives the Court's doctrinal framework. See, for example, the debate among the justices in Frontiero v. Richardson, 411 U.S. 677 (1973), and Craig v. Boren, 429 U.S. 190 (1976), as to the appropriate level of scrutiny to be afforded in gender discrimination cases.
appropriate level of scrutiny to apply to a given line of cases. There has been widespread recognition that the Court's scrutiny levels have changed over time, both in their formulation and in their application. There has been abundant criticism of the coherence of the levels, especially as the Court has applied them to cases. Recently, several commentators suggested that the Court's established scrutiny levels typology, which features at least three and possibly as many as six levels of scrutiny, is on the verge of degeneration. But there have been few efforts to analyze the scrutiny levels practice as a historical phenomenon. This seems all the more striking because for a time span of 150 years, in which the Court rendered numerous decisions reviewing the acts of legislatures on constitutional grounds, it made a quite different set of scrutiny level choices from the sets it has employed since the 1930s.

During the period from *Marbury v. Madison* to *United States v. Carolene Products, Co.*, the Court essentially subjected all challenged decisions of other branches to the same standard of review, but at the same time it often lingered over the question of whether it could constitutionally review a decision by the Executive or Legislature at all. Although the Court's posture of review during that time period can fairly be described as heightened, that description would be misleading because no other levels of scrutiny existed. Further, the Court did not employ any of the

3. Gerald Gunther's article, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972), is an influential example of scholarship that seeks to instruct the Court about relevant factors in a scrutiny levels decision.


6. Other than the quite brief historical discussions in Shaman, Cracks in the Structure, supra note 4; SHAMAN, CONSTITUTIONAL INTERPRETATION, supra note 4; and Massey, supra note 5, at 947–57, there are two other sources that describe the historical context of the Court's scrutiny levels practice: LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) and HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT (8th ed. 2003). Both sources are primarily concerned with fitting the Court's scrutiny levels jurisprudence into the major themes of their works. Tribe relates the practice to the various "models of constitutional law" he outlines in his book. See TRIBE, supra, at 564–75. Abraham and Perry attempt to canvass some political and philosophical justifications for a "double standard" of judicial review in economic cases and civil liberties cases. See ABRAHAM & PERRY, supra, at 25–32.

7. 5 U.S. (1 Cranch) 137 (1803).

8. 304 U.S. 144 (1937).

9. SHAMAN, CONSTITUTIONAL INTERPRETATION, supra note 4, at 74, 112, identifies a handful of nineteenth-century cases in which the Court alluded to a presumption of constitutionality for legislation. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871); Sinking-Fund Cases, 99 U.S. 700, 718 (1878); Trade-Mark Cases, 100 U.S. 82, 96 (1879). But those allusions seem to have been rhetorical devices rather than evidence of an actual practice of deferential review, or indeed, of any consciousness of levels of judicial scrutiny toward constitutionally challenged actions by other branches. SHAMAN, CONSTITUTIONAL INTERPRETATION, supra note 4, at 74; Willard Hurst, Review and
analytical criteria it subsequently came to associate with the scrutiny level decision, such as whether a particular legislative or executive decision allegedly affected "fundamental" constitutional rights, or whether that decision rested on a constitutionally "suspect" classification of individuals or groups or an "invidious" discrimination between them.\(^\text{10}\) Instead, the Court's decision to review an action of another branch turned on a criterion that moderns have come to associate not with judicial scrutiny but with justiciability: whether a decision of another "department" of government lies within the "discretion" of that department.

This Article represents an effort to historicize the Court's scrutiny levels jurisprudence.\(^\text{11}\) The Article first sketches a historical account of the Court's response to the constitutionally challenged actions of other branches from *Marbury* to *Carolene Products*. The Article then explores the emergence of the Court's modern approach to judicial scrutiny. In the process, this Article addresses two related sets of questions.

The first set of questions focuses on the antecedents of the Court's modern scrutiny levels jurisprudence. I attempt to recover the Court's approach toward challenged decisions of other branches from the early-nineteenth century, when its power to review both federal and state statutes that allegedly violated the Constitution was definitely established, to the 1930s, when it initiated what I will be calling bifurcated review, as outlined in *Carolene Products*, and thus began to develop a constitutional jurisprudence of scrutiny levels. I ask how the Court's pre-

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\(^\text{10}\) *The Distribution of National Powers, in Supreme Court and Supreme Law* 140, 156 (Edmond Cahn ed., 1954).

\(^\text{11}\) By the 1880s, the Court had identified a category of businesses "affected with a public interest" that were subject to police power regulations if the regulation was not unreasonable. See *Munn v. Illinois*, 94 U.S. 113 (1876); *see infra* notes 203–15 and accompanying text. In at least one early-twentieth-century opinion, *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931), Justice Brandeis, for the Court, stated that since "[t]he statute here questioned deals with a subject clearly within the scope of the police power . . . [T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *Id.* at 257–58. That "presumption of constitutionality," however, was limited to cases involving businesses—in *O'Gorman*, the fire insurance business—"affected with a public interest." *Id.* at 257.

10. *See infra* Part IV.

11. The term "historicize" seeks to capture the double role I assign to history in this Article and in other recent works on American constitutional jurisprudence. Historicizing a doctrine or practice in contemporary constitutional law, or a concept in contemporary constitutional commentary, refers to the process of simultaneously locating and explaining the historical origins of the doctrine, practice, or concept and demonstrating its contingency as an analytical phenomenon. Historicizing legal constructs undermines their universality by associating them with the particularistic concerns of a prior moment in time. For additional examples of the technique, see G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 Va. L. Rev. 1463 (2003) [hereinafter White, *Constitutional Journey*] and G. Edward White, *Unpacking the Judicial Center*, 85 N.C. L. Rev. 1089 (2005) [hereinafter White, *Unpacking the Judicial Center*].
Carolene Products approach to other branch decisions should be understood\textsuperscript{12} and why that approach came under strain in the early-twentieth century.

The next set of questions is connected to the collapse of the Court’s initial approach to the challenged decisions of other branches and its replacement with an approach, explicitly set forth in Justice Stone’s “footnote four” in Carolene Products\textsuperscript{13} and implicitly adopted in some earlier cases in the 1930s, which sought to establish two categories of constitutionally challenged legislation that would invoke two different levels of judicial scrutiny. I ask how and why that approach emerged. In the process of exploring those questions, I address the connection between the Court’s bifurcated approach to constitutional review and two other interpretive techniques it employed in early twentieth-century constitutional cases: glosses on open-ended constitutional provisions such as “due process of law” and judicial incorporation of provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

In outline form, this Article’s narrative begins by describing the connections between republican constitutional theory, the conception of constitutionalism that informed the founders’ generation, and the twin principles of judicial review and departmental discretion that lay at the heart of republican constitutionalism. This Article then proceeds to show how a robust conception of departmental discretion—which allowed the Court to avoid reviewing other branch decisions that involved questions that were “submitted to the executive” or were “political” in their nature—enabled the Court to treat all other judicial questions as within its departmental province and thus requiring no deference to other branch actors. Although the lines between “judicial” and “executive” or “political” questions were clearly not as bright as the Court’s approach suggested, the departmental discretion principle presupposed that those lines were often self-evident and should be maintained in close cases.

The departmental discretion principle resulted in the Court’s invalidation of comparatively little federal legislative or executive action through the Civil War, and in the antebellum years, the Court managed to reach doctrinal accommodations that permitted states to engage in a fair amount of regulatory and promotional legislation based on their police powers. But with the Reconstruction Amendments came a potentially expanded role for the courts as guardians of individual liberties and property rights, which were newly protected against state interference by the Due Process Clause of the Fourteenth Amendment. After an early effort to circumscribe its new role by defining “due process” as whatever was within the scope of state police powers and then invoking the departmental discretion principle to avoid reviewing any police power legislation, the Court found itself drawn into

\textsuperscript{12} I will not be using the phrase “uniformly heightened scrutiny” to describe the Court’s approach to reviewing challenged decisions of other branches in the years from Marbury to Carolene Products. The phrase invites anachronism because it presupposes that from the time its judicial review powers were established, the Court self-consciously adopted a posture of scrutiny toward challenged acts of other branches. Such was not the case. Although the Court placed challenged acts in different categories and declined to review some of those acts, it used the language of justiciability, not the language of scrutiny levels, to justify its categorizations.

The phrase “uniformly heightened scrutiny” does capture, however, the fact that prior to Carolene Products the Court did not invoke any “presumption of constitutionality” for a legislative or executive decision that it chose to review.

\textsuperscript{13} 304 U.S. at 152 n.4.
the task of “tracing the boundary” between legitimate exercises of the police power and illegitimate, unconstitutional invasions of private rights. Eventually the Court openly identified its role as that of boundary tracing. The Court defended that role on the grounds that its proper function in a republican constitutional order was to protect the fundamental rights of citizens against state usurpation, and that by doing so, the Court was merely declaring principles of law, not making law itself or entering into the domain of policy.

Thus, by the early-twentieth century, as the Court settled comfortably into its role as boundary tracer, the departmental discretion principle shrunk in significance. Even in those instances when the Court concluded that the states’ police powers or the federal government’s commerce powers prevailed over private rights, the Court itself was marking the sphere of legislative discretion. Increasingly, the Court was resorting to the doctrinal formulas it used to place legislation on the permissible or impermissible sides of the public-private boundary as surrogates for the departmental discretion principle. As assumptions about the role of humans as causal agents in the universe—and the role of judges as potential lawmakers—began to change in the early-twentieth century, the doctrinal formulas courts had developed to aid them in boundary tracing came to be criticized as designed to serve the ideological ends of willful humans holding power.

By the second decade of the twentieth century, the idea of lawmaking by unelected federal judges was deemed inconsistent with democratic theory, which now seemed a superior alternative to republicanism in a modern industrial society with broad political participation and a more fluid class structure. Some commentators openly suggested that the Constitution’s meaning should change to reflect altered social and economic conditions. Others felt that judicial boundary tracing was too likely to reflect ideological biases to be continued. At the same time, in Commerce Clause cases and in police power-due process cases involving the regulation of economic activity or the redistribution of economic benefits, the Court began to abandon its boundary tracing formulas for a general attitude of deference to legislators.

In this atmosphere, the Court could have adopted an abdicationist posture toward judicial review of the other branches’ challenged activity, but it did not. Instead, the Court began to experiment with a posture triggered by scrutiny level choices: the posture outlined in *Carolene Products*. Although footnote four in *Carolene Products* has come to be seen as a charter for the Court’s twentieth century scrutiny levels jurisprudence, a series of cases the Court decided in the late 1930s and early 1940s involving incorporated rights and foreign affairs issues, as well as police power-due process issues, present a more complete picture of the Court’s new approach. In those cases, the Court’s decision about the level of scrutiny to be afforded a particular action by another branch of government became a surrogate for the departmental discretion principle. Because the Court’s approach was not fully abdicationist, but selectively deferential and aggressive, its scrutiny levels decisions over time became a version of the doctrinal formulas it once employed in boundary tracing.

With the last development, this Article reaches the current state of judicial scrutiny in constitutional jurisprudence. Some commentators have suggested that the approach the Court has employed since *Carolene Products*, now reflected in multi-tiered scrutiny levels with attendant doctrinal baggage, is in a state of collapse. The history of judicial scrutiny suggests that the disintegration of the
Court’s scrutiny levels jurisprudence may be inevitable as the weight of its doctrinal baggage increases and contemporary actors become further removed from the intellectual and social conditions that made a scrutiny-triggered approach to judicial review appear attractive. To understand the future of judicial scrutiny of constitutionally challenged legislation, the Article concludes, one needs to understand that history.

II. REPUBLICAN CONSTITUTIONAL THEORY AND JUDICIAL REVIEW: THE TRADITIONAL REGIME

This Section describes the Supreme Court’s dominant approach to reviewing constitutionally challenged actions of other branches from the early-nineteenth century to the 1930s. Before that approach can be mapped through an analysis of individual cases, it is necessary to understand the approach’s connection to the constitutional theory that animated it: American constitutional republicanism of the founding generation. The Court’s dominant approach to judicial review throughout the nineteenth century represented a fusion of two of the framers’ foundational principles: the principle of republican-style judicial supremacy and the principle of departmental discretion.14 Both principles undergirded an idealized role for the judicial department, as personified by the Supreme Court, in the new American constitutional republic.

A. Republican Constitutional Thought and the Principle of Departmental Discretion

The 1819 Term of the Supreme Court was one of the most momentous in its history, including the arguments and decision in *McCulloch v. Maryland*15 and the Court’s disposition of *Dartmouth College v. Woodward*,16 which had been set for reargument but was suddenly decided, with full opinion, on the first day the Court’s Term opened.17 By the close of the 1819 Term, a number of the Court’s germinal constitutional decisions had been decided: *Marbury*,18 *Fletcher v. Peck*,19 New

14. See White, *Constitutional Journey*, supra note 11 (arguing that the framers’ version of judicial supremacy presupposed a defined set of constitutional issues that judges were capable of deciding in a disinterested fashion, and that the principle of departmental discretion served as a counterweight to judicial supremacy). The departmental discretion principle was grounded on a foundational belief of republicans of the framing generation: that preservation of the separate, autonomous powers of governmental “departments” was vital to the survival of republics.
17. For details see WHITE, supra note 1, at 176–80. The Court’s Term in Washington, for most of John Marshall’s tenure as Chief Justice (1801–1835), extended only from the first week in February or the second week in January until the end of March. The rest of the year the Justices remained in their home communities or tended to their duties as Circuit Court judges, traveling from courthouse to courthouse within the geographic circuits to which they were assigned. “Circuit riding,” as it was called, occupied the Justices in the spring and fall. See id. at 159–64.
18. 5 U.S. (1 Cranch) 137 (1803).
19. 10 U.S. (6 Cranch) 87 (1810) (holding that states cannot constitutionally rescind land grants to individuals who purchased the land in good faith).
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Jersey v. Wilson, Terrett v. Taylor, Martin v. Hunter’s Lessee, and Sturges v. Crowninshield, as well as Dartmouth College and McCulloch. Commentators had become aware of the Court’s unquestioned importance as an actor in the American constitutional and political system.

The Dartmouth College case demonstrated the Court’s preparation to “pack” the Contracts Clause of the Constitution with the republican credo of protection for the “vested rights” of individuals in order to prevent state legislatures from modifying the terms of their existing relationships with eleemosynary institutions, including institutions of higher education. The ramifications of the case initially seemed immense, and two Boston commentators took the occasion to reflect more generally on the Court. Some passages from their essays, written in 1819 and 1820, encapsulate the role of a Supreme Court Justice as it was then understood by educated elites.

1. The Role of Judges in American Constitutional Republicanism

In one essay, a correspondent of Boston’s Columbian Centinel, identified only as “A,” stated that the Dartmouth College decision handed down the “great and important constitutional principle” that the legislative “powers are limited, not only by the rules of natural justice . . . but by the very letter and spirit of the constitution.” The chief source of “this restraint” on legislatures was “in our Courts of Justice.” The courts, “A” declared, “may be considered the bulwark of

20. 11 U.S. (7 Cranch) 164 (1812) (holding that the Contracts Clause overrides a state statute repealing an exemption from taxation that was repugnant to an existing contract).
21. 13 U.S. (9 Cranch) 43 (1815) (holding that a state cannot constitutionally revoke land grants it previously made).
22. 14 U.S. 304 (1 Wheat.) 304 (1816) (holding that the Supreme Court has the power to review final decisions of state courts).
23. 17 U.S. (4 Wheat.) 122 (1819) (holding that a state statute allowing debtors to discharge debts incurred before the statute’s enactment violates the Contracts Clause).
27. Marshall gave no indication in his Dartmouth College opinion that legislatures could modify the terms of relationships with corporations they chartered, but a concurring opinion by Justice Story indicated that if legislatures wanted to avoid violating the Contracts Clause they could reserve the right to modify terms in their original charters. 17 U.S. (4 Wheat.) at 708, 712 (Story, J., concurring); see WHITE, supra note 1, at 627.
28. Commentary on the Supreme Court by nonlawyers was relatively common in the early-nineteenth century. Particularly in the major cities, men of high social standing “read law” as part of their general education. The legal and literary communities significantly overlapped in cities such as Boston, and journals such as the North American Review devoted space to legal as well as to literary issues. See Alfred S. Konofsky, Law and Culture in Antebellum Boston, 40 STAN. L. REV. 1119, 1125–37 (1988).
29. COLUMBIAN CENTINEL (Boston), Feb. 10, 1819, quoted in WHITE, supra note 1, at 751.
30. Id.
the Constitution to guard it against legislative encroachments. They are an intermediate body between the people and the legislature.”

“A” then went on to say:

It is peculiarly gratifying to discover in [the courts] an inflexible and uniform adherence to the rights of individuals and those of the Constitution. It is [a] matter of rejoicing to discover purity and independence in this branch of our government. These are qualities essential to the perpetuity of the Constitution. Whenever the Judiciary department becomes more corrupt than the Legislative, we must share the common fate of all Republics.

A year later, Warren Dutton echoed these observations in an article on the Supreme Court in the *North American Review.* After reviewing *Dartmouth College* and several other of the Court’s decisions, Dutton emphasized that when the Constitution was adopted, “[m]uch reliance was placed on the security, which the due exercise of the judicial power would afford, to the rights of states, as well as of individuals, when infringed or invaded by the encroaching spirit of legislative bodies, either in the states or in Congress.” The “judicial power,” Dutton claimed, “was regarded by the friends of a new and better order of things, as a being, separated from the prejudices, the passions, and the interests of men, watching and regulating the movements of a complex system.” “Within the last twenty years,” he believed, “we have seen the judicial department protecting the rights of the citizens of a state against the injustice of their own legislatures, and keeping within their constitutional bounds the legislative and executive powers of the union.” And “through the disastrous changes that await all free governments,” Dutton concluded, “[the judiciary] may be found to be the strongest barrier against the tide of popular commotions, or the usurping spirit of popular assemblies.”

In these excerpts, we can see connections between basic premises of republican political theory and an idealized role for judges as constitutional interpreters. Both “A” and Dutton assumed that although a republic was the best of all political worlds, it would inevitably decay; the “common fate of all [r]epublics” was that freedom would spark licentiousness, demagoguery, and ultimately corruption and tyranny. Nonetheless it was uplifting, for dedicated republicans, to contemplate

31. *Id.*
32. *Id.*
33. [Warren Dutton], Book Review, 10 N. AM. REV. 83 (1820) (reviewing Timothy Farrar, Report of the Case of the Trustees of Dartmouth College against William H. Woodward (1819), and 4 Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States (1819)). The book review was untitled. The identification of Dutton as the book review’s author was made by Charles Warren in 2 THE SUPREME COURT IN UNITED STATES HISTORY 2 (1922).
34. *Id.* at 105.
35. *Id.*
36. *Id.* at 113.
37. *Id.*
38. *Id.* at 114–15; COLUMBIAN CENTINEL, supra note 29.
39. COLUMBIAN CENTINEL, supra note 29.
40. For a discussion of the pervasiveness of these assumptions in eighteenth and early-nineteenth-century republican thought, see Drew R. McCoy, The Elusive Republic 32–40 (1980).
the Constitution as enduring over time, and its strictures against legislative usurpation of the rights of state governments or individuals as remaining in place for at least a while. Even more uplifting was the thought of a class of pure and independent judges guarding the rights protected by the Constitution. As “A” put it, judges were “an intermediate body between the people” and usurpatious legislatures.\textsuperscript{41} Judges discerned and applied constitutional safeguards that protected citizens of the republic. Dutton hoped that, in this capacity, judges could separate themselves from “the prejudices, the passions, and the interests of men” and thus serve as impartial regulators and watchers of a complex constitutional system.\textsuperscript{42} “A” felt that if the judicial guardians of republican constitutionalism themselves became corrupt, “the common fate of all republics,” disintegration to tyranny, would ensue.\textsuperscript{43}

The judiciary’s function in a constitutional republic had its most vital embodiment in the work of Justices on the United States Supreme Court. Only they had the power to employ the Constitution to prevent Congress from encroaching on the powers of states and usurping the rights of individuals. Likewise, only the Supreme Court could prevent state legislatures from making the same encroachments and usurpations. The Justices’ very lack of accountability to the other branches of government made them more likely to be independent and free from corruption. Moreover, as Dutton noted, Americans gave “a new dignity and higher duty to LAW” by creating a “mode of government” symbolized by a Constitution that is interpreted by judges and designed to subject “legislative bodies to rule, and hold[ ] them under the restraints of . . . fundamental principles and enactments.”\textsuperscript{44} By following the dictates of law rather than the passions or the interests of humans, judges reaffirmed the central role of the Constitution: the preservation of the American republic from the inevitable pressures of corruption and tyranny. Both commentators hoped that republican citizens could trust judges to protect their constitutional rights by following law and thereby transcending partisanship.

That hope was the flip side of the deep fatalism of republican theorists of the founding generation. Republican theory assumed that partisanship was endemic in humans.\textsuperscript{45} Even judges were not free from its corrupting influences. Yet law in America could not be partisan if it were to be a force forestalling tyranny and corruption. “A” spoke of “purity and independence” in judges as essential to preserving the Constitution.\textsuperscript{46} Dutton conceded that “no species of oppression is so hopeless or so terrible, as that which may be practised under the forms of justice,”\textsuperscript{47} and noted that “every good man would wish that the law should be supreme over all” only when “justice is allowed to do her work, uncorrupted and unobstructed.”\textsuperscript{48}

Judicial maintenance of a distinction between law and partisanship, between judicial impartiality and judicial willfulness, was thus crucial to the integrity of

\textsuperscript{41} COLUMBIAN CENTINEL, supra note 29.
\textsuperscript{42} Dutton, supra note 33, at 105.
\textsuperscript{43} COLUMBIAN CENTINEL, supra note 29.
\textsuperscript{44} Dutton, supra note 33, at 113–14.
\textsuperscript{45} For the republican assumption that humans are endemically partisan, see ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 30 (1977).
\textsuperscript{46} COLUMBIA CENTINEL, supra note 29.
\textsuperscript{47} Dutton, supra note 33, at 107.
\textsuperscript{48} Id. at 113.
judges in American constitutional republicanism. The preoccupation of early Supreme Court Justices with that distinction is visible in two comments made by the two dominant judges on the Marshall Court, Chief Justice John Marshall and Justice Joseph Story. In the 1824 case of Osborn v. Bank of the United States, Marshall, for the Court, held that Congress’s charter of a national bank meant that suits against the bank must be brought in federal courts, and that states could not tax the bank’s operations. Late in his opinion, Chief Justice Marshall responded to the intimation that he and his fellow judges were using a congressional statute to increase not only the power of Congress against the states but the power of the federal courts themselves. Marshall declared:

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge . . . [but only] for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

As for Justice Story, he felt an obligation as a judge and as a legal commentator to maintain a bright line between principles of law and partisan political views. When Justice Story’s Commentaries on the Constitution appeared in 1833, it was treated by his close friends and jurisprudential allies, such as Marshall and the New York judge and commentator James Kent, as a “bold and free desien[s]e of sound doctrine, against the insidious, mischievous, and malignant attacks of Jefferson,” who had been an outspoken opponent of the Marshall Court’s alleged consolidationist tendencies since leaving the Presidency in 1809. Justice Story, however, stated that his work did not set forth “any novel views[ ] and novel constructions of the Constitution,” and that he had no “ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts.”

49. For more on the roles of Chief Justice Marshall and Justice Story on the Supreme Court between 1801, when Marshall was appointed Chief Justice of the United States, to 1845, when Justice Story suddenly died at the age of 66, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001), R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY (1985), and WHITE, supra note 1.
50. 22 U.S. (9 Wheat.) 738 (1824).
51. Id. at 818.
52. Id. at 777, 791.
53. Id. at 865.
54. Letter from James Kent to Joseph Story (June 19, 1833), in 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 134–35 (1851). Marshall wrote Justice Story, after hearing that his Commentaries had been published, that the Commentaries “would give our orthodox nullifier a fever,” and that it would provoke “young men” who “grow up in the firm belief that . . . [n]othing . . . is to be feared but that bugbear, consolidation; and every exercise of legitimate power is construed into a breach of the constitution.” Letter from John Marshall to Joseph Story (Apr. 24, 1833), in THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL 149–50 (John Edward Oster ed., photo reprint 1967) (1914); Letter from John Marshall to Justice Story (June 3, 1833), in THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL, supra, at 151.
55. STORY, supra note 26, at vi.
commentator was only to "bring[] before the reader the true view of [the Constitution's] powers." He wanted readers to think of his treatise as "less . . . my own opinions[] than as those of the great minds[] which framed the Constitution." That Justice Story made these remarks as a commentator rather than as a judge—in his last fifteen years on the Court he produced treatises on a variety of legal subjects—only serves to underscore how invested he was in the idea of true legal interpretations that would transcend partisanship.

The reaction of contemporaries to Justice Story's treatise, when juxtaposed against his self-description as a commentator, reveals a paradox that lies at the core of the idealized role of judges in early American constitutional republicanism. When Marshall spoke of judges exercising "discretion," he identified that paradox. Judicial "discretion" and judicial "will" conjured up the image of judges as partisans. And republicans understood that judges were partisans because all humans were inherently "passionate" and "interested" and thus inevitably in pursuit of their partisan concerns. The whole structure of republican government was designed to check the partisanship that led to demagoguery, tyranny, licentiousness, or corruption; the point of a written Constitution was to codify protections for citizens against rampant partisanship. Republican government envisaged judges as participants in the process of checking power usurpations and protecting citizen rights in a republic, but they were no less human than those they sought to check through law. Thus, judges had a vital role not only to moderate their own passions and move beyond their partisan interests but also subordinate their destructive human tendencies in fidelity to a corpus of law that was more than the aggregate of edicts by partisan humans holding power. That challenge seemed, in some respects, inimical to human nature but necessary to keep a constitutional republic from degenerating.

The paradox described above was embodied in the two opposing but complimentary principles undergirding the idealized judicial role in the founding generation's concept of American constitutional republicanism. The principle of judicial supremacy testified to the ideal that judges should be disinterested savants—legally trained elites, who had the knowledge to discern and apply legal authorities, and, having neither purse nor sword, did not have their interests directly enhanced by their office. As disinterested savants, judges were better suited than other officeholders to apply the foundational republican beliefs embodied in authoritative sources of law—of which the Constitution was paramount—to legal controversies. However, judges' application of authoritative law was limited only to legal controversies, and both terms had precise constitutional meanings. Therefore, the judicial "department" created by the Constitution was the chief office designed to ensure that law protected republican citizens against themselves, but the judiciary was only designed to operate in the realm of "law," an embodiment of the sovereign people in a republic that imposed checks even on the sovereign.

Thus, the strength of the judicial supremacy principle in republican constitutional theory depended on the judiciary exercising that supremacy only within the confines of its own department—only within those realms where legal

56. Id.
57. Id.
58. See WHITE, supra note 1, at 95.
training and an appreciation of the primacy of a government of laws gave officials a selective advantage. Judges certainly had power: the power to authoritatively resolve disputes and the power to apply law to controversies. Yet republican theorists sought to equate judicial power with a correct understanding of law. Judges were not, as Marshall said, exercising the will of the members of the legislative and executive departments, who had the power to draft, enact, and enforce laws. They were exercising the will of judges.

The departmental discretion principle followed directly from this confined description of the judicial department in American republican constitutionalism. Marshall's disposition of *Marbury* demonstrated the close affinity between the principles of judicial supremacy and departmental discretion. Although Marshall ultimately concluded that the Supreme Court did not have constitutional authority to issue a writ of mandamus in *Marbury's* case, he did not reach that issue until raising and deciding another, which was arguably mooted by his conclusion. William Marbury sued to recover a judicial commission in the District of Columbia that had been granted him by outgoing President John Adams, pursuant to legislation enacted by Congress on February 27, 1801, in the last days of the Adams administration. Adams signed Marbury's commission and deposited it in the office of the Secretary of State—who happened, at the time, to be John Marshall. Marshall failed to deliver Marbury's commission before the newly elected President, Thomas Jefferson, formally assumed office. Upon assuming office, Jefferson ordered the new Secretary of State, James Madison, not to deliver the commission.59

In his opinion, Marshall considered whether the courts could review Jefferson's executive order affecting Marbury's commission. That issue turned, he suggested, on whether the Executive "possess[ed] a constitutional or legal discretion."60 In some instances the Constitution had granted the Executive discretionary powers, such as the power to grant pardons or veto legislation. But the Constitution did not grant the power to revoke an appointment by Congress—which had Article I power to pass legislation affecting the District of Columbia—for a specified term of office. Nor did Jefferson have a "legal" discretion to revoke Marbury's commission, because it was signed by Adams, Congress's agent, and had arguably "vested" with Adams's signature.61 Marbury, Marshall concluded, was seeking a remedy for the violation of his allegedly vested right to a commission, and hence was entitled to have the question "whether a right has vested . . . tried by the judicial authority."62

Although he concluded that the departmental discretion of the Executive did not preclude judicial review of the legal status of Marbury's commission, Marshall did so against the backdrop of a broad formulation of the departmental discretion principle. After concluding that the courts could try the issue of whether Marbury's commission vested upon Adams's signature, Marshall stated:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive

61. *Id.* at 162.
62. *Id.* at 166–67.
officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.\textsuperscript{63}

At first blush, this language would seem to declare a number of arguably "legal" questions nonjusticiable. Marshall’s statement did not simply refer to questions "submitted to the executive" by the Constitution or other laws, but to questions that were "in their nature political," a potentially vast category that might include a great deal of legislation as well as executive actions. Further, Marshall suggested that courts only passed "on the rights of individuals" when they could fairly allege that they had "vested" rights for which there were legal remedies.\textsuperscript{64} A good deal of legislative or executive activity that arguably had adverse effects on individuals did not infringe on vested rights. For example, if Adams had promised Marbury that, pursuant to the 1801 congressional statute providing for the appointment of justices of the peace in the District of Columbia, he would appoint him to a judgeship but then neglected to sign Marbury’s commission or affix it with his Presidential seal, Marbury would not have been able to successfully complain in a court. Adams’s power to appoint judges in the District of Columbia was a discretionary power of the executive department. He could choose not to exercise it, and adversely affected parties could not seek judicial redress.

The broad formulation of the departmental discretion principle made by Marshall in Marbury has regularly been minimized by commentators because of a far more celebrated passage in his opinion. Marshall began that passage by noting "[t]he judicial power of the United States is extended to all cases arising under the constitution."\textsuperscript{65} He then continued:

\textsuperscript{63} Id. at 170. When he wrote this passage, Marshall seems to have had a clear understanding of what he meant by questions “submitted to the executive.” In a speech before the House of Representatives on March 7, 1800, Marshall discussed whether John Adams, as President of the United States, had been justified in delivering Thomas Nash (also known as Jonathan Robbins), a seaman accused of committing a murder on a British frigate, to British authorities. John Marshall Speech on the Case of Thomas Nash (Mar. 7, 1800), in THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL, supra note 54, at 225, 226–27. Nash sought asylum in the United States, claiming that he was an American citizen and that he had only resisted an effort to impress him. Id. at 226–27, 251–53. In the course of defending Adams’s decision, Marshall made an extended argument that the Nash incident turned on executive discretion because it represented “a national demand made upon the nation,” and Adams’s decision involved “questions of political law,” such as whether the frigate, which was captured by an American vessel off the Atlantic Coast, was “legally captured or not, and whether the American government was bound to restore” the vessel and its prisoners. Id. at 247. In the process of that argument, Marshall said that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations” and asked:

\textsuperscript{64} Marbury, 5 U.S. (1 Cranch) at 167, 170.

\textsuperscript{65} Id. at 178.
Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? . . . 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 all, what part of it are they forbidden to read, or obey?66

This passage has frequently been cited as an argument for the necessity of judicial interpretation of the Constitution in those cases that “arise under” it—judicial review of the actions of other branches challenged on constitutional grounds. As such, the passage does not easily reconcile itself with the earlier Marbury passage about departmental discretion. The earlier passage suggested that a court cannot entertain some questions involving the Constitution because they have been “submitted” to other branches of government or do not involve “legal” subject matter.67 What if prospective Article III cases or controversies require a resolution of such questions?

The typical way modern commentators have made sense of the two passages in Marbury is to suggest that Marshall’s broad formulation of the departmental discretion principle was artful. In the end courts, as part of their powers of judicial review, would decide which cases turned on questions that were “political” or “submitted to the executive” and thus not justiciable. Because judges would formulate the scope of the departmental discretion principle in cases, departmental discretion was properly seen as subordinate, rather than complementary, to judicial supremacy. As Edward Corwin put it in a 1914 article, “[Marshall in Marbury] took the engaging position of declining to exercise power which the Constitution withheld from [the Court], by making the occasion an opportunity to assert a far more transcendant power.”68 At the same time, while “in the very process of vindicating judicial review, [Marshall] admitted to a degree the principle that had thus far been contended for only by opponents of judicial review[.]. . . the doctrine of departmental discretion.”69

Corwin’s view—commonly reflected in the shibboleth that although courts do not decide “political questions,” what constitutes a “political question” is decided by courts—represents a caricature of the departmental discretion principle as it was understood in early nineteenth-century republican constitutional jurisprudence. As a brief sample of cases illustrates, the departmental discretion principle’s scope was quite impressive, and, more significantly, it was not a principle designed to give courts ample freedom to expand or contract their jurisdiction as they saw fit. The most striking feature of the Supreme Court’s early-nineteenth-century departmental discretion cases is the categorical language judges employed in placing a question in the realm of another department, therefore making it not justiciable. The language suggests that beyond the comparatively few cases in which the Court considered questions that appeared to be at the margins of justiciability and nonjusticiability,

67. Id. at 170.
69. Id. at 571.
many more contested issues may have existed whose resolutions were taken for
granted as being in the province of other departments.

2. *Departmental Discretion Cases, 1819-1855*

a. *McCulloch v. Maryland*

Most of the significant Marshall Court decisions between *Marbury* and
*Mcculloch v. Maryland* did not provide opportunities for exposition of the
departmental discretion principle. With the exception of *Martin v. Hunter’s
Lessee*, the cases did not involve questions about the scope of the Supreme Court’s
jurisdiction, and *Martin* raised that question only with respect to state courts. In
*Mcculloch*, however, the Court’s power to scrutinize the actions of another
department of the federal government was implicated in its decision about
Congress’s constitutional authority to charter a national bank. But the Court’s
power to submit acts of Congress to constitutional scrutiny was not seriously
contested in *McCulloch*; the arguments of both sides assumed that the Court
possessed that power. Nonetheless, Marshall did allude to the departmental
discretion principle in his *McCulloch* opinion and offered a deeper grounding for
his position in subsequent commentary on the case.

Marshall’s latitudinarian interpretation of congressional implied powers in
*Mcculloch* arguably raised the question of whether there were any constitutional
limits on the departmental discretion of Congress when it sought to exercise powers
that the Constitution expressly or impliedly granted. With that question in mind,
Marshall remarked:

Should Congress, in the execution of its powers, adopt measures
which are prohibited by the constitution; or should Congress,
under the pretext of executing its powers, pass laws for the
accomplishment of objects not entrusted to the government; it

70. 14 U.S. (1 Wheat.) 304 (1816).
71. Id. at 313. The issue of whether the Supreme Court could review final decisions of state
courts on issues involving federal law was contested in some circles. For example, *Martin* and its
sequel, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), were criticized in a series of anonymous
articles in the *Richmond Enquirer* between October 1820 and July 1821, and similar commentary
appeared in the *Washington Gazette* in the fall of 1821. Yet the Court’s power to prevent states from
“nullifying” the federal law’s impact on them seemed incumbent in the very concept of a federal Union.
For more detail, see WHITE, supra note 1, at 495–524. In contrast, the issue of whether the Court could
review the decisions of federal branches on federal law issues arguably did not threaten the existence
of the new federal government.
73. See WHITE, supra note 1, at 543–45 (discussing the parties’ arguments in *McCulloch*).
74. “Let the end be legitimate, let it be within the scope of the constitution, and all means which
are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the
letter and spirit of the constitution, are constitutional.” *McCulloch*, 17 U.S. (4 Wheat.) at 421. For an
earlier case in which Marshall announced that Congress “must be empowered to use any means which
are in fact conducive to the exercise of a power granted by the constitution,” see *United States v.
would become the painful duty of this tribunal... to say that such an act was not the law of the land.75

However, he added:

[Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake... to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.76

The McCulloch opinion was attacked in anonymous essays in the Richmond Enquirer, which so provoked Marshall that he responded anonymously in the Philadelphia Union and the Alexandria Gazette.77 Two arguments he advanced in his anonymous defense of McCulloch explicitly tied the departmental discretion principle to an idealized view of the judiciary in the American constitutional republic. The first argument maintained that:

According to [the Constitution] the judicial, is a coordinate department, created at the same time, and proceeding from the same source, with the legislative and executive departments.

... [No department] is the deputy of the whole, or of the other two... Each is confined to the sphere of action prescribed to it by the people of the United States, and within that sphere, performs its functions alone... On a judicial question then, the judicial department is the government, and can alone exercise the judicial power of the United States.78

Although Marshall’s argument usually has been seen simply as an effort to invoke the republican axiom of separated and divided powers to reinforce judicial review, his argument is more concrete. Marshall suggested that judicial review follows logically from the departmental discretion principle. The judicial department’s power to scrutinize acts of other departments is both derived from and confined by the finding that those acts raise “judicial questions.” Moreover, the argument assumes that the nature of judicial questions will be self-evident.

Marshall then advanced his second argument:

76. Id.
[T]he whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres, the duties assigned to them. . . .

To whom more safely than to the judges are judicial questions to be referred? . . . To secure impartiality, they are made perfectly independent. They have no personal interest in aggrandizing the legislative power. Their paramount interest is the public prosperity, in which is involved their own and that of their families. . . . The people are the authors of all; the departments are their agents; and if the judge be personally disinterested, he is as exempt from any political interest that might influence his opinion, as imperfect human institutions can make him. 79

This argument begins by tying the “departmental” structure of the federal union—as outlined by the Constitution—more explicitly to the republican axiom that sovereignty rested in the people of the United States. Marshall’s main purpose, however, was not simply to link departmental discretion to republican theory, but to supply reasons why judges should decide judicial questions. Judicial questions in a republic, Marshall intimated, were questions that concerned “public prosperity,” conflicts among citizens, or conflicts between citizens and their government. Those questions are peculiarly suited to be decided by federal judges for two reasons. First, federal judges are “perfectly independent,” having life tenure and hence no “personal interest” in “aggrandizing” the power of legislatures who otherwise might be able to determine the duration of their offices. Although Marshall, as an orthodox early-nineteenth-century republican, acknowledged the partisan nature of humans and hence the “imperfect” quality of “human institutions,” he concluded that “personally disinterested” judges would recognize that “public prosperity” would in turn advance judges’ well-being and “that of their families.” Judicial discretion to decide questions of law thus followed from the impartiality and disinterestedness of judges. Therefore, the impartiality and disinterestedness of judges signified the investment of republican theory in law as a constraint on human passion and self-interest.

Thus, by 1819 Marshall had fashioned links between the departmental discretion principle, judicial review, and two foundational axioms of republican theory: separation of governmental powers and sovereignty in the people. The main import of those links, for our purposes, is that they were intended to justify the power of judges to determine what classes of questions that arose out of social and political controversies in the republic were judicial and what questions should be confined to other departments. A translation of Marshall’s arguments from the language of departmental discretion to the languages of judicial review and judicial scrutiny indicates that he was advancing two propositions. First, in terms of judicial review, when judicial questions were raised, the federal courts had full power to review the acts of other federal departments on constitutional or legal grounds and to determine the constitutional or legal legitimacy of those acts. Second, in terms of judicial scrutiny, when a judicial question was properly raised with respect to the

79. Id. at 211–12.
acts of other federal departments, there was no presumption that those acts were constitutional or otherwise legal. In mid-twentieth-century terms, the level of judicial scrutiny was always “strict.”

Both propositions, however, had important corollaries. When the acts of a department other than the judiciary raised questions within its own discretion—questions that were not judicial in their nature—the federal judiciary possessed no power to resolve those questions. Thus, judicial review in those instances only extended to the preliminary determination that the acts of another department raised or did not raise judicial questions. If the other department’s acts did not raise judicial questions, then the departmental discretion principle precluded further judicial inquiries. In terms of judicial scrutiny, if, because the acts involved the other department’s discretion, the other department’s acts did not raise judicial questions, then they were not scrutinized at all.

Therefore, it is hypothetically possible to think of Marshall’s departmental discretion arguments as erecting a structure of scrutiny levels: strict scrutiny for all acts of other federal departments that raised judicial questions and no scrutiny for acts that did not raise judicial questions because they involved core departmental functions. But that hypothetical speculation would be anachronistic. The pivot point in Marshall’s structure was not the level of judicial scrutiny but the nature of the questions implicated by the acts of another federal department. Marshall and his contemporaries did not think about levels of judicial scrutiny at all. They thought about how to establish, in the context of actions by other branches that arguably raised constitutional or legal issues, the lines between judicial and nonjudicial questions.

Between Marshall’s remarks in 1819 about departmental discretion and 1855, the Court decided several cases in which it invoked the departmental discretion principle to conclude that the cases were not justiciable. One striking feature of those cases is that at least through 1849—when the Court concluded in Luther v. Borden80 that the legitimacy of opposing governments in Rhode Island could not be settled in a judicial proceeding81—the conceptualization of judicial and nonjudicial questions advanced by Marshall in Marbury remained in place. To illustrate, in a separate opinion in Luther,82 Justice Levi Woodbury, after asking “[i]n what place runs the true boundary line” between “judicial” and “political” questions, stated that when

80. 48 U.S. (7 How.) 1 (1849).
81. Id. at 41, 47.
82. Id. at 48–88 (Woodbury, J., dissenting). The reporter described Woodbury’s opinion as a dissent. Justice Woodbury noted, however, that “[I] concur with the rest of the court in the opinion[,] that . . . the validity of the old charter . . . is not within our constitutional jurisdiction.” Id. at 51. One of the two principal issues in the case was whether the Court could decide which of two competing governments in 1842, one of which operated under a charter originally granted to proprietors by Charles II of England in the seventeenth century, was the legitimate government of Rhode Island. Id. at 48. It was that issue which prompted Woodbury’s delineation of the distinction between “judicial” and “political” (nonjusticiable) questions. Id. at 51. The other issue was whether the charter government had legitimately declared martial law to protect itself against its competitor. Id. Woodbury, the Supreme Court Justice whose circuit included Rhode Island, concluded, unlike the rest of the Court, that it had not. See id. at 51, 59–88 (Woodbury, J., dissenting).
a constitution or law, however originating, be clearly acknowledged by the existing political tribunals . . . [and] when the claims of individuals come in conflict under [that constitution or law], it [was] the true province of the judiciary to decide what [those claims] rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully or wisely made.\(^{83}\)

Woodbury was echoing Marshall's language in *Marbury*.

Having internalized the republican axioms that "the [federal] judiciary, by its mode of appointment, long duration in office, and slight accountability, [was] fitted to check legislative power" when challenged and that Congress and the President were "by their pursuits and interests, better suited to make rules,"\(^{84}\) Justices in the first half of the nineteenth century seemed, on the surface, to have difficulty recognizing cases in which the distinction between judicial and political questions was implicated. Justice Woodbury listed twelve instances in which the Supreme Court of the United States had applied the distinction,\(^{85}\) which can be grouped in two categories, examples of nonjusticiablist "executive" discretion and nonjusticiablist "legislative" discretion.

Closer analysis of three of the Court's departmental discretion cases, however, reveals a more complex picture. Although in each of the cases the Court concluded that the issues raised were outside the province of the judiciary, their disposition obviously affected the legal rights of individuals and required the Court, in the course of reaching its conclusions about justiciability, to implicitly decide some legal questions.

Therefore, the cases posed a difficulty for the Court's departmental discretion jurisprudence, which grew in complexity over time. The difficulty centered on the importance to be attached, in cases where justiciability was the central issue, to what might be thought of as the "judicial baggage" of an exercise of discretionary power by another branch. That judicial baggage was a product of the assumption that once the executive or legislative branch exercised its discretion in the form of a policy directive, courts, in a republic, must provide a forum where the effects of that directive on the constitutional or legal rights of individuals could be adjudicated. The attachment of judicial baggage to discretionary policymaking by the other branches meant that any exercise of executive or legislative discretion might potentially be challenged in a court. It also meant that in deciding that the departmental discretion principle made a particular challenge not justiciable, a court would effectively be adjudicating that challenge.

This difficulty had been inherent in the Court's departmental discretion jurisprudence from the start: it followed from the tacit judgment that the judiciary would constitute the final authority for determining whether it could exercise jurisdiction over a particular departmental discretion case. But Marshall's language in *Marbury* and *McCulloch* seemed to assume that the line between political and

\(^{83}\) Luther v. Borden, 48 U.S. (7 How.) 1, 54 (1849) (Woodbury, J., dissenting).

\(^{84}\) Id. at 53.

\(^{85}\) Id. at 56–58. Justice Woodbury also listed three English decisions grounded on the distinction. For a list of the U.S. cases Woodbury cited, see infra note 119.
judicial questions would be easy to draw. That line may well have been apparent in many cases that did not find their way to the Court, but those that did in the fifty-odd years after Marbury were brought and appealed in part because the line was not apparent. In particular, cases surfaced from situations in which measures enacted by the executive or legislative branches, although they arguably governed subjects typically regarded as the core of executive or legislative discretion, patently affected the constitutional or legal rights of individual citizens. When that situation occurred, did it mean that the courts, as part of their obligation to provide a forum to resolve constitutional and legal questions raised by other branches' decisions, were required to scrutinize the measures in question?

b. Foster v. Neilson

A comparatively early example of departmental discretion raising this complexity was the Court's 1829 decision in Foster v. Neilson. The case was a title dispute over land in the state of Louisiana, about thirty miles east of the Mississippi River. The plaintiff in the dispute claimed title to the land on the basis of an 1804 grant from an officer of the Spanish government, which once owned that portion of Louisiana and claimed not to have relinquished it. The plaintiff brought suit to eject the defendant, an American settler in possession of the land. Several treaties between Spain, France, and the United States affected ownership of the land, and counsel for the plaintiff asserted that "the true interpretation and effect of these treaties . . . now comes before [the Supreme Court of the United States] to be finally settled judicially." But Marshall, for the Court, held that the effect of the treaties had in fact been "settled" by laws and practices of the United States government over a span of years between 1803 and the 1820s. Given those practices, he concluded that the courts could not decide the treaties' impact on the title dispute.

At the opening of the nineteenth century, both France and Spain held dominion over significant tracts of land in the New World, but the Napoleonic Wars and their side effects eventually resulted in both nations relinquishing those tracts to the United States. Foster turned on a disputed sequence of events in the relinquishment process. The validity of the plaintiff's title to the land in what was once known as the Feliciana district—a region that by 1829 was within the state of Louisiana—rested on the assumption that because Spain possessed the Feliciana district at the close of the eighteenth century and did not cede the district to France in a secret treaty signed by the two nations in 1800, it was not within the territory, designated "Louisiana," that France ceded to the United States in the Louisiana Purchase Treaty of 1803. The plaintiff in Foster argued that the Feliciana district was understood to remain in West Florida, territory the Spanish government acquired from England in 1783. The line between the Louisiana and West Florida territories, the plaintiff claimed, was the Mississippi River, Louisiana being west of the river and West Florida east of it. Since the Feliciana district was east of the

86. 27 U.S. (2 Pet.) 253 (1829).
87. Id. at 256.
88. Id. at 257.
89. Id. at 308–09.
90. Id. at 254–55, 299–03.
Mississippi, he maintained that it was still a territory of the Spanish Crown in 1804 when the Spanish government sold some lands in the district, a portion of which the plaintiff eventually bought in 1811. 91

The defendant's claim to the disputed land in Foster was based on possession rather than title. But the defendant was also able to point to a series of acts by the United States Congress that seemed inconsistent with the recognition of any titles to the land derived from the Spanish Crown. 92 One was an 1804 act of Congress that divided the "Louisiana" territory into two territories—one of which was composed of an area called "Orleans territory" that included lands east of the Mississippi River and north of the port of New Orleans—that Spain had claimed as part of West Florida territory. 93 That act included a provision declaring that "all grants for lands within the ["Louisiana" territory] ceded by the French Republic to the United States [and earlier ceded to France by Spain were] . . . null, void, and of no effect in law or equity." 94 That act, Marshall eventually concluded for the Court in Foster,

was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and without deciding on the extent of that retrocession, to put the titles which might be thus acquired through the whole [Louisiana] territory, whatever might be its extent, completely under the control of the American government. 95

A second act of Congress, passed in 1812, enlarged the boundaries of the state of Louisiana to include the Feliciana district and other land east of the Mississippi River, and two other acts of 1817 created the states of Alabama and Mississippi out of territory extending from east of the Mississippi River to west of the Perdido River in what is now Florida. 96 Taken together, the United States Government's actions suggested that it believed that the "Louisiana" territory it received from France in 1803 extended eastward to the Perdido rather than stopping at the easternmost borders of the Mississippi. In that same time period, however, the Spanish government had resisted all efforts to suggest that in ceding the "Louisiana" territory to France in 1800, it gave up any land from east of the Mississippi River to the Atlantic Coast, which by the 1820s had become the American states of Louisiana, Mississippi, Alabama, and Florida. 97

The diplomatic dispute thus turned on what France, Spain, and the United States meant by the "Louisiana" territory when the territory passed from Spain to France to the United States between 1800 and 1803. The dispute was affected by the extravagant land claims originally made by European nations in the New World and the relationship between those claims and the practicalities of New World

91. Id. at 254–55.
93. Id. at 304.
94. Id.
95. Id. at 304–05.
96. Id. at 308.
97. Id. at 305–06.
settlement by inhabitants of claiming nations. 98 Lands west of the Florida coast and east of New Orleans were treated as “waste lands” by the Spanish Crown, 99 and were inhabited primarily by aboriginal tribes throughout the eighteenth century. “Louisiana” territory initially may have been regarded as bounded on the east by the Mississippi River only because that boundary was convenient and land to the east was largely uninhabited. The territories of “East and West Florida” that Spain acquired from England in 1783 were unsettled in their interior, and between 1800 and 1819 the Spanish government, facing pressure from Napoleon and England and rebellions in its Latin American colonies, was increasingly inclined to ignore its North American possessions.

In short, no one, including signatories to treaties, really knew the precise boundaries of the Louisiana and Florida territories, and the European nations involved seemed more interested in preserving their dignity through carefully worded ambiguities in treaties than in actually laying claim to New World land. Against this backdrop, the United States, with its strong post-Louisiana Purchase interest in eliminating Spanish as well as French influence from the New World, aggressively encouraged settlement of the southern regions of both the Louisiana and Florida territories. By 1829, in the wake of Florida, Mississippi, Alabama, and Louisiana joining the Union and rapidly becoming settled, counsel for the plaintiff in Foster was able to assert that the “great and interesting question” of the borders of Louisiana and West Florida territories no longer needed to be “discussed diplomatically between the representatives of [Spain and the United States] . . . upon grounds of policy and national interest,” but could be “presented for decision as a merely legal question” because “[i]t has ceased to be a national controversy, and has assumed a shape peculiarly fitted for this tribunal.” 100 This last argument indicated that Foster was a case that illustrated the complexities of judicial application of the departmental discretion principle. Many decisions by the executive and legislative branches had the potential to affect the rights of individual citizens. Treaties with foreign governments affecting the status of land on the North American continent were just one set of examples.

What distinguished Foster from Martin v. Hunter’s Lessee, 101 where the Court considered, in the context of a land title dispute, the effect of a treaty between England and the United States on land in Virginia? In both cases governments had passed laws stating differing positions about the ownership of the land in question. In both cases the property rights of American citizens turned on which government positions American courts would treat as authoritative. Therefore, why did the Court conclude that the conflict in Martin, between the Treaty of Paris and a 1779 Virginia escheat act, raised “judicial” questions, 102 but decide that the differing

98. English claimants landing in Virginia asserted that the dominion of the English crown extended from the Atlantic Shore to the Pacific Ocean, and the French claimed to the “Louisiana” territory extended from New Orleans to the northernmost reaches of the Mississippi River.
100. Id. at 279.
102. Id. at 358–59. For a discussion of Martin v. Hunter’s Lessee, see White, supra note 1, at 495–504. There was at least one important difference between Martin and Foster. In Martin, the conflict was between a federal treaty, the 1783 Treaty of Paris, and a state statute, the Virginia Escheat Act of May 3, 1779. When the Virginia Court of Appeals held in 1810 that the Virginia Escheat Act prevailed over the Treaty, that action drew into question the validity of a treaty of the United States
positions in *Foster* were “political” and that the case was therefore not justiciable? In both cases the interpretation of treaties was at issue, and Marshall’s opinion for the Court in *Foster* set forth alternative legal interpretations of the relevant treaties and even revealed that the Justices were divided on which interpretation they found controlling.  

Marshall ultimately concluded in his opinion in *Foster* that the Court could not substitute its view for Congress’s on a matter as political as whether the United States or some other sovereign owned disputed land, nor could it take jurisdiction of the case because Congress had established a process for the adjudication of all the titles to land affected by the relevant treaties. Marshall concluded that Congress had not put such a process in place for the particular land in dispute.

government and thus gave the Supreme Court of the United States jurisdiction, under Section 25 of the Judiciary Act of 1789, to review the court of appeals’ decision. *Id.* at 304–13. In *Foster*, by contrast, the differing interpretations of Spain and the United States about who owned East and West Florida in the years between 1803 and 1819 were based on alternative understandings due to scattered language in treaties between Spain, France, and the United States about the boundaries of the “Louisiana” territory when the United States acquired it from France in the Louisiana Purchase and the relationship between those boundaries and Spanish claims to East and West Florida.

Although the Marshall Court ultimately treated the difference between *Martin* and *Foster* as decisive on the issue of justiciability, one could argue that the distinction between laws that enacted the policies of the legislative and executive departments and laws that directly affected the constitutional or legal rights of individuals was not a difference that spoke to a foundational distinction on which the Court’s departmental discretion decisions rested. Since the treaties pertaining to lands in the Feliciana district each purported to define the years in which one sovereign nation or another (Spain, France, or the United States) was the owner of territory in that district, they necessarily affected the legal rights of any party whose claim to ownership of land in the district rested on titles derived from one of those sovereign nations. Accordingly, counsel for the plaintiff in *Foster* argued that the legal rights of those parties needed to be determined in a court by a judicial interpretation of the treaties. *Foster*, 27 U.S. (2 Pet.) at 279.

103. At one place in his opinion in *Foster*, Marshall pointed out an ambiguity in the 1819 treaty in which Spain relinquished its claims in the regions previously known as East and West Florida, whose boundary either stretched westward to the Mississippi River as the Spanish government maintained, or only to the Perdido River (now the boundary between the westernmost portions of the Florida panhandle and the easternmost portions of southeastern Alabama) as the United States maintained. *Foster*, 27 U.S. (2 Pet.) at 310–13. Marshall considered whether the Spanish government, in relinquishing “the Floridas” in 1819, had assumed that grants of land it made in “the Floridas” before the signing of the treaty remained valid, so that the treaty did not affect the grant at issue in *Foster*. *Id.* at 311. After interpreting ambiguous language in the 1819 treaty, he concluded that “[o]ne other judge and myself” were of the view that “fair grants” made by Spain before the treaty were “as obligatory on the United States, as on his Catholic majesty.” *Id.* at 313. But “[t]he majority of the Court,” he added, “think differently,” believing that all titles in land traced to Spanish grants between 1803 in Mississippi and Alabama “might be objected to on the ground of fraud,” given Spain’s 1800 cession of the “Louisiana” territory to France and France’s 1803 sale of that territory to the United States. *Id.* The division among the Justices was ultimately rendered moot by Marshall’s disposition of *Foster*, but the exercise indicates that the Court was well aware of the difficulty in separating legal from political questions in the case.

104. Marshall stated:

In a controversy between two nations concerning national boundary, it is scarcely possible that the Courts of either should refuse to abide by the measures adopted by its own government. . . . The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to [the] principles which the political departments of the nation have established.


105. *Id.* at 314–16.

106. *Id.* at 316–17.
arrive at this conclusion, he revisited the 1819 treaty between Spain and the United States, emphasizing the provision that: "[A]ll the grants of land made before the 24th of January, 1818, by his Catholic majesty . . . shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty."\textsuperscript{107}

This provision, being in a federal treaty, became "the law of the land" in the United States.\textsuperscript{108} But the language stating that the grants shall be "ratified and confirmed" in the provision was the "language of contract," in which "either of the parties engages to perform a particular act."\textsuperscript{109} The United States was pledging to "execute the contract" through some sort of legislative process.\textsuperscript{110} The decision to establish the process was entrusted to Congress; hence, "the treaty addresses itself to the political, not the judicial department; and [Congress] must execute the contract before it can become a rule for the Court."\textsuperscript{111} Thus, even if one could read the treaty of 1819 as a concession by the United States that it would recognize some Spanish dominion over portions of the "Louisiana" or "West Florida" territories between 1803 and 1819, and perhaps eventually confirm the validity of some land titles in those areas that derived from grants by the Spanish Crown, Congress had not yet ratified and confirmed the plaintiff's title in \textit{Foster}. Therefore, in the end, the departmental discretion principle resulted in the premature submittal of the case to the Court.

Twenty years after \textit{Foster}, the Court described the case as standing for the proposition that

where the title to the property depended on the question, whether the land was within a cession by treaty to the United States, . . . after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that the question was a political one, the decision of which, having been made in this manner, they must conform to.\textsuperscript{112}

That reading of \textit{Foster} was made by Justice Woodbury in his separate opinion in \textit{Luther}, where he listed the case among "[s]everal precedents" illustrating the principle that "as judges, our duty is to take for a guide the decision made on [political questions] by the proper political powers, and . . . enforce it until duly altered."\textsuperscript{113} As we have seen, \textit{Foster} was not so simple a case. Although the United States acted as if it owned the Louisiana Territory after 1803, it did not act as if it

\textsuperscript{107} Id. at 310 (quoting Treaty Between the United States of America and the King of Spain, U.S.-Spain, Feb. 22, 1819).
\textsuperscript{108} Id. at 314.
\textsuperscript{109} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849).
\textsuperscript{113} Id.
owned East or West Florida until 1819, and Spain never acknowledged that lands east of the Mississippi River were in the Territory of Louisiana.\footnote{114. In \textit{Foster}, Marshall noted that despite protracted efforts by the governments of the United States and Spain to settle the question of the Louisiana Territory’s boundaries at the time Spain ceded that territory to France in 1800, "[e]ach persevered in maintaining the construction with which he had commenced." \textit{Foster}, 27 U.S. (2 Pet.) at 306.}

Finally, \textit{Foster} not only turned on the Court’s judgment that differences among governments about dominion over property were political questions. The case also turned on the Court’s reading of the eighth article of the 1819 treaty between Spain and the United States in which Spain ceded East and West Florida to the American government.\footnote{115. \textit{Id.} at 310.} Although that article clearly seemed designed to preserve the legal status of Spanish land grants made in those territories before January 24, 1818,\footnote{116. The treaty was signed on February 22, 1819, but article eight was directed at “all the grants of land made before the 24th of January, 1818, by his Catholic majesty.” \textit{Id.}} it included the phrase “shall be ratified and confirmed,” which Marshall interpreted as a promise by the United States to establish processes to perfect titles to land in East and West Florida which derived from those land grants.\footnote{117. \textit{Id.} at 310, 313.} The meaning of article eight of the treaty was a legal question. Marshall decided that question for the Court, and that decision was as important to the outcome in \textit{Foster} as his judgment that disputes among sovereign nations over the ownership of land were not justiciable.\footnote{118. Marshall, in a subsequent decision, concluded that the meaning of the 1819 treaty between the United States and Spain was different from what he ruled it to be in \textit{Foster}. See \textit{United States v. Perchman}, 32 U.S. (7 Pet.) 51, 88–89 (1832), in which Marshall, for the Court, had access to the treaty translated from its Spanish version, as well as the American version in its original English.} \textit{Foster} did not establish that the line between those cases that the judiciary could entertain and those that were confined to the discretion of other departments was self-evident.

Nonetheless, \textit{Foster} was the sort of case in which the departmental discretion principle tended to surface in the early-nineteenth century. \textit{Foster} involved a controversy implicating the foreign relations powers of the Executive and the Senate, which were responsible for the making and ratification of treaties between the United States and other nations. Of the twelve Supreme Court decisions Justice Woodbury cited in \textit{Luther v. Borden} as examples of judicial deference to the departmental discretion of other branches, ten of them involved the exercise of foreign relations powers.\footnote{119. Luther v. Borden, 48 U.S. (7 How.) 1, 56–57 (1849). The cases, in the order Justice Woodbury cited them, were \textit{Decatur v. Paulding}, 39 U.S. (14 Pet.) 497 (1840); \textit{Foster v. Neilson}, 27 U.S. (2 Pet.) 253, 309 (1829); \textit{Garcia v. Lee}, 37 U.S. (12 Pet.) 511, 520 (1838); \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 20 (1831); \textit{Rhode Island v. Massachusetts}, 37 U.S. (12 Pet.) 657, 736, 738 (1838); \textit{Williams v. Suffolk Ins. Co.}, 38 U.S. (13 Pet.) 415, 419 (1839); \textit{Rose v. Himely}, 8 U.S. (4 Cranch) 241, 268 (1808); \textit{United States v. Palmer}, 16 U.S. (3 Wheat.) 610, 634 (1818); \textit{Gelston v. Hoyt}, 16 U.S. (3 Wheat.) 246 (1818); \textit{The Divina Pastora}, 17 U.S. (4 Wheat.) 52, 64 (1819); \textit{The Santissima Trinidad}, 20 U.S. (7 Wheat.) 283, 336–37 (1822); and \textit{Scott v. Jones}, 46 U.S. (5 How.) 343, 374 (1847). All but \textit{Cherokee Nation, Rhode Island v. Massachusetts, and Scott v. Jones} involved foreign relations treaties or the diplomatic recognition of foreign governments, and \textit{Cherokee Nation} involved a treaty between the United States and the Cherokee tribe, which argued that it should be given the legal status of a “foreign” sovereign power with respect to any rights conferred to it by a treaty. For more detail on the Cherokee cases, see \textit{White, supra} note 1, at 716–30.} Additionally, Marshall in \textit{Marbury},\footnote{120. Marbury v. Madison, 5 U.S. (1 Cranch) 135, 170 (1803).} and in his
remarks to the House of Representatives in 1800, identified foreign relations issues as paradigmatic examples of questions that were not justiciable because they had been "submitted to the executive" under the Constitution.

c. Luther v. Borden

In contrast, Marshall’s category of cases that were governed by the departmental discretion principle because they raised "[q]uestions, in their nature political" was far less well developed when the Taney Court considered Luther v. Borden in 1849. Justice Woodbury only cited two examples of cases that did not involve foreign affairs powers, and in one of them, a boundary dispute between states, he noted that the Constitution provided that states could agree to have the dispute settled by the Supreme Court. The Court exercised its original jurisdiction to decide several boundary disputes between states in the nineteenth century.

Luther gave the Court an opportunity to apply the departmental discretion principle to a wider set of cases raising "questions in their nature political." Entertaining the case might have plunged the Court into the extremely sensitive task of making substantive interpretations of the meaning of "a republican form of government" and of "domestic violence" under the Guarantee Clause of the Constitution. The Guarantee Clause states that "[t]he United States shall guarantee to every State in [the] Union a Republican Form of Government, and shall protect each of them ... [from] domestic [v]iolence." No specific branches of the United States government are mentioned in the Clause; the wake of a political crisis in Rhode Island provided the Court with a test case in which it had an opportunity to invoke it.

The colonial charter of the government of Rhode Island, which was never modified after Rhode Island joined the Union, severely limited eligibility for voting. By 1840, after the population of the state had been swelled by mill and factory workers who did not own property, close to 90% of the adult males in Providence, the state capital, could not vote. Frustrated at their lack of success in convincing the legislature to broaden the franchise, a group of reformers drafted a new state constitution between 1841 and 1842—known as the People’s constitution—submitted it to a referendum of all adult white male citizens of the state—who voted to adopt it—and organized elections for a new state government. In response, the existing government submitted a revision of the current state constitution to those voters eligible to vote under the original charter, who rejected the revised constitution. When the newly elected People’s government began to form itself, the existing government—known as the Freeholders’

122. Marbury, 5 U.S. (1 Cranch) at 170.
government—declared martial law and arrested the newly elected People’s governor, Thomas Wilson Dorr, charging him with treason.\textsuperscript{127}

The “Dorr Rebellion” ended quickly in 1842, when the Freeholders’ government used the state’s militia to suppress the Dorrites.\textsuperscript{128} At the same time, the Freeholders submitted another revised constitution, considerably broadening the franchise, which voters approved.\textsuperscript{129} \textit{Luther} was an effort on the part of reformers to restore the legitimacy of the People’s government, and to nullify Dorr’s 1844 treason conviction. The reformers sought a judicial determination that the Freeholders’ legislature was not a republican government and thus could be replaced by the people at large, even without formal legislative proceedings.\textsuperscript{130} Consequently, they also sought a determination that the Freeholders’ government had no authority to enact martial law.\textsuperscript{131} Rhode Island courts concluded that the Freeholders’ government had authority and upheld Dorr’s treason conviction.\textsuperscript{132}

A Dorr supporter, Martin Luther, filed an action for trespass against Luther Borden and others in federal district court in Rhode Island, alleging that Borden, a member of the Rhode Island militia, broke into Luther’s house during the time martial law was declared and, in the process of searching for Luther, damaged some property. Luther’s lawsuit claimed that since a majority of white males in the state ratified the People’s constitution and elected the People’s government, the Freeholders’ government was displaced and thus had no authority to declare martial law. Further, the United States had an obligation under the Guarantee Clause to ensure the citizens of Rhode Island a republican form of government, and the Freeholders’ government did not take that form. Thus any courts established by the Freeholders’ government after the People’s government came into existence were illegitimate and could not try anyone for treason, and as a result, the United States government was bound to nullify any acts of the Freeholders’ government after the People’s constitution was ratified.\textsuperscript{133} The federal district judge dismissed Luther’s suit, and the case was then certified to the Supreme Court of the United States under a pro forma division of the judges on that Court, which consisted of the federal district judge and the Supreme Court Justice assigned to the New England circuit.\textsuperscript{134}

\textsuperscript{127} On the Dorr Rebellion and the events leading to \textit{Luther}, see George M. Dennison, \textit{The Dorr War: Republicanism on Trial}, 1831-1861 (1976).

\textsuperscript{128} \textit{Luther}, 48 U.S. (7 How.) at 37.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 19–26.

\textsuperscript{131} Luther v. Borden, 48 U.S. (7 How.) 1, 19–26, 38 (1849).

\textsuperscript{132} Id. at 38.

\textsuperscript{133} For a summary of those arguments, see id. at 19–26.

\textsuperscript{134} Id. at 18–19, 47. Justice Joseph Story, who died in 1845, was the Supreme Court Justice assigned to the New England circuit at the time of pro forma certification. Twenty-nine questions were certified to the Supreme Court of the United States. The technique of pro forma certification of questions through a feigned division of the federal district judge and the Supreme Court Justice assigned to a federal circuit—at the time the U.S. Circuit Courts of Appeal were composed exclusively of these two judges—was a convenient way for Supreme Court Justices to get questions of law entertained by the full Court. Justice Story was particularly inclined to adopt the technique of pro forma certificates of division. For more detail, see White, supra note 1, at 173–80. In his opinion in a companion case to \textit{Luther}, a separate trespass action arising out of the same facts, by Rachel Luther, Martin Luther’s wife, Chief Justice Taney noted that:

It appears, on the face of the record, that the division [between Justice Story and the district judge] was merely formal, and that the whole case has been transferred to this court, and a multitude of points (twenty-nine in number)
The arguments made on behalf of Luther were fraught with difficulties for the Taney Court. President John Tyler had encouraged the Freeholders' government to declare martial law and call up the state militia to suppress the Dorrites. After coming into existence in May 1842, the Dorr government adjourned, after only two days, until July 1842. It was never acknowledged by the Freeholders' government, which continued to operate. The Dorr government did not meet in July 1842, or ever again. Dorr was arrested and charged with treason in August and eventually had his conviction for treason upheld by the Rhode Island Supreme Court in 1844. In November 1842, the Freeholders' government submitted a revised constitution to voters, who adopted it. In May 1843, that constitution went into effect.\footnote{135} If the Court were to accept the Guarantee Clause and martial law arguments of the Dorrites, the last seven years of government in Rhode Island, including a decision by that state's supreme court on the legitimacy of the Freeholders' constitution, would have been declared null and void.

Although it was highly unlikely that the Taney Court would countenance an effort to use the federal courts to negate a decision by a state supreme court on the question of whether the government established in that state was legitimate, the Court declined to make use of its option to dismiss \textit{Luther} as improperly certified. Instead, the Court used the occasion to make several pronouncements about the reach of the departmental discretion principle. Although each of those pronouncements appeared to make sense in the context of the case, they were not indubitably obvious as propositions of constitutional law.

The first pronouncement related to separation of powers. Chief Justice Taney's opinion maintained that since "[i]t is the province of a court to expound the law, not to make it,"\footnote{136} it followed that if a court "decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."\footnote{137} But that argument obviously proved too much: judicial review assumed that courts could decide some governmental acts had no legal authority, being constitutionally invalid, without having to deny the authority of the government itself. The next pronouncement, related to federalism, was similarly overbroad. Chief Justice Taney invoked the "well settled rule . . . that the courts of the United States adopt and follow the decisions of the State courts in questions presented for its decision. We have repeatedly decided that this mode of proceeding is not warranted by the act of Congress [The Judiciary Act of 1802, 2 Stat. 156, 159-61], authorizing the justices of a Circuit Court to certify to the Supreme Court a question of law which arose at the trial, and upon which they differed in opinion. \textit{Luther}, 48 U.S. (7 How.) at 47. By that comment, Chief Justice Taney meant that the practice of wholesale pro forma certification of questions up to the Court was not contemplated by Congress. He indicated that "many cases, in which, like the present one, the whole case was certified, have been dismissed for want of jurisdiction." \textit{Id.} at 47. He consequently dismissed the suit by Rachel Luther, noting at the same time that "the parties will understand the judgment of this court upon all the material points certified" and decided in Martin Luther's case. \textit{Id.} at 47-48.

Chief Justice Taney's language suggests that the Court could have dismissed \textit{Luther} as improvidently certified to it, which would have had resulted in the same outcome, but it wanted the opportunity to extend the category of legislative departmental discretion cases.\footnote{135} See \textit{Dennison}, supra note 127, at 84–109. \footnote{136} \textit{Luther}, 48 U.S. (7 How.) at 41. \footnote{137} \textit{Id.} at 40.
which concern merely the constitution and laws of the State.” He suggested that a state supreme court’s determination of which, among opposing governments, was the legitimate government of the state was such a decision. Yet if that were so, the Guarantee Clause of the Constitution would seem to have no effect. How could a federal court determine whether a “Republican Form of Government” existed for the purpose of assessing the United States’ obligation to guarantee that form “to every State,” if it were bound by state court decisions about whether the government in that state was legitimate and hence “republican”?

Chief Justice Taney had an answer to that question: the Guarantee Clause entrusted the determination of whether a state was republican to Congress. He gave no support for his claim that the Constitution had “treated the subject as political in nature,” and thus entrusted it to Congress rather than the courts. He apparently assumed that once Congress admitted “the senators and representatives of a State . . . into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.” But in concluding that Congress’s decision as to whether a republican form of government exists in a state was “binding on every other department of government, and could not be questioned in a judicial tribunal,” Chief Justice Taney seemed to ignore the possibility that a decision might affect the constitutional rights of citizens of the United States. Suppose Congress decided in 1860 that the state of Mississippi did not have a republican form of government because a majority of the state’s voting population owned slaves. In the 1857 Dred Scott case, Chief Justice Taney suggested that the Due Process Clause of the Fifth Amendment provided protection for the property rights of slaveholders. Did his comments in Luther suggest that congressional legislation abolishing or modifying slavery in Mississippi could not be reviewed by the courts?

Finally, Chief Justice Taney stated that because Congress had implemented the “domestic violence” language of Article IV, section 4 of the Constitution with a 1795 statute entrusting the President with the power, on application of a state legislature or its executive, to call up state militias to suppress violence in the state, courts could not question executive decisions about “which is the [legitimate state] government, and which party is unlawfully arrayed against it,” that were necessary preliminaries to calling up the militias. “If the judicial power extends so far” as to allow courts to review those executive decisions and potentially “discharge those who were arrested or detained by the troops in the service of the United States,” Chief Justice Taney argued, “the [Guarantee Clause] is a guarantee of anarchy, and not of order.” And if “this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over.”

138. Id.
139. See id. at 42.
140. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).
141. Id.
143. Luther, 48 U.S. (7 How.) at 43.
144. Id.
145. Id.
Once again, Chief Justice Taney’s pronouncement, as a proposition of constitutional law, was far too broad. The designation of the Executive as the implementator of constitutional guaranties does not shield that branch from subsequent judicial inquiry into whether, in the process of attempting to implement those guaranties, other constitutional rights were violated. To suggest that on-the-spot review in a domestic emergency might be awkward—President Tyler was hardly neutral in the controversy—did not mean that subsequent review should be precluded.

Thus none of the legislative or executive decisions that Chief Justice Taney’s Luther opinion confined to the realm of departmental discretion were “in their nature political” and therefore not justiciable across the board. They were simply decisions the Taney Court found awkward to review at the time. Once again the scope of departmental discretion was less than it seemed, and bright lines between judicial and nonjudicial questions were harder to fashion than a nineteenth-century opinion of the Court had suggested.

d. Murray’s Lessee v. Hoboken Land & Improvement Co.

The Court heard a third departmental discretion case of genuine complexity in 1855, Murray’s Lessee v. Hoboken Land & Improvement Co.\(^\text{146}\) That case originated from a title dispute in which the claims of both parties to land in New Jersey derived from Samuel Swartwout, the land’s initial owner, who was collector of the United States customs for the Port of New York from 1830 to 1838.\(^\text{147}\) In March 1838, Swartwout left his position, and an audit of his account in November 1838 revealed that he had not remitted $1,374,119.65 to the United States Treasury. After the audit, the solicitor of the Treasury Department issued a “distress warrant” pursuant to an 1820 act of Congress.\(^\text{148}\) The act provided that a lien for the amount due the United States should exist on the lands of the debtor once a levy recording the amount of the debt was recorded in the office of the federal district court in whose district the lands were situated.\(^\text{149}\) Sometime before April 10, 1839, the United States recorded that levy, making the distress warrant enforceable against any lands owned by Swartwout.\(^\text{150}\)

On that date, the lessor of the plaintiffs in Murray’s Lessee bought Swartwout’s estate at an execution sale. Shortly thereafter, on June 1, 1839, the United States Marshal for the District of New Jersey held a sale under the distress warrant, and the Hoboken Land and Improvement Company bought Swartwout’s lands.\(^\text{151}\) The United States had conceded that perfected its lien on those lands prior to the date the plaintiffs bought them if the distress warrant procedure was valid. Therefore the plaintiffs sought to attack the validity of that lien.\(^\text{152}\) They challenged the 1820 act of Congress authorizing the distress warrant procedure as unconstitutional on two related grounds: first, the procedure amounted to a summary deprivation of the

\(^{146}\) 59 U.S. (18 How.) 272 (1856).
\(^{147}\) Id. at 274–75.
\(^{148}\) Id. at 275.
\(^{149}\) Id. at 274.
\(^{150}\) Id.
\(^{151}\) Id.
debtor Swartwout's property by the Secretary of the Treasury, who was an executive official and not a court; and second, by depriving Swartwout of property without a hearing and without a trial by jury in violation of the Due Process Clause of the Fifth Amendment.\textsuperscript{153} As Justice Benjamin Curtis put it for the Court:

Taking these two objections together, they raise the questions, whether, under the constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury . . . can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the constitution; and if so, . . . whether the warrant in question was such due process of law?\textsuperscript{154}

Justice Curtis's opinion in Murray's Lessee answered these questions in reverse order. By surveying the summary procedure for collecting debts owed to the sovereign in England and in American states, he concluded that procedures resembling distress warrants had been so regularly adopted and so "repeatedly acted on by the judiciary and the executive" that they "cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs."\textsuperscript{155} This conclusion, however, did not end the inquiry, because it was clear that the distress warrant procedure "issues against the body, lands, and goods of certain public debtors" without "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings."\textsuperscript{156} Furthermore, the procedure was one of "those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law."\textsuperscript{157} Did this mean that auditing and recording a levy on a collector's assets, even if it satisfied the requirements of due process, was a "judicial" proceeding and thus, when performed only by executive officials, was incompatible with Article III?

This was the issue that had dogged the Court's departmental discretion cases from Marbury on. When certain kinds of governmental acts arguably affected the legal and constitutional rights of individuals and involved "an inquiry into the existence of facts and the application to them of rules of law,"\textsuperscript{158} when should the Court nonetheless deem those acts to be within the discretion of the Executive or Congress and thus not susceptible to judicial scrutiny? As Foster and Luther demonstrated, aphorisms such as "the legislature and executive make laws and the judiciary applies them" did not easily resolve that issue, nor was the content of judicial questions, as opposed to questions "submitted to the executive" or "in their nature political," readily discernible. As Justice Curtis stated:

\textsuperscript{153} Id. at 273–74.
\textsuperscript{154} Id. at 275–76.
\textsuperscript{155} Id. at 280.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856).
In an enlarged sense... judicial act[s] [include]... [a]ll those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia... or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial.\textsuperscript{159}

"It [was] necessary to go further," Justice Curtis suggested, and show that questions arising from "the exercise of judgment upon law and fact" by branches of the government must, "from their nature," give rise to "controversies to which the United States is a party, within the meaning of the second section of the third article of the constitution."\textsuperscript{160} Congress or the Executive could "provide by law" that a particular set of questions "shall form the subject-matter of a suit in which the judicial power can be exerted."\textsuperscript{161} But when Congress or the Executive has made no such provision, "the question is, whether its subject matter is necessarily... a judicial controversy."\textsuperscript{162}

Justice Curtis's formulation did not supply courts with a magic formula for deciding when to apply the departmental discretion principle. However, the formulation did represent an opportunity for the Court to clarify its departmental discretion jurisprudence by recognizing two recurrent features of cases on the margins of justiciability. One feature was that the great bulk of such cases were, like Foster, Luther, and Murray's Lessee, cases in which political issues merged with legal and constitutional issues, making categorization difficult. All departmental discretion cases necessarily involved legal or constitutional interpretations of acts of the Executive or Congress. Anytime the Court decided that a case ultimately raised questions other than judicial questions, it had consequently interpreted the meaning of a treaty or the Guarantee Clause or the Due Process Clause or the "case and controversy" requirement of Article III. Therefore, it was useless to pretend that mere recitals of the distinction between judicial and executive or legislative questions could do any work.

The second feature of the departmental discretion cases that Justice Curtis recognized in Murray's Lessee was the capacity of all acts of the Executive or Legislature to have effects that appeared to make them suitable for judicial scrutiny. All executive or legislative acts involved, at some level, the application of rules of law to facts, and they all arguably affected the legal or constitutional rights of individuals. Indeed, the more another branch provided for minimal judicial review of one of its acts, as Congress did in the 1820 statute at issue in Murray's Lessee,\textsuperscript{163} the more the act appeared to give rise to judicial questions. Thus, as the federal government increased its foreign relations activities and enacted more domestic legislation in the latter half of the nineteenth century, courts would have to wrestle increasingly with the issue of how to confine the category of justiciable controversies.

\textsuperscript{159} Id.
\textsuperscript{160} Id. at 280–81.
\textsuperscript{161} Id. at 281.
\textsuperscript{162} Id. at 280–81.
\textsuperscript{163} The statute provided that collectors of treasury revenues could "bring before a district court the question, whether [they were] indebted as recited in the warrant." Id. at 284.
Looking back at *Foster, Luther,* and *Murray's Lessee* as a unit, one feature of these cases stands out. They each involved legal issues connected to the exercise of an arguably core function of another department of the government—determining whether the United States or a foreign government had dominion over territory in the New World, supplying federal aid to a state in an emergency, or establishing a process where the United States could swiftly recover debts owed to it by its revenue agents—and where the other department had *actually exercised* that function. The departmental discretion issues in these cases were not hypothetical; courts would be second guessing the acts of another branch in determining whether these cases were justiciable. That actually exercised core function feature may have been dispositive in cases where the legal dimensions otherwise seemed plain. *Foster* was a land title dispute, *Luther* an action in trespass, and *Murray's Lessee* another title dispute turning on the priority to be given to a government lien. Courts traditionally entertained all of those actions.

In the period between the Civil War and the First World War, two new features of the American constitutional landscape emerged that placed greater pressure on the lines between legal and political questions. One new feature was the passage of the Reconstruction Amendments, especially the Fourteenth Amendment, which contained provisions that allegedly enhanced the Court's role as a censor of state police power legislation. The second new feature was the increased growth of legislative activity itself, initially at the state level but also, in the twentieth century, by Congress. The question raised by those developments was whether the enhanced effect of congressional and state legislation on the private lives of American citizens would be accompanied by an enhanced role for the judiciary as overseer of that legislation. As the courts struggled with that question, pressure began to be placed on the unarticulated scrutiny levels decisions that were inherent in antebellum departmental discretion jurisprudence.

164. During the immediate aftermath of the Civil War, the Court invoked the departmental discretion principle in three controversial cases. In *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475 (1867), and *Georgia v. Stanton,* 73 U.S. (6 Wall.) 50 (1868), the Court used the departmental discretion principle to stop an injunction that would have prevented President Andrew Johnson and his Secretary of War, Edwin Stanton, from enforcing the Military Reconstruction Act of 1867, which abolished state governments in the Confederate States and replaced them with military districts under the control of the Union. The ground for the injunctions was the alleged unconstitutionality of the Act. The Chase Court unanimously held, in both cases, that the power of the President or an executive officer to enforce the laws made by Congress was a prerogative of executive discretion and that the courts could not review the power until the discretion was actually exercised. *Johnson,* 71 U.S. (4 Wall.) at 500; *Stanton,* 73 U.S. (6 Wall.) at 77.

In *Ex parte McCordel,* 74 U.S. (7 Wall.) 506 (1869), the same Court unanimously deferred to Congress when it curtailed the Court's appellate jurisdiction to hear habeas corpus petitions from prisoners who claimed to have been convicted under unconstitutional Reconstruction statutes. The *McCordel* Court argued that since the Constitution gave Congress the power to make "exceptions" to the Court's appellate jurisdiction, a congressional statute restricting the Court's jurisdiction over a particular class of cases was an exercise of legislative discretion and hence not subject to judicial review. *Id.* at 514.
B. The Departmental Discretion Principle and Judicial Review of Police Powers Legislation

This Section argues that the analytical work performed by the categories of antebellum departmental discretion jurisprudence, through which the Court had labeled certain issues as "legislative" or "executive" in character and hence not justiciable, became less effective after the Civil War as more state police power legislation appeared, and with it more constitutional challenges to that legislation. As lawyers and judges began to recognize that the Due Process Clause of the Fourteenth Amendment might embody vested rights and anti-class principles, tracing the boundaries between public power and private rights appeared to be a regular responsibility of the courts. Initially, the Supreme Court resisted the task of boundary tracing, instead drawing on departmental discretion jurisprudence for the proposition that the scope of legislative power to promote public health, safety, or morals was a legislative question and thus not justiciable. But as due process challenges to police power legislation became more frequent, the assumption that private rights yielded to public power any time a legislature characterized its actions as promoting health, safety, or morals became more difficult to sustain. Eventually the Court came to recognize that if the Due Process Clause imposed any restraints on legislatures at all, the judiciary needed to decide, in cases raising judicial questions, what those restraints were.

The result was that the categories of departmental discretion jurisprudence no longer served to define the scope of police power legislation. Judicial boundary tracing required something else: the categorization of statutes that fell on one side of the boundary line as legitimate exercises of the police power or on the other as impermissible intrusions on private rights. As courts settled into their role as boundary tracers, they began to employ constitutional doctrine in the fashion they had once employed propositions associated with the departmental discretion principle. Instead of equating due process with the permissible scope of legislative power as determined by the legislative department, courts came to equate due process with a line of decisions categorizing some statutes as valid exercises of the police power and others as invalid usurpations of private rights. Judicially fashioned due process doctrine became, like the categories of departmental discretion jurisprudence before, a surrogate for judicial scrutiny of types of legislation. This Section traces those developments.

1. The Impact of the Reconstruction Amendments

The Thirteenth, Fourteenth, and Fifteenth Amendments altered the structure of American constitutional government. By the 1880s it was apparent that even if the revolutionary potential of those Amendments to alter antebellum configurations of the relationship between the federal government and the states would not be

immediately realized, the Amendments would eventually modify two core principles of early-nineteenth-century constitutional republicanism.

The first principle—which was emphasized in "A" s and Dutton's adumbrations of the Supreme Court's role—was constitutional protection for the vested rights of individuals. The idea that a government could not take property from A and give it to B remained associated with the foundations of republican government in late-nineteenth-century constitutional jurisprudence. But the idea was refurbished to take into account the much broader distribution of the franchise in the mid-nineteenth century and the growing tendency of state governments to involve themselves in public-regarding activities, such as the regulation of transportation franchises and the development of public educational institutions. Moreover, with the reduction of restrictions on voting, the growth of national and local political parties, and the recruitment of newly arrived immigrants into party organizations, the specters of demagoguery and corruption in state legislatures took on a new shape. Republican theorists worried less about unscrupulous individuals undermining the vested rights of individuals through impassioned appeals to mobs than about legislation becoming an exercise in rewarding some social and economic classes of voters at the expense of other classes. The vested rights principle had evolved into the anti-class principle.

The second principle to be modified was the role of the judiciary in a republican constitutional order. As early as 1868, constitutional commentator and judge Thomas Cooley recognized that although state legislatures could reserve for themselves the right to change the terms of contracts they made with private parties notwithstanding the vested rights principle and the Contracts Clause, if those

166. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), a majority of the Court gave a limited reading of the Fourteenth Amendment's Privileges and Immunities Clause and declined to use the Amendment's Due Process Clause to invalidate state legislation that was advanced as a health measure but whose effect was to favor some slaughtering operations at the expense of others. In the Civil Rights Cases, 109 U.S. 3 (1883), a majority struck down the Civil Rights Act of 1875, an effort, grounded on the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, to prevent private citizens from denying blacks equal access to public accommodations. The majority opinions in both cases maintained that the balance between federal and state power in the Union would be severely disrupted if the courts read the Thirteenth or Fourteenth Amendments as a charter to the federal judiciary to protect individual citizens from virtually any form of discrimination by states or individuals. See The Slaughter-House Cases, 83 U.S. (16 Wall.) at 77–78; The Civil Rights Cases, 109 U.S. at 13.
167. COLUMBIA CENTINEL, supra note 29.
168. Dutton, supra note 33.
169. See STORY, supra note 26.
170. For a discussion of the emergence of the anti-class principle in postbellum constitutional jurisprudence and its eventual undergirding as one of the major constitutional doctrines of the late nineteenth and early twentieth centuries, see Charles W. McCurdy, "The Liberty of Contract" Regime in American Law, in THE STATE AND FREEDOM OF CONTRACT 161 (Harry N. Scheiber ed., 1998). For an example of judicial application of early-nineteenth-century conceptions of the vested rights principle to police power legislation after the Civil War, see White, Constitutional Journey, supra note 11, at 1516–22 for an analysis of the Slaughter-House Cases.
171. This was the joint message of Justice Story's concurring opinion in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 708 (1819), and the Court's decision in Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837), where a majority eventually concluded that Massachusetts, having previously granted one corporation franchise rights for a bridge across a river, could subsequently grant another corporation rights for a competing bridge. For discussion of the implications of those cases for the vested rights principle, see White, supra note
legislatures passed laws that had the effect of taking property from A and giving it to B, they were at risk of violating the Due Process Clause of the Fourteenth Amendment. The idea that state statutes might be subjected to judicial invalidation under the Due Process Clause if they infringed on vested rights, taken together with the anti-class principle, appeared to open a far more active agenda for judges exercising their constitutional review function. As state legislation grounded on the states' police powers to protect the health, safety, and morals of their citizens increased, judicial review of that legislation under the Fourteenth Amendment—at least to some judges who considered the implications of that Amendment's passage—seemed destined to increase as well. Justice Noah Swayne, in his dissenting opinion in the Slaughter-House Cases, said that the Thirteenth, Fourteenth and Fifteenth Amendments "may be said to rise to the dignity of a new Magna Charta" and "trench directly upon the power of the States." "Nowhere, than in this court," Justice Swayne felt, "ought the will of the nation, as [expressed in those Amendments], to be more liberally construed or more cordially executed."

The potential impact of the role Justice Swayne envisaged for the judiciary can be seen if one engages in a comparison of the sort of legislation typically enacted by state legislatures and Congress before and after the Civil War and the implications, for those who continued to believe in both the sanctity of vested rights and the departmental discretion principle, of enhanced judicial review of that legislation. Between the time of Marbury and Dred Scott, Congress passed a strikingly small amount of legislation on any subject, but the states passed a fair amount of legislation affecting private contractual rights and regulating commerce. ^176^ The Court did not invalidate a single congressional statute between Marbury and Dred Scott, that is, between 1803 and 1857. In that same time period the Court entertained a number of cases posing Contracts Clause and Commerce Clause challenges to state economic regulations. The Court's doctrinal posture in Contracts Clause cases, although rhetorically hostile to state interference with vested rights, tended to be solicitous of legislation that infringed on property rights in the promotion of economic competition or "progress." ^177^ In Commerce Clause cases, although the Court consistently affirmed the federal government's authority to control the terms under which commercial traffic flowed across state lines, it

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1, at 622–28, 668–73.
173. 83 U.S. (16 Wall.) 36 (1873).
174. Id. at 125 (Swayne, J., dissenting).
175. Id. at 129.
177. For a discussion of the Marshall Court's Contracts Clause cases between 1827 and 1835, see WHITE, supra note 1, at 648–63. The Court's approach culminated in the Taney Court's decision in Charles River Bridge v. Woodward, 36 U.S. (11 Pet.) 420 (1837). After Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843), the Court concluded that Contracts Clause cases involved a judicial inquiry into whether the contractual obligation being impaired was "substantial" and the legislative modifications of it were "reasonable."
allowed the states room to supervise forms of that traffic that Congress had not chosen to regulate.\footnote{178}

In short, before the Civil War, the Court did not have many opportunities to scrutinize acts of Congress and invalidated only a precious few. Additionally, as the scope of state police power legislation began to broaden in the three decades preceding the Civil War, the Court seemed to tolerate a fair amount of state involvement with contractual obligations and interstate commerce. In contrast, between 1857 and 1883 the Court invalidated three congressional statutes\footnote{179} and signaled that even though a majority of its Justices might not regard the Reconstruction Amendments as "a new Magna Charta"\footnote{180} that "ought . . . to be . . . liberally construed,"\footnote{181} the Amendments provided the Court with enhanced opportunities to scrutinize state legislation on constitutional grounds.\footnote{182}

The altered economic climate during the three decades after the Civil War was the backdrop against which a potentially new role for the judiciary might emerge. That climate featured a significant growth in the number and size of corporations and an increased involvement by corporate enterprises in interstate activity. The massive development of the railroad industry, dominated by comparatively few corporate entities whose lines spread across the entire continent, and the emergence

\footnote{178} The leading case was \textit{Cooley v. Board of Wardens}, 53 U.S. (12 How.) 299 (1852), where the Taney Court sustained a Pennsylvania "pilotage law" that required ships of a certain size stationed in the Port of Philadelphia to employ local pilots for the navigation of local waters in the area of the port. The \textit{Cooley} opinion maintained that interstate commerce took diverse forms, and Congress's power to regulate commerce was only exclusive when the form required a uniform rule for the whole nation ("selectively exclusive"). Pilotage, which often involved the knowledge of local waterways, was not such a form. \textit{Id.} at 319.

\footnote{179} In addition to invalidating the Missouri Compromise in \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1857) and the Civil Rights Act of 1875 in the \textit{Civil Rights Cases}, 109 U.S. 3 (1883), a majority of the Court invalidated an 1862 congressional statute making greenbacks the equivalent of legal tender in \textit{Hepburn v. Griswold}, 75 U.S. (8 Wall.) 603 (1870). The \textit{Hepburn} decision was reversed a year later in the companion cases \textit{Knox v. Lee and Parker v. Davis}, 79 U.S. (12 Wall.) 457 (1871). The sequence has come to be known as the \textit{Legal Tender Cases}.

\footnote{180} \textit{The Slaughter-House Cases}, 83 U.S. at 125 (Swayne, J., dissenting).

\footnote{181} \textit{Id.} at 129.

\footnote{182} The Louisiana statute at issue in the \textit{Slaughter-House Cases} gave a particular corporation, the Crescent City Stock Landing and Slaughterhouse Company, a monopoly over the slaughtering business in New Orleans. The statute was justified as a health measure, whose purpose was to ensure that all the butchers in New Orleans used the Crescent City facilities, which were located outside the center of the city. \textit{Id.} at 38. Assuming that the public health rationale for the legislation was not pretextual, the statute did not violate the Contracts Clause as it was then understood, and thus no constitutional attack on the statute was possible without recourse to the Fourteenth Amendment's Privileges and Immunities or Due Process Clauses. \textit{Id.} at 66. The Court's opinion in the cases assumed that those clauses presented a cognizable constitutional challenge, giving the Court power to review the legislation in question. That assumption suggested that the Court might take on that role in future cases challenging state legislation under the Fourteenth Amendment. In \textit{Davidson v. New Orleans}, a landowner challenged a municipal assessment of his property for the purpose of raising funds for swamp drainage. 96 U.S. 97, 97–99 (1878). Justice Samuel Miller, in the course of dismissing the claim, referred to a "strange misconception" of the scope of the Fourteenth Amendment's Due Process Clause, namely that it could be employed to "bring[] . . . to the test of the decision of this court" arguments directed at "the merits of [any state] legislation" affecting private property. \textit{Id.} at 104. Earlier in his opinion, however, Justice Miller conceded that "a statute which declares in terms . . . that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would . . . deprive A. of his property without due process of law, within the meaning of the constitutional provision." \textit{Id.} at 102.
of "trusts," holding companies that controlled the incorporation decisions and shares of stock of large industrial corporations, dominated the late-nineteenth-century American economy. Large-scale corporate enterprise was suddenly perceived as a potentially malign force, capable of corrupting legislatures, retarding competition, and oppressing industrial laborers. In the face of these developments, a recasting of the largely promotional attitude of state legislatures toward corporations that marked the 1840s and 1850s began.\textsuperscript{183}

2. Municipal Bond Cases

Two examples of that changed attitude became the subject of prominent lawsuits in the 1860s and 1870s. The first example was the repudiation by municipalities or states of bonds they had previously issued in order to finance subsidies to corporations—mainly railroads—whose business they sought to attract. Municipal bond suits began to find their way to the Supreme Court as early as 1864, and the Court was still deciding them as late as 1888.\textsuperscript{184} Although the Court's results in that time period alternated between upholding the claims of bondholders and permitting repudiation, its approach to the cases remained consistent. The central issue in the cases, the Court assumed, was whether a subsequent modification of the terms of bond obligations previously undertaken by a state or municipality amounted to an impairment of contract obligations within the meaning of the Contracts Clause, a judicially cognizable issue.\textsuperscript{185} On the surface, the late-nineteenth-century municipal bonds cases looked very much like antebellum Contracts Clause cases. But in one case, ultimately affirmed without opinion by an equally divided Court, Chief Justice Morrison Waite revealed that the departmental discretion principle had found its way into the Court's analysis. In considering whether a state-induced change in the remedies accorded to bondholders amounted to a repudiation of the state's obligations, and thus a violation of the Contracts Clause, Chief Justice Waite wrote that:

[T]he question becomes one of reasonableness, and of that the legislature is primarily the judge . . . . We ought never to overrule the decision of that department of government, unless a palpable error has been committed . . . . If a state of facts could exist which would justify the change in the remedy that was made we must


\textsuperscript{184} Charles Warren found that the Court decided nearly 200 cases testing the legality of repudiations of bond obligations by municipalities or states between 1874 and 1888. 2 CHARLES WARREN, \textit{THE SUPREME COURT IN UNITED STATES HISTORY} 678 (rev. ed., Fred B. Rothman & Co., 1987) (1926).

\textsuperscript{185} Over time, a Court majority fashioned a distinction between municipal or state acts that directly repudiated a previous commitment to honor bonds and acts that changed the remedies creditors could use to enforce the bonds' validity. The latter legislation did not violate the Contracts Clause. See, e.g., Antoni v. Greenhow, 107 U.S. 769, 774 (1883) (stating that "changes in the forms of action and modes of proceeding do not amount to an impairment of obligations of a contract, if an adequate and efficacious remedy is left").
presume it did exist, and that the law was passed on that account.\textsuperscript{186}

This language suggested that the justices were beginning to think of Contracts Clause cases less as exercises in determining whether contractual obligations had literally been impaired and more as judgments about the probity of a legislature’s modification of its prior contractual commitments. Once that reconceptualization occurred, the issue of whether the judiciary should “overrule” the decision of another department was sharply posed. Chief Justice Waite indicated that such overruling was generally inappropriate, and that the Court should search for “a state of facts . . . which would justify the change,”\textsuperscript{187} even if it had to employ some inventiveness in the search. That judicial technique was a product of fidelity to the departmental discretion principle.

3. Rate Regulation Cases

Departmental discretion issues also surfaced in the second major illustration of an altered attitude on the part of states and localities toward corporate enterprise after the Civil War: state legislation regulating the rates charged by companies involved with commercial transportation, particularly grain warehouses (known as “elevators”) and railroads. That legislation was challenged in the courts on a variety of constitutional grounds, including the Contracts Clause, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. Here the challenges were more novel, resembling the arguments advanced but not resolved in the Slaughter-House Cases, where Justice Miller’s opinion for the Court rested on a narrow reading of the Privileges and Immunities Clause.\textsuperscript{188} In an 1874 case, \textit{Bartemeyer v. Iowa},\textsuperscript{189} the Court, holding an Iowa statute prohibiting the sale of liquor was a constitutional exercise of the state’s police powers, intimated that the Due Process Clause would have been implicated had the statute been applied to liquor owned before it went into effect.\textsuperscript{190}

The cases in which states sought to regulate the rates of railroads and storage facilities were clearly in a different constitutional category from the municipal bonds cases because they did not involve legislative modifications of existing contractual obligations. They arose from direct legislative efforts to control the prices charged for goods and services by corporations in the business of commercial transportation. Although most of the challenges were made to legislation affecting railroad rates, the Court’s eventual lead opinion in a series of consolidated cases, \textit{Munn v. Illinois},\textsuperscript{191} addressed the constitutionality of an Illinois statute regulating grain elevators.\textsuperscript{192} The Court’s decision to focus on that statute rather than


\textsuperscript{187} Id. at 214.

\textsuperscript{188} See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80–81 (1873).

\textsuperscript{189} 85 U.S. 129 (1874).

\textsuperscript{190} Id. at 132–33.

\textsuperscript{191} 94 U.S. 113 (1877).

\textsuperscript{192} When the Court announced the \textit{Munn} decision, it also decided two companion cases, \textit{Chicago, Burlington & Quincy Railroad Co. v. Iowa}, 94 U.S. 155 (1877) and \textit{Peik v. Chicago & North-western Railway Co.}, 94 U.S. 164 (1877), both of which involved efforts by states to regulate
legislation directed at railroads, which the Court eventually came to treat as comparable, was probably strategic. Illinois sought to regulate grain elevators located within its borders, and although some of the product stored in them was eventually shipped across state lines, their connection to interstate commerce was less obvious than that of the railroads. Further, the grain warehousing industry, unlike the railroad industry, did not feature exclusive or limited state corporate franchises, which had formed the setting of many antebellum Contracts Clause cases.

Munn thus seemed designed to bring the issue of the constitutionality of police power regulations affecting private businesses to the surface. That issue, after the passage of the Fourteenth Amendment, was novel because the Court had not squarely faced the question of whether the vested rights principle, with its expanded anti-class implications, was now part of the doctrinal overlay of the Due Process Clause. Three possible responses suggested themselves, each having ramifications for the departmental discretion principle.

One response, which Justices Field and Swayne offered in the Slaughter-House Cases and Justice Field developed somewhat further in his dissenting opinion in Munn, treated private liberties and property rights after the passage of the Fourteenth Amendment against the backdrop of republican theory and the vested rights principle, so that the Due Process Clause of the Fourteenth Amendment became a kind of Magna Charta directed at state governments. Under this theory, private property was presumptively immune from state regulation, although the state could justify taking property for public uses as long as it provided adequate compensation. Over time, Justice Field’s version of this response emphasized the judicial formulation of bright-line divisions between the private and public sectors, so as to prevent corruption in the public sphere and overreaching by private special interests.

Justice Bradley intimated another response in a concurrence in Bartemeyer. He argued—an argument that Thomas Cooley had also made in his Constitutional Limitations treatise and Justice John Marshall Harlan would advance in his majority opinion in the 1887 case Mugler v. Kansas, where he concluded that a state could outlaw the manufacture of beer for the maker’s own use—that all private property was held subject to the police power, and so the terms “liberty” and “property” in the Fourteenth Amendment’s Due Process Clause needed to be understood as being qualified by the scope of the police powers of the states. Although Cooley had suggested that “due process” obviously included the requirement that “vested rights must not be disturbed,” any legislative measure legitimately within the scope of the police power did not, by definition, violate constitutionally protected rights.

railroad rates, treating that legislation as governed by its analysis in Munn.

193. See The Slaughter-House Cases, 83 U.S. (16 Wall.) at 95–96 (Field, J., dissenting); id. at 124–25 (Swayne, J., dissenting); Munn, 94 U.S. at 136–54 (Field, J., dissenting).

194. See McCurdy, supra note 183, for a detailed explanation of Field’s approach.

195. COOLEY, supra note 172, at 356–58, 572–73.


198. COOLEY, supra note 172, at 357–58.
It is not clear to what extent this response assumed that the scope of state police powers would be self-evident is not clear. Justice Field’s response anticipated considerable judicial activity in marking the boundary between the private and public sectors. Chief Justice Waite, in contrast, appeared to believe that a legislature’s mere recital of a police powers rationale for legislation could suffice to justify the legislation as legitimate; at least he suggested as much in passages of his opinion for the Court in *Munn*. In one passage he said that “[e]very statute is presumed to be constitutional,” and “[t]he courts ought not to declare one to be unconstitutional, unless it is clearly so.”199 In another passage he said that “we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.”200 In yet another passage he stated that “[o]f the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.”201 Chief Justice Waite concluded his opinion by noting that the power to determine the reasonableness of rates charged by regulated businesses was a legislative power, and although that power might be abused, “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”202

Taken at face value, these passages of Chief Justice Waite’s *Munn* opinion suggest that the departmental discretion principle remained robust even after the passage of the Reconstruction Amendments. He stated a presumption in favor of the legislation’s constitutionality, suggested that the legislature, not the courts, was the appropriate department to determine the scope of its own powers, formulated a very deferential standard—if a court could subsequently supply some hypothetical basis, the court thus would be assuming it existed at the time of the legislation—for determining whether a statute was grounded on any factual basis, and declared that if legislative judgments about the reasonableness of regulation were subject to abuse, the remedy for disappointed persons lay in the voting booths rather than in the courts. But a closer look at the *Munn* opinion indicates that it can also be seen as representing a third response to the question of how the Due Process Clause should be harmonized with state police powers legislation.

Chief Justice Waite began his analysis in *Munn* by declaring that “statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law” under some but not all circumstances.203 Accordingly, when a legislature sought to regulate the rates charged by a private corporation, courts needed to “inquire as to the principles upon which [the regulation] rests, in order that we may determine what is within and what without its operative effect.”204 He then suggested that what was “within” and “without” the permissible scope of a legislative regulation affecting private property, for the purposes of the Due Process Clause, turned on the way in which the property was used.205 He invoked a maxim he identified with a treatise written by Lord Chief Justice Hale, stating that when property became “affected with a

199. *Munn*, 94 U.S. at 123.
200. *Id.* at 132.
201. *Id.* at 132–33.
202. *Id.* at 134.
204. *Id.* at 125.
205. *Id.*
public interest” it ceased to be private and could be “controlled by the public for the common good.”206 This maxim, he argued, had become part of the common law and was embodied in the principle that private property “became clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”207 The “affected with a public interest” doctrine helped define what a property right meant for purposes of the Due Process Clauses.

Having identified the “affected with a public interest” doctrine, Chief Justice Waite then listed examples of private property that had been “used in a manner to make it of public consequence” under English and American common law.208 Among the examples he cited were ferries, wharves, warehouses, inns, turnpikes, bridges, mills, and common carriers.209 Each of these businesses were “devoted to a public use” and thus clothed with a public interest and subject to regulation.210 Having established that the principle for determining whether a legislative regulation affecting private property violated the Due Process Clauses was whether the property in question had become affected with a public interest, Chief Justice Waite then devoted much of the rest of his Munn opinion to demonstrating that grain elevators were clothed in a public interest.211 Because of the grain elevators’ great significance to the shipment of grain from the midwestern states that produced it to the markets on the east and west coasts, because nearly all the nation’s midwestern grain passed through the port and railroad hub of Chicago and was stored in elevator warehouses while awaiting shipment, and because the Chicago grain elevator franchises charged uniform, comparatively high storage rates, Chief Justice Waite found the grain elevators were clothed in a public interest.212

For Chief Justice Waite, this ended the analysis. Either a business was “private” or “public” in the sense of being affected with a public interest. If it were private, legislatures could not regulate its prices without running afoul of due process; if it were public, any legislative regulation of its rates passed constitutional muster because the judiciary could not inquire into the reasonableness of rates set by legislatures. A regulation was either “within” or “without” the police power. If it were within the police power, it satisfied due process standards. In some respects, Chief Justice Waite’s approach was reminiscent of earlier departmental discretion cases; it was as if he were treating the legislative regulation of property affected with a public interest as a question that had been “submitted to the legislature” and was thus not cognizable in court.

But this was only true if the category of businesses “affected with a public interest” was as easily discernible as the categories of questions “submitted to the executive” or “in their nature political” had once seemed to be. Those categories proved to be difficult in operation, and Chief Justice Waite’s category would prove to be difficult as well. Chief Justice Waite himself wrote to a friend shortly after Munn was handed down that “[t]he great difficulty in the future” would be “to establish the boundary between that which is private, and that in which the public

206. Id. at 126 (citation omitted).
207. Id.
208. Id. at 126.
210. Id. at 130.
211. Id. at 130–32.
212. Id.
has an interest."\textsuperscript{213} He intimated that \textit{Munn} had been the lead opinion in the rate regulation cases decided in 1877 because "[t]he Elevators furnished an extreme case and there was no difficulty in determining on which side of the line they properly belonged."\textsuperscript{214} But other cases might prove more difficult if the "affected with a public interest" principle were to do any analytical work in due process challenges to state legislation. Justice Field, dissenting in \textit{Munn}, claimed that the principle was virtually useless since it could be made to apply to every business "engaging the attention and labor of any considerable portion of the community."\textsuperscript{215} If Chief Justice Waite understood the line between private and public property to be a meaningful boundary, the judiciary would have to trace it out over a series of cases. Thus, by declaring that the scope of legislative power to regulate private property was a \textit{legislative} question, Chief Justice Waite laid the groundwork for its becoming a \textit{judicial} question.

4. \textit{The Emergence of Judicial Boundary Tracing}

Although Chief Justice Waite surely did not think of his opinion in \textit{Munn} as representing a turning point in departmental discretion jurisprudence, his opinion arguably was. After \textit{Munn} it was clear that the Court would invoke a common law formula to resolve the question of which police power regulations conformed to due process standards and which did not. Unless Chief Justice Waite's "affected with a public interest" category was limitless, it invited further judicial tracing of the boundary between the police power and private rights. This meant that the discretion of legislatures to regulate property in the public interest was subject to judicial oversight any time a regulation arguably trespassed on private prerogatives.

Thus, less than two decades after \textit{Munn}, it had become clear that the Court was preoccupied with due process challenges to state legislation and that only two approaches to the intersection of police powers legislation and the Due Process Clause remained salient in constitutional jurisprudence. One approach, employed by Justice Field, was an effort to develop bright-line boundaries between public power and private rights with an emphasis on the presumption—something of an echo of the vested rights principle—that persons could engage in lawful callings free from state interference. The other approach was illustrated by two cases in the late 1880s sustaining police power regulations against due process challenges. In both of those cases, \textit{Mugler v. Kansas}\textsuperscript{216} and \textit{Powell v. Pennsylvania},\textsuperscript{217} the Court treated legislation prohibiting the manufacture of beer for private use and banning the sale of oleomargarine altogether as being well within the police powers of the state. The Court said in \textit{Mugler}:

\begin{quote} [I]f, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use... would tend to cripple... the effort to guard the community against the evils\end{quote}

\textsuperscript{213} Letter from Waite to James Sheldon (March 30, 1877), \textit{quoted in Magrath, supra} note 186, at 187.
\textsuperscript{214} Id.
\textsuperscript{215} \textit{Munn}, 94 U.S. at 141 (Field, J., dissenting).
\textsuperscript{216} 123 U.S. 623 (1887).
\textsuperscript{217} 127 U.S. 678 (1888).
attending the excessive use of such liquors, it is not for the courts . . . to disregard the legislative determination of that question.\textsuperscript{218}

In \textit{Powell}, the Court said that whether the danger from even healthful oleomargarine on the market required "the entire suppression of the business" was a "[q]uestion of fact and of public policy which belong[ed] to the legislative department to determine."\textsuperscript{219}

The approaches, rhetorically, were not all that far apart. In \textit{Mugler}, the Court concluded that due process challenges to police power legislation might succeed if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects."\textsuperscript{220}

In \textit{Powell}, the Court conceded that "the privilege of pursuing an ordinary calling" was part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.\textsuperscript{221} However, in \textit{Mugler}, the Court did not seem troubled by the fact that some breweries shut down by the statute had been in existence before its passage.\textsuperscript{222} Similarly, in \textit{Powell}, the Court ignored evidence from an oleomargarine manufacturer that its product was as nutritious as butter, and the legislation was therefore not a public health measure but was in effect a subsidy to the dairy industry.\textsuperscript{223} Justice Field expressed concern about both of those points,\textsuperscript{224} which seemed to signal the majority's disinclination to consider whether the legislatures' police power rationales might have been pretextual.

By the death of Chief Justice Waite in 1888, it became clear that although the Court continued to use the language of departmental discretion jurisprudence in cases in which it considered the constitutional validity of state legislation, the boundaries of its role vis-à-vis legislative departments had subtly shifted. Little by little, the inquiries raised by provisions of the Reconstruction Amendments did their work. Instead of questions involving the exercise of core legislative powers, such as those protecting public health or safety, being seen primarily as legislative in their nature, some—when they arguably had the effect of taking property from \textit{A} and giving it to \textit{B} or had the effect of interfering with the lawful exercise of one's calling—had come to be seen as potentially judicial. Even when courts and commentators instinctively retained the conception, left over from departmental discretion jurisprudence, that the scope of legislative police powers defined the scope of the Due Process Clauses, the intersection of police powers with the Fourteenth Amendment invited, as Chief Justice Waite recognized, judicial boundary tracing.

The more the late-nineteenth-century Court became engaged in boundary tracing in police power-due process cases, the more an altered role for the judiciary became entrenched. Justice Brewer described that role in an 1893 address, although

\begin{quote}
218. \textit{Mugler}, 123 U.S. at 662.
220. \textit{Mugler}, 123 U.S. at 661.
222. See \textit{Mugler}, 123 U.S. 657.
223. See \textit{Powell}, 127 U.S. at 689.
\end{quote}
his purpose was to reassure his audience about the limited range of the judicial department. Justice Brewer said:

The courts hold neither purse nor sword; they cannot corrupt nor arbitrarily control. They make no laws, they establish no policy, they never enter into the domain of popular action. They do not govern. Their functions . . . are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law.\footnote{225}

Although Justice Brewer’s comments were designed to buttress conventional definitions of the judiciary’s functions in orthodox departmental discretion jurisprudence, they revealed that the Reconstruction Amendments were perceived as having altered those functions. His language describing the courts as “never enter[ing] into the domain of popular action,” as “mak[ing] no laws,” and “establish[ing] no policy” sought to reassert the existence of clear boundaries between the judiciary and other departments.\footnote{226} But his statements were accompanied by language sketching an image of the courts as overseers of potential trespasses by the elected departments into a domain of private “right and justice” as established by foundational principles of constitutional and natural law.\footnote{227} The conceptual map pictured in Justice Brewer’s comments retained a sphere of “popular action” in which laws and policies were fashioned and into which the judiciary did not enter. Nevertheless, his comments also pictured the courts as standing on a boundary line between that sphere and the sphere of private rights, vigilantly safeguarding those private rights from trespasses by public actors.

5. \textit{James Bradley Thayer and the “Clear Mistake” Rule: The Departmental Discretion Principle and Deferential Judicial Scrutiny}

By the time Justice Brewer made his comments, others recognized the potential of the Reconstruction Amendments—when interpreted in the altered social and economic context of late-nineteenth-century America—to greatly increase the scope of judicial interpretive power and thereby dissolve the lines between judicial questions and those confined to the discretion of the other departments. In two essays written in 1893\footnote{228} and 1901,\footnote{229} James Bradley Thayer contrasted the contexts in which Congress passed the Legal Tender Act in 1863, and that of the early-twentieth century.

Although the Legal Tender Act “intimately and more seriously touch[ed] the interests of every member of [the] population” when passed, Thayer noted that “it

\footnote{225} David P. Brewer, Justice of the United States Supreme Court, The Nation’s Safeguard (Jan. 17, 1893), in 13 PROC. N. Y. ST. B. A. 37, 46 (1893).
\footnote{226} Id.
\footnote{227} Id.
\footnote{228} James B. Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, 7 HARV. L. REV. 129 (1893) [hereinafter Thayer, \textit{Origin and Scope}].
was the legislature that determined [the] question [of the constitutionality of making paper money legal tender], . . . not merely primarily, but once for all." Thayer, Address, supra note 229, at 65.

230 Thayer, Origin and Scope, supra note 228, at 136.

231 Id.

232 Id. at 136, 144.

233 Id. at 136–37.

234 Thayer, Address, supra note 229, at 65.

235 Id. at 64.

236 Id. at 65.

237 Id. at 61.

238 Id. at 63 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892)).

239 Id. at 66–67.

240 Thayer, Address, supra note 229, at 68.
"constitutional mistake," the judiciary would be "keeping its hands off [legislative acts] wherever it is possible to do it."241 Underscoring that approach to judicial review, Thayer asserted that the "remarkable jurisdiction" of American courts to oversee the actions of other governmental branches "has had some of its chief illustrations and its greatest triumphs . . . while the courts were refusing to exert it."242

Thus, as late as 1901, an influential constitutional commentator continued to maintain that so long as the courts adhered firmly to the departmental discretion principle they could avoid "a vast . . . increase of judicial interference with legislation."243 Clearly, Thayer understood departmental discretion as something different from the idea that certain questions were "in their nature political" or of the class "submitted to the executive." He did not describe a category of departmental activity that gave rise to nonjusticiable issues when he urged the courts to recognize that the legislative or executive branches were "charged, primarily with the duty of judging of the constitutionality of its work" and thus "entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice."244 Instead, he described a hands off standard for judicial review of the other branches' acts that were challenged on legal or constitutional grounds. In short, he sought to enlist the departmental discretion principle in arguments for deferential judicial scrutiny of the other branches' activity.

Modern commentators tend to see Thayer's "clear mistake" rule of administration as an early recognition of the countermajoritarian constraints on American judges in a democratic theory guided society.245 However, his call for a hands off judicial approach to the decisions of the other branches was not connected to democratic theory246 and bore only an indirect relationship to the central constitutional issues in the years between Munn and the close of the nineteenth century. Thayer designed his "clear mistake" rule only for courts reviewing a coordinate branch of government—federal courts reviewing acts of Congress or the Executive, or state courts reviewing state officials.247 In the major constitutional cases of the last quarter of the nineteenth century, the Supreme Court limited its review to state police power legislation under the Fourteenth Amendment. Thus, Thayer's rule of administration did not apply in any of the cases in which the Court struggled, in the years after Munn, to determine the proper boundary between the state police power and private rights.

Nonetheless, Thayer's effort to convert the departmental discretion principle into a standard of deferential review bore an indirect relationship to the guardian role for the federal judiciary that emerged with the Reconstruction Amendments. Among the "[v]ery serious things" Thayer had noticed happening in late-nineteenth-

241. Id. at 69.
242. Id.
243. Id. at 65.
244. Id. at 68.
245. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 40 (1962) (discussing the "clear mistake" rule as an accommodative principle in a representative democracy).
246. For more detail on the comparison between Thayer's "clear mistake" rule and theories of democratic constitutionalism, see White, Constitutional Journey, supra note 11, at 1529–31.
247. The judiciary's "duty . . . of keeping its hands off," Thayer noted, was confined to cases in which it was "dealing with the acts of co-ordinate legislatures." Thayer, Address, supra note 229, at 69.
century constitutional jurisprudence were “more and more prohibitions and restraints” imposed on state legislatures by new constitutions in the states. These new constitutions provided a “harvest” for state courts that “promptly and easily proceed[ed] to set aside acts of the legislatures.” This encouraged legislators to “shed all consideration of constitutional restraints,” thereby “turning that subject over to the courts.” All of this made “[t]he people . . . careless as to whom they send to the legislature,” resulting in “unfit persons [who] pass foolish and bad laws” and a tendency among citizens to look to the Judiciary “to protect them against their more immediate representatives.” Thayer deplored all of those trends. Because he identified their origin with “the portentous and ever increasing flood of litigation to which the fourteenth amendment has given rise,” his readers might well have concluded that if the Supreme Court set an example by adopting a hands off posture toward state as well as federal legislation the Court reviewed on constitutional grounds, it might help curtail the “vast and growing increase of judicial interference with legislation.”

Thayer’s “clear mistake” rule of judicial administration can be seen as straddling the two quite different universes of constitutional jurisprudence that briefly co-existed at the close of the nineteenth century. The pre-Civil War departmental discretion cases reflected the traditional universe and its salient categories centered on justiciability and the lines between judicial, legislative, and executive questions. Thayer invoked that universe when he referred to the courts’ respect for “co-equal and independent departments” and their “triumphs” in “refusing to exert” their review powers. The other universe was the emerging late-nineteenth-century world of due process challenges to police power legislation, in which courts stood poised to police the boundary between public power and private rights. In this universe, Thayer’s “clear mistake” rule served as a surrogate for deferential judicial scrutiny.

For Thayer, the universes overlapped because he assumed that every legislative act that raised legal or constitutional issues represented an implicit judgment on those issues. If the Court viewed an act under the traditional universe, its passage signified a legislative judgment about its legal and constitutional validity. Under established principles of departmental discretion, such as those followed by Chief Justice Waite in his opinion for the Court in Munn, that ended the matter, even after the Fourteenth Amendment. Legislatures were the appropriate judges of the scope of their police powers. In the terms of the modern universe of constitutional jurisprudence, Thayer recognized, the Fourteenth Amendment and comparable state provisions might establish limits on legislative activity. If those limits anticipated some judicial oversight of legislatures, then the courts should use their oversight sparingly. For the most part, courts should keep their hands off in respect for the competence of legislatures as constitutional interpreters.

248. Id. at 64.
249. Id.
250. Id. at 64–65.
251. Id. at 65.
252. Id. at 64–65.
253. Thayer, Address, supra note 229, at 63, 69.
Thus, Thayer designed his rule to retain the departmental discretion principle, whether in its original form or as a surrogate for limited judicial scrutiny. However, in the first two decades of the twentieth century, the Court did not direct its energy at reviving traditional departmental discretion jurisprudence or at implementing Thayer’s “clear mistake” rule. Instead, the Court directed its energy at fashioning doctrinal formulas that served as guides for boundary tracing, which seemed inevitable when considered in light of the new post-Reconstruction role for the judiciary as the tracer of the boundary between public power and private rights. When one examines those formulas against the background of departmental discretion jurisprudence, the formulas can be seen as efforts to transfer the emphasis from issues of justiciability to issues of constitutional doctrine in cases involving judicial oversight of the actions of the other branches. When one looks at the functions of doctrine in a scattering of early-twentieth-century boundary tracing cases, it turns out that one function was to serve as a surrogate for judicial scrutiny of federal or state legislation.

C. The End of the Traditional Regime

As the United States entered World War I in 1917, a survey of the landscape of American constitutional law would have noted some striking changes since the Court began to engage in boundary tracing in the police power-due process cases of the 1870s. That boundary tracing process had continued and became more refined. Chief Justice Taft described the process in 1923 as a “laborious[]” judicial effort to mark “[t]he boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments” featuring the “pricking out a line in successive cases.”255 Although the police power-due process cases were a staple of the early-twentieth-century Court’s docket, they were not the only exercises in judicial boundary tracing. Boundary tracing had become the Court’s dominant methodology in cases involving the actions of federal administrative agencies and cases testing the scope of the federal government’s commerce powers.

The massive growth of industrial corporate power in the last quarter of the nineteenth century ultimately prompted Congress to intervene on behalf of the principle of competitive freedom in the marketplace. Congress chose two forms of intervention: the passage of statutes seeking to prevent “combinations of capital” that tended to lessen competition and the creation of federal administrative agencies, to which Congress delegated its regulatory powers to oversee corporations engaging in interstate commerce. The federal government’s commerce power, treated as the equivalent of state police powers, formed the constitutional basis for both forms.

The Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890 constituted the first examples of congressional intervention in the economy.256 The former statute created a federal agency, the Interstate Commerce Commission (ICC), charged with regulating carriers in interstate commerce.257 The latter statute

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257. Interstate Commerce Act, § 11.
declared "every contract, combination . . . or conspiracy in, restraint of trade," and any attempt, combination, or conspiracy to monopolize a market in interstate commerce, to be illegal.\textsuperscript{258} Both statutes provided for what appeared to be limited judicial review.\textsuperscript{259} Congress gave the ICC power to set aside carrier rates that were not "reasonable and just" and required the courts to treat findings of fact as conclusive and binding.\textsuperscript{260} However, the Sherman Act's categorical language gave courts little room to exempt interstate combinations of capital from its provisions.\textsuperscript{261}

Nonetheless, the idea that the federal government's power to regulate interstate commerce might be employed to permit governmental incursions on private rights that would be impermissible under a police power due process analysis soon found its way into judicial decisions involving the Interstate Commerce Act and the Sherman Act. In 1895, the Court concluded that the Sherman Act did not apply to the activities of the American Sugar Refining Company, a corporation that after 1892 controlled 98% of the market for domestic sugar manufacturing.\textsuperscript{262} The Court held that the company was primarily engaged in producing sugar rather than selling it, and thus its business affected interstate commerce "only incidentally and indirectly."\textsuperscript{263} Then in 1897, the Court ruled that although the ICC had the power to set aside unreasonable carrier rates, Congress did not explicitly give the power to make rates, and thus the ICC's findings could be reviewed de novo and reversed by courts.\textsuperscript{264} Eventually the Court concluded that comparable judicial oversight was part of the Sherman Act as well. In cases decided in the first two decades of the twentieth century, the Court concluded that the phrase "every combination in restraint of trade" in the Act could be limited by the common law doctrine of "unreasonable" restraints, and it fashioned a "rule of reason" that exempted some monopolistic practices from the Act's coverage.\textsuperscript{265}

These cases evidence the Court's solicitude for large-scale industrial enterprise in the late nineteenth and early twentieth centuries. However, if one considers them as examples of boundary tracing, analogous to the police power due process cases, they appear to be efforts to use judicially fashioned common law and constitutional doctrines—in these instances doctrines associated with the Commerce Clause—to achieve the same separation of impermissible invasions on private rights from permissible uses of public power that the Court sought in state police power cases.

Once Congress signaled its readiness to use its powers to regulate interstate commerce as a justification for limiting the freedom of individuals to pursue their callings, the Court confronted options similar to those it faced when state police

\textsuperscript{258} Sherman Antitrust Act, §§ 1, 2.
\textsuperscript{259} Interstate Commerce Act, § 16; Sherman Antitrust Act, § 4.
\textsuperscript{260} Interstate Commerce Act, § 11.
\textsuperscript{261} Sherman Antitrust Act, § 1.
\textsuperscript{262} United States v. E.C. Knight Co., 156 U.S. 1, 9, 12 (1895).
\textsuperscript{263} Id. at 12.
\textsuperscript{265} For the evolution of the Court's rule of reason approach to Sherman Act cases, compare United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), which held that every combination restraining trade was illegal under the Sherman Act regardless of whether it would be reasonable under common law, with Standard Oil Co. v. United States, 221 U.S. 1 (1911), which held that courts must use the standard of reason applied at common law to determine whether a combination in restraint of trade is illegal under the Sherman Act, and United States v. American Tobacco Co., 221 U.S. 106 (1911), which affirmed the holding in Standard Oil.
power legislation was first challenged under the Fourteenth Amendment’s Due Process Clause. In the late-nineteenth-century police power cases, the Court recognized that it could do one of two things: it could treat a legislature’s effort to exercise police powers as a definitive judgment on the constitutionality of that exercise and let the legislature’s professed definitions of the scope of their police powers define the content of due process, or the Court could get into the business of tracing boundaries. In the Interstate Commerce Act and Sherman Act cases, the Court faced a comparable choice. Either it could treat the existence of the federal government’s power over interstate commerce as a sufficient justification for regulating the rates of every carrier and the practices of every “combination of capital” that affected that commerce, or it could decide where federal control over interstate commerce ended and other regimes—most notably that in which individuals could pursue their economic affairs free from governmental regulation—began.

After the same initial hesitation that marked its approach to the police power-due process cases between the 1890s and World War I, the Court made a similar decision to scrutinize rather than merely accept federal assertions of regulatory power under the Commerce Clause. The Court concluded that “commerce” had a limited definition; thus, the federal government’s commerce power had a limited scope. The Court eventually decided the Sherman Act’s seemingly categorical language needed to be understood in light of preexisting common law doctrines confining that language. As a result, the Court got itself into the business of reviewing the findings of fact, as well as the policies, of federal administrative agencies.

In the process, the Court created a web of doctrine, based on its interpretations of the Sherman Act and Interstate Commerce Act cases, which paralleled its interpretations of the scope of state police powers. When the Court began reviewing the findings of fact and the policies of administrative agencies, the traditional universe of nineteenth century jurisprudence, with its comparatively robust principle of departmental discretion, still existed. In this context, it is possible to see the aggregated interpretations of the Commerce Clause and Due Process Clauses which the Court made in the late nineteenth and early twentieth centuries, as the functional equivalent of scrutiny levels decisions. The Court’s activity suggested that it no longer regarded the scope of the government’s authority to make laws that arguably invaded the legal or constitutional rights of individuals as capable of being defined by the departmental discretion principle and its concept of justiciability. Instead, the scope needed to be traced out in successive cases by the Court itself.

As justiciability receded as an analytical device in cases challenging the actions of the other branches on legal or constitutional grounds, what remained was simply the Court’s tracing of the boundary between permissible and impermissible governmental action in due process cases and Commerce Clause cases. As the Court traced the boundary in successive cases, it relied upon doctrinal distinctions and recognized that those distinctions—“direct” versus “indirect” effects of an activity on interstate commerce, “reasonable” versus “unreasonable” restraints of trade or carrier rates, “private” or “affected with a public interest” businesses—served as signals for when the Court aggressively scrutinized the actions of the other branches and when it presumed them to be constitutional.

Once American constitutional jurisprudence reached this point in its history, the Court’s own doctrinal exegesis controlled the exercise of judicial review rather than
the principle that "co-equal" departments decided constitutional questions within their own spheres. A new regime, in which the doctrinal techniques accompanying judicial review determined the other branches’ scope of discretion, replaced the traditional regime in which judicial review coexisted with the departmental discretion principle. As the new regime took shape, questions arose with regard to the judiciary’s jurisprudential authority to make that determination. That authority rested on the foundational assumptions of republican political theory, but those assumptions themselves came under scrutiny by the early-twentieth century.

III. MODERN DEMOCRATIC CONSTITUTIONAL THEORY AND THE COLLAPSE OF DOCTRINAL FORMULAS IN CONSTITUTIONAL INTERPRETATION

This Section argues that, in the early decades of the twentieth century, the doctrinal formulas that aided the Court in tracing the boundary between permissible and impermissible exercises of legislative power were undermined by new conceptions of the role of judges as constitutional interpreters. Instead of judicial glosses on constitutional provisions being thought of as efforts to adapt the foundational principles embodied in the Constitution to new controversies, those glosses came to be thought of as willful efforts to change the meaning of the Constitution in response to the altered social and economic conditions of modernity. As this view of constitutional interpretation gained momentum, the Court’s boundary tracing decisions were seen as exercises in public policy with ideological implications. Meanwhile, the Court found it increasingly difficult to apply the doctrinal formulas it employed in boundary tracing across a range of cases. Eventually the Court abandoned judicial glossing of constitutional provisions as a technique for marking the spheres of influence of the judiciary and other departments. In this setting, judicial scrutiny levels first made their appearance.

A. The Emergence of Democratic Constitutional Theory

We have seen that the robust conception of departmental discretion that existed in traditional American constitutional jurisprudence was based on two axioms of republican constitutionalism: that the Constitution existed to secure private rights against their usurpation by government and that the judicial branch of government declared, rather than made, law. Republicans assumed the judiciary was well suited to protect individual rights against governmental interference because, as Justice Brewer had stated in his 1893 address, it had “neither purse nor sword.”266 Having no access to the spoils of legislative office, judges were less tempted to equate the public interest with their private interests and were thus less susceptible to corruption. Having no power to make laws or to enforce them, judges were not capable of assuming the role of arbitrary tyrant. Therefore, judges served as a check on the partisanship, licentiousness, corruption, or tyranny of the other branches.

In a speech in which Justice Brewer reminded his audience that judges never entered the domain of policy and did not make laws, his invocation of republican axioms demonstrated that republican constitutional theory still influenced

266. Brewer, supra note 225, at 46.
conceptions of the judiciary a hundred years after the framing of the Constitution. But less than two decades after Justice Brewer's remarks, an altered attitude toward the foundational assumptions of republican theory began to gain influence among some members of American academia. Republicanism, in their view, was not fully compatible with modernity. Those academics defined modernity as the conflux of advanced industrial capitalism, broadened political participation, fluid rather than fixed gradations of social status, and secularized theories of human knowledge that rested on the contributions of science rather than the dogmas of religion. Humans, armed with scientific knowledge and advanced technological capacity, were capable of transforming their environment. To be a "modern," at the bottom, was to be one who recognized the causal power of human agency in the universe.

1. Modernity, Republican Constitutional Theory, and Causal Agency

Republicanism, from this perspective, was not a "modern" political theory. It described humans as endemically partisan and self-interested, inevitably prone to abuse power and fall susceptible to corruption or tyranny. Republicanism attributed causal agency to a host of factors—nature, religion, the cycles of history, and relatively fixed status gradations—over which humans had little control. It was suspicious of democratic forms of government, believing that they encouraged mob passions and demagoguery, and of government itself. In contrast, modernist American political theorists were enthusiastic about the potential of humans to better themselves and the potential of government to help in that process. In the place of a cyclical theory of history, modernists advanced historicist, progressive theories. History was the progression of human-induced qualitative change; the future was not simply part of a cycle, but an improvement on the past.

2. Toward Democratic Constitutional Theory

The result was that American political culture, by the early decades of the twentieth century, was far more receptive to the idea that government programs and policies could better the condition of American citizens. Alongside Justice Brewer's conception of government activity as potentially trespassing on private rights emerged a conception of government activity as enhancing the rights of members of the public in a democratic society. Democratic constitutionalism, as it evolved during the first three decades of the twentieth century, emphasized governmental promotion of two sets of rights in particular. One set included rights associated with the opportunity for all citizens, whatever their backgrounds or beliefs, to fully participate in public affairs—rights such as freedom of speech, freedom of religion,

267. Id.
270. For evidence of this altered conception of history among historians in the early-twentieth century, see ROSS, supra note 268, at 312–19.
271. See Brewer, supra note 225, at 46.
and unrestricted access to the public deliberations of elected officials as they made laws and formulated policy. The other set included rights associated with improving the condition of workers in the labor force, a right to a minimum level of wages and a maximum number of working hours. By 1941, President Franklin Roosevelt was to encapsulate those sets of rights and add another based on the conception of a constitutional democracy as the antithesis of totalitarian states on the right or the left. In a message to Congress announcing the “Lend-Lease” program, under which armaments would be provided to Britain and her allies in their war against the Axis Powers, President Roosevelt said that Americans were entitled to freedom of speech, freedom of religion, freedom from want, and freedom from fear.

As the United States was drawn into a world war and experienced an economic depression in the first three decades of the twentieth century, policy-makers increasingly responded to the dislocations caused by those events by expanding the presence of government in American life. States passed legislation regulating economic activity and redistributing economic benefits. Likewise, Congress passed legislation creating jobs in the public sector and delegating power to federal regulatory agencies. Banking, securities, and electronic communications were among the industries subjected to federal regulation. Eventually, after the Democratic Party under Franklin Roosevelt captured the Presidency in 1932, Congress introduced a code of regulatory practices for most American industries. Those developments suggested that a sea change had taken place in the attitudes of Americans toward government, especially the federal government. Whereas traditional republican theory saw the Union as a minimalist entity, primarily designed to guard the United States against its enemies and to prevent the parochial interests of states from fostering anarchy or chaos, democratic theory anticipated a positive role for the federal government as a promoter of the freedoms to which citizens in a democracy were entitled.

3. **Democratic Theory and Constitutional Adaptivity**

As a symbiotic relationship between modernity and democratic theory developed in early-twentieth-century America, the Supreme Court struggled to adapt to the expanded role of government and the enhanced status of new sets of democratic constitutional rights. The central element in that struggle was a tension between the Court’s dominant early-twentieth-century approach to constitutional interpretation and new conceptions that emerged in the wake of altered theories of causal agency. The Court predicated its orthodox approach on an assumption, which the Justices shared since the founding period, about the way the Constitution was to be interpreted over time. As Marshall said in *McCulloch v. Maryland*, the Constitution was designed “to be adapted to the various crises of human affairs.”

Marshall and his contemporaries understood the term “adapted” in that statement to have a particular meaning. As new controversies surfaced that called for the application of existing constitutional provisions, those provisions were “adapted”

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272. *Id.*


to the controversies—they were applied so as to simultaneously expand and preserve their meaning. Applying provisions to resolve new disputes demonstrated that the Constitution was capable of enduring over time; its provisions were capacious enough to encompass controversies that even their original drafters had not anticipated. But when the Court used a constitutional provision to resolve a novel controversy, it did not change its fundamental meaning but reaffirmed it. The Court’s philosophy was that each of the Constitution’s provisions embodied foundational principles of republican theory, so that by finding a provision capable of resolving a new dispute, the Court affirmed the provision’s continuing authority.\(^{275}\)

Thus, for Marshall and his contemporaries, adapting the Constitution to new crises was not the equivalent of changing its meaning. When Justice Brewer spoke of judges preventing “popular action” from “trespass[ing] upon right and justice as it exists in written constitutions and natural law,” he anticipated that judges could discern what “right and justice” meant, and that those principles would not fundamentally change.\(^{276}\) That theory of constitutional adaptivity went hand-in-hand with the theory that judging is the discerning and applying of pre-existing legal principles rather than the fashioning of new ones. Fashioning new ones and changing the meaning of the Constitution would be making law, something judges, Marshall and Brewer believed, did not do. A republican constitution was designed to prevent judges from making law by establishing written principles designed to be adapted to new crises over time.

Thus, republican constitutionalism’s assumption about causal agency reinforced assumptions about the capacity of legal principles to be adapted to new controversies over time. Since law, as embodied in the foundational principles of a written constitution, was itself a causal agent in the universe—a body of timeless universal principles that served to restrain the passions of humans and provide cement for social organization—its ability to endure over time was important to the preservation of republican government in America. The same assumptions helped shape the role of judges as constitutional interpreters. Because judges were human, and thus self-interested and partisan, they could not be entrusted with the power to make law in the fashion of legislatures because they were not directly accountable to the popular will. But their ability to discern and apply the law lent them authority as constitutional interpreters. By declaring the meaning of the Constitution, judges reinforced the causal primacy of legal principles. By adapting the Constitution to the evolving crises of human affairs, judges demonstrated the capacity of foundational principles of republican theory to endure over time.

If one rejects the assumption that law is a timeless, universal causal agent and sees it as the product of the will of humans holding power, a different view of constitutional adaptivity and of the role of judges as constitutional interpreters follows. When judges adapted a constitutional provision to resolve a controversy the drafters had not foreseen, the judges not only found the provision apposite to the controversy but found it consistent with one resolution of the controversy and not another. A group of early-twentieth-century constitutional scholars argued that this

\(^{275}\) See White, New Deal, supra note 269, at 205–06.
\(^{276}\) Brewer, supra note 225, at 46.
adaptation gave a new meaning to the constitutional provision. 277 This argument demonstrated that the Constitution was a living document whose meaning changed in accordance with the changing social and economic conditions from which new constitutional controversies emerged. It also revealed that when judges helped change the meaning of the Constitution, they were making law.

Those who endorsed a “living Constitution” approach to constitutional interpretation conceded that judges acted as lawmakers when they helped change the meaning of the Constitution. 278 Those commentators’ primary concern was with the implications of that conclusion for the role of the judiciary in a democratic society. If judges were lawmakers and the meaning of the Constitution changed over time, the doctrinal formulas judges supplied in interpreting constitutional provisions were akin to the policy directives of legislatures rather than efforts to discern the meaning of timeless legal principles.

In the early twentieth century, the emergence of “living Constitution” approaches to constitutional interpretation ultimately produced a jurisprudential crisis, in which the nature of constitutional adaptivity and the role of judges as constitutional interpreters became the subject of academic and professional debates. 279 The most significant aspect of that crisis, for present purposes, was its effect on the accumulated doctrinal formulas that characterized the Court’s police power—due process cases. Two lines of those cases were particularly prominent and controversial because of their close connections to the defining elements of democratic constitutional theory. One line of cases featured the judicially created “liberty of contract” doctrine, which courts used to analyze police power legislation regulating economic activity. The other line involved cases in which the Court used the police powers as a basis for regulating the “liberty” of free speech.


The Court’s endorsement of the liberty of contract doctrine, a judicial gloss on the term “liberty” in the Fourteenth Amendment’s Due Process Clause, signified the Court’s acceptance of the proposition that due process included the principle against class legislation. Beginning in 1897, the Court required that police power legislation not offend the anti-class principle in three sets of cases involving contract formation. The earliest set of cases involved statutes flatly prohibiting individuals or companies from entering into certain types of contractual relations, such as contracts with out-of-state insurance companies insuring property within a state. 280 These cases did not represent much of a doctrinal variation from the Court’s existing police powers jurisprudence because it was hard to see how those statutes

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277. For examples of early-twentieth-century scholars holding this “living Constitution” theory of constitutional adaptivity, see WHITE, NEW DEAL, supra note 269, at 208–11.
279. For more detail, see WHITE, NEW DEAL, supra note 269, at 215–18.
280. The Court first announced the liberty of contract doctrine in Allegheny v. Louisiana, 165 U.S. 578, 592 (1897).
promoted public health, safety, or morals. Their significance was the Court’s conceptualization of a Fourteenth Amendment liberty to enter into contracts.

The next set of cases brought the anti-class principle more clearly into focus, representing the Court’s effort between 1898 and the 1920s to separate constitutionally permissible from impermissible wages and hours legislation. The judiciary achieved that separation by recognizing that legislation redistributing benefits from one class of persons to another violated the Due Process Clause unless it benefitted the public at large. Under certain circumstances, the state’s police power could overcome freedom of contract, but only where the legislation promoted the public interest rather than the interest of a particular class. Thus, a limit on the hours worked by underground miners281 or women282 could be justified under the state’s police power as public health measures, given the susceptibility of the workers and the risk that they might become wards of the public if they developed health problems. In contrast, efforts to limit the working hours of bakers,283 the resale prices of theatre tickets,284 or the fees set by employment agencies285 lacked an appropriate health, safety, or morals justification. The impermissible legislation simply benefitted one class of market actors at the expense of another. Even susceptible classes of workers sometimes needed freedom to bargain and sell their services on the terms they chose.286

The final line of liberty of contract cases involved state efforts to outlaw “yellow dog” contracts, agreements between industrial laborers and their employers in which the employees agreed as a condition of their employment not to join labor unions or submit labor disputes to compulsory arbitration. In those cases, the Court concluded that promoting harmony in labor relations fell outside the traditional rationales justifying a state’s exercise of police powers.287

From one perspective, the liberty of contract cases were orthodox exercises in the Court’s doctrinalist approach to police power cases that began in the 1880s. The Court’s function in those cases was boundary tracing, and its use of doctrinal formulas to place cases on one side or another of the boundary was as unexceptionable as its distinction between “direct” and “indirect” effects on interstate commerce in Commerce Clause cases or between “private” property and property “affected by a public interest” in rate regulation cases. From another perspective, the Court’s decisions defining the term “liberty” in the Fourteenth Amendment’s Due Process Clause as encompassing the right of industrial workers to bargain for their services on their own terms constituted an unwarranted interference with legislative discretion. One commentator argued that legislation imposing wages and hours requirements on the industrial labor force was a quintessential exercise of the state’s police power, and any doubts about its

constitutionality “must be resolved in favor of the Legislature.” In the same year, another commentator suggested that the courts were “seiz[ing] upon vague clauses in the constitution to perpetuate the economic views of the past” about wages and hours legislation, and “the time seem[ed] to have arrived to call a halt upon the encroachments of the judiciary” so as to “maintain[] . . . the independence of the three departments of government.”

By the end of the nineteenth century, some critics of liberty of contract decisions began to see the doctrine as embodying an ideological bias in the judiciary. C.B. Labatt wrote in 1893 that the decisions reflected “economic prepossessions” and “class prejudices” and would “scarcely fail to strengthen the impression which is already widely prevalent among working men, that the courts are a mere stronghold of capital.” That line of criticism revealed that at least some commentators treated the judicial glossing of constitutional provisions as the equivalent of policy-making. Within a decade, this reaction to liberty of contract cases surfaced on the Court itself. Labatt claimed that some of the Court’s liberty of contract decisions “breath[ed] the very spirit of Mr. Herbert Spencer.” Similarly, in 1905, Justice Holmes, dissenting in a liberty of contract case, said that “[t]he Fourteenth Amendment [did] not enact Mr. Herbert Spencer’s Social Statics.”

The significance of this reaction to the judiciary’s use of doctrines such as liberty of contract to trace out the boundary between public power and private rights was that the reaction threatened to undermine the legitimacy of judicial use of doctrinal formulas as a surrogate for the departmental discretion principle. Doctrinal formulas in police power due process cases, Contracts Clause cases, or Commerce Clause cases had served to legitimize the judiciary’s hands-off posture toward some acts of the other branches and its scrutiny of others. The formulas had made the alternative postures a set of constitutional requirements reinforcing the departmental discretion principle. If doctrinal formulas had ideological dimensions, however, their use suggested that courts were inclined to scrutinize the activities of other branches when they disliked the policies embodied in those activities. That amounted to judicial encroachment and offended the departmental discretion principle. In short, the more commentators emphasized the ideological dimensions of doctrinal formulas, the less those formulas were seen as doing any work to preserve the independence of the branches of government.

291. Id. at 864. Herbert Spencer was the author of Social Statics (1851), one of the earliest—and best known—“Social Darwinist” texts. Social Statics predated Darwin’s On The Origin of Species by six years and coined the phrase “survival of the fittest.” Morton J. Horwitz, Foreward: The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 HARV. L. REV. 32, 46 n.70 (1993).
5. *Democratic Theory and Doctrinal Formulas II: "Liberties of the Mind"

As the Court began to use the liberty of contract gloss to aid its boundary tracing in police power-due process cases, it also began to gloss the term "liberty" in cases where statutes restricted freedom of expression. Over the forty-odd years in which the Court created and developed the liberty of contract doctrine, it experimented with three distinct doctrinal approaches to speech issues. One approach, which had dominated American free speech jurisprudence for most of the nineteenth century, treated the passage of the First Amendment as having no effect on common law principles affecting free speech. 293 The Court regarded the First Amendment as designed only to provide protection against prior restraints on expression—government preclearance or censorship of ideas prior to their utterance or publication. 294 Since the First Amendment only applied against Congress, this approach assumed that the federal government could punish seditious, libelous, blasphemous, obscene, or indecent speech with impunity so long as it did not censor the speech in advance. The approach further assumed that the states had significant power to restrict expression.

Over the course of the nineteenth century, few federal statutes restricted speech 295 and comparatively few speech-based challenges to state police power legislation were posed. 296 This meant that the constitutional status of freedom of expression was largely undeveloped by the opening of the twentieth century. 297 But in the years after the Civil War, legal treatise writers began to suggest that even if the First Amendment only prevented prior restraints, liberty in the Fourteenth Amendment’s Due Process Clause very likely encompassed liberties of the mind. Under this approach, the same judicial glossing of liberty that produced the liberty of contract doctrine had the potential to result in some recognition of the right of citizens to receive and communicate ideas and information. 298 By the early decades of the twentieth century, other commentators had concluded that Blackstone’s prior

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293. The Supreme Court endorsed this approach in *Robertson v. Baldwin*, 165 U.S. 275 (1897).
294. The idea that the liberty of the press consisted only of protection from "laying no previous restraints upon publications" was advanced in William Blackstone’s *Commentaries on the Laws of England*. WILLIAM BLACKSTONE, 4 COMMENTARIES §152.


296. For a discussion of free speech challenges of state police power legislation in the late-nineteenth century, see Rabban, *supra* note 295, at 131–49. Rabban concluded that “the overwhelming majority of decisions in all jurisdictions rejected free speech claims,” but “a minority of state... courts upheld [them].” Id. at 131–32.

297. “The overwhelming weight of judicial opinion in all jurisdictions before World War I offered little recognition and even less protection of free speech interests.” Id. at 175.

298. The most prominent nineteenth century commentator making this argument was Thomas Cooley, whose *Constitutional Limitations* treatise gave some attention to liberties of the mind when he discussed the scope of liberty under the Fourteenth Amendment’s Due Process Clause. See Cooley, *supra* note 172, at 355. For discussion of Cooley’s approach, see Rabban, *supra* note 295, at 181–82.
restraint doctrine was inconsistent with the First Amendment and free speech clauses in state constitutions.\footnote{299}

Prior to World War I, however, the Supreme Court showed no inclination to read the First Amendment broadly or to uphold free speech challenges to state police powers legislation. In two state cases, Justice Holmes, writing for the Court, allowed a Colorado court to hold a newspaper editor in contempt for criticizing the motives of state judges\footnote{300} and allowed the state of Washington to suppress articles about nudity.\footnote{301} In Schenck v. United States,\footnote{302} the first case testing the constitutionality of the Espionage Act of 1917, which criminalized expression tending to undermine the United States' participation in World War I, the court unanimously upheld a conviction for distributing leaflets critical of the war effort to men who were conscripted for military service.\footnote{303} Justice Holmes's opinion nonetheless backed away from the proposition that the First Amendment only supplied protection against prior restraints.\footnote{304} It implied that the mere recital of a government interest in maintaining solidarity in wartime was insufficient to restrict speech criticizing the government unless the speech in question posed a "clear and present danger" to national security.\footnote{305} Despite the tentativeness of Justice Holmes's language in Schenck,\footnote{306} it was clear that the Court was inclined to make, in cases testing Congress's power to restrict speech, the same sort of categorical distinctions between permissible and impermissible legislation it had made in state police power cases.\footnote{307} Thus by the 1920s the Court had seemingly abandoned the doctrine that freedom of expression was limited to protection from prior restraints, and had concluded that Fourteenth Amendment liberty included liberties of the mind, although the tenor of its free speech decisions remained far from libertarian.

Then in a 1925 case, Gitlow v. New York,\footnote{308} the Court announced, with virtually no discussion, that the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment's free speech clause.\footnote{309} The casual analysis of

\footnote{299} Rabban cites the fifth edition of Cooley's treatise (1883) as evidence that he had rejected Blackstone's position by that date. RABBAN, supra note 295, at 177. Theodore Schroeder, Henry Schofield, Ernst Freund, and Roscoe Pound were other commentators who rejected the proposition that free speech was limited to protection from prior restraints. See id. at 189-93.

\footnote{300} Patterson v. Colorado, 205 U.S. 454, 465 (1907).

\footnote{301} Fox v. Washington, 236 U.S. 273, 277-78 (1915).

\footnote{302} 249 U.S. 47 (1919).

\footnote{303} Id. at 48-53.

\footnote{304} Id. at 51.

\footnote{305} Id. at 52.

\footnote{306} Justice Holmes indicated in Schenck that "in many places and in ordinary times" the defendant's language critical of the government would be protected by the First Amendment. Schenck, 249 U.S. at 52. Holmes's statement may have been in response to a concession by the United States in its brief in Debs v. United States, 249 U.S. 211 (1919), a companion case to Schenck, that the First Amendment went beyond prior restraints. See RABBAN, supra note 295, at 277 (quoting the brief for the United States in Debs).

\footnote{307} As the Court decided more free speech cases in the years after World War I, it used the "bad tendency" test to distinguish protected speech from unprotected speech. The bad tendency test examined whether or not an expression had a tendency to encourage acts that the state had a right to prevent. Holmes alluded to the bad tendency formula in Schenck and used it in two companion cases decided at the same time—Debs and Frohwerk v. United States, 249 U.S. 204, 209 (1919). See RABBAN, supra note 295, at 282-85.

\footnote{308} 268 U.S. 652 (1925).

\footnote{309} Id. at 666.
the incorporation issue in *Gitlow* might seem puzzling given that the Court had declined to entertain the argument that the Fourteenth Amendment incorporated free speech rights in two earlier decisions, and had stated in a 1922 case that "neither the Fourteenth Amendment nor any provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech.'" In two decisions in 1923 and 1925, however, the Court invalidated state statutes as infringing liberties of the mind—the right of students to learn foreign languages and the right of parents to send their children to private schools. In addition, the Court had recognized in a 1920 case that a state statute preventing interference with enlistment in the armed services could be challenged as infringing on the right to express pacifist opinions. Justice Brandeis dissented in that case, saying that he had "difficulty in believing" that because the Fourteenth Amendment's Due Process Clause "has been held to protect against state denial the right . . . to contract," it did not also extend to "liberty . . . to teach . . . the doctrine of pacifism." In short, liberties related to expression did not appear conceptually different from liberty of contract by the 1920s. Both were judicial glosses on a constitutional provision, and both were part of a boundary tracing methodology in police power cases.

Thus, one can assume that, in the years immediately following *Gitlow*, judges did not draw a conceptual distinction between First Amendment rights that were incorporated against states and Fourteenth Amendment liberties of the mind. Both sets of rights were given comparable solicitude; both were subject to restriction by legislation based on the state's police power. Between 1907 and 1931, the Court only invalidated legislation challenged on liberty of the mind grounds in three instances and did not invalidate any federal or state legislation challenged on First Amendment or incorporated First Amendment grounds.

The growth of free speech cases in the 1920s thus initially seemed to be another example of judicial glossing of constitutional provisions in order to facilitate boundary tracing. Incorporation of the provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause was yet another example of glossing. However, as the number of speech cases increased after World War I and criticism surfaced that sought to expose the Court's liberty of contract decisions as ideologically motivated, an interesting dissonance between the Court's two

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310. In *Patterson v. Colorado*, Justice Holmes's opinion assumed that the First Amendment was relevant to a state statute providing criminal contempt penalties for criticism of state judges, but his prior restraints interpretation of the scope of First Amendment protection rendered that issue moot. 205 U.S. 454, 462 (1907). Justice John Marshall Harlan, dissenting in *Patterson*, stated that he believed that freedom of expression was a constitutional privilege without specifying where that privilege originated. Id. at 465 (Harlan, J., dissenting). In *Fox v. Washington*, counsel for the defendant argued that *Patterson* had not decided whether the Fourteenth Amendment made the First Amendment applicable to state action but that, in any event, freedom of speech was a liberty protected against the states under the Due Process Clause. 236 U.S. 273, 275 (1915). Holmes's opinion construed the statute in *Fox* as prohibiting only expression that actually encouraged a breach of state law. Id. at 277. He did not address First Amendment arguments and thus technically did not pass on the incorporation claim. See *id.* The issue thus remained undecided after *Patterson* and *Fox*.


314. *id.* at 343 (Brandeis, J., dissenting).

315. In addition to *Meyer* and *Pierce*, see *Farrington v. Tokushige*, 273 U.S. 248 (1927), which also involved decisions by parents about their children's educational choices.
principal lines of police power cases emerged. The juxtaposition of two cases decided by the Court in 1931 reflected that dissonance. One case involved a situation where Minnesota sought to apply a statute forbidding the publication of a “malicious, scandalous and defamatory newspaper” in order to enjoin a Minneapolis paper from distributing future issues. A five-Justice majority comprised of Justices Hughes, Holmes, Brandeis, Stone, and Roberts invalidated the statute on the ground that it constituted a prior restraint on speech. Justices Van Devanter, McReynolds, Sutherland, and Butler dissented. The other case involved a New Jersey statute regulating fees paid to local agents by insurance companies, which was challenged as a violation of liberty of contract. The same majority of Justices sustained the New Jersey legislation as an appropriate exercise of the police power, and the same four dissenters registered their opposition. The majority in the Minnesota case declared that prior restraints on speech were presumptively invalid, whereas the majority in the New Jersey case suggested that police power regulations affecting economic activity were presumptively constitutional. It was as if the Court had come to regard the exercise of judicial glossing in liberty of contract cases and liberty of mind cases as qualitatively different.

B. Democratic Theory and the Collapse of Doctrinal Formulas

1. Commentary

By the 1930s, the stage was set for a wholesale reexamination of the role of doctrinal formulas as surrogates for the departmental discretion principle. If judicial glossing was an exercise in policy-making, formulas such as liberty of contract simply provided judges with an opportunity to strike down legislation they disliked. In his testimony before Congress supporting the Roosevelt Administration's 1937 plan to reorganize the Court by appointing additional justices should existing members fail to retire at the age of 70, Edward Corwin emphasized that the ideological nature of judging, coupled with the increased participation of judges as constitutional interpreters since Reconstruction, undermined the departmental discretion principle. The current Court, Corwin charged, had been endeavoring to elevate into constitutional law a particular economic bias, which was a “theory of political economy that government must keep its hands off of business” and “must not interfere with the relations of employer and employee.” Its bias was especially troublesome because in the “last forty or fifty years” the Court had “in the exercise of judicial review dissolved every limitation upon the exercise of its
power."³²⁴ This created "a serious unbalance in the Constitution resulting from the undue extension of judicial review."³²⁵ The Court "projected itself into [the] political field" and was "sinn[ing] against the fundamental maxim of judicial review; namely, all doubts will be resolved in favor of the legislature."³²⁶

By the early 1940s, one commentator argued that for the departmental discretion principle to be preserved and judicial review to be squared with democratic theory, the Court needed to adopt a deferential stance toward all legislation.³²⁷ Henry Steele Commager maintained that when courts reviewed legislation they were passing on acts that a majority not only ratified but also implicitly subjected "to scrutiny in regard to [their] conformity with the Constitution."³²⁸ The passage of legislation, Commager argued, represented "a majority vote for its constitutionality."³²⁹ Judicial invalidation of legislation thus amounted to "one non-elective and non-removable element in the government [rejecting] the conclusions on constitutionality arrived at by the two elective and the two removable branches."³³⁰ Not only was judicial review a usurpation of the discretion of another department of government, it was undemocratic because of the judiciary's limited accountability.

Commager's argument demonstrated the incompatibility of republican and democratic constitutional theory with respect to their assumptions about the judiciary. He attacked both of the republican arguments that served to legitimate the principle of judicial supremacy when contested departmental interpretations of the Constitution existed. Republicans dealt with the issue of judicial bias by treating the judiciary as a class of savants, trained to discover the law, and by sharply distinguishing between the will of the judge and the will of the law. Commager asserted that the argument that judges were "peculiarly fitted"³³¹ to interpret constitutional provisions failed because most exercises of constitutional interpretation involved "vague and ambiguous clauses" whose meaning was determined not "by legal research but by 'considerations of policy.'"³³² Judges were no better versed on policy considerations than members of other departments.

Republicans also believed that the judiciary was incapable of making corrupt or arbitrary decisions. Commager claimed that the argument that courts "alone are independent and unbiased"³³³ also failed because any close student of the Court's nineteenth century decisions could see that the Court "intervened again and again to defeat congressional efforts to free slaves, guarantee civil rights to Negroes, to protect workingmen, outlaw child labor, assist hard-pressed farmers, and to democratize the tax system."³³⁴ The features of the judiciary that republican constitutional thought deemed safeguards against tyranny or corruption were treated

³²⁴ Id. at 221.
³²⁵ Id. at 220.
³²⁶ Id. at 256.
³²⁷ See Henry Steele Commager, Majority Rule and Minority Rights 40–55 (1943).
³²⁸ Id. at 40.
³²⁹ Id.
³³⁰ Id.
³³¹ Id. at 42.
³³² Id. at 43.
³³³ Commager, supra note 327, at 42.
³³⁴ Id. at 55.
by Commager and other democratic theorists as illusory and potentially inconsistent with democratic principles.

2. The Abandonment of Doctrinal Formulas

As this commentary surfaced, the Court had difficulty maintaining the integrity of the doctrinal approach it developed in connection with boundary tracing. In several areas, such as police power cases involving economic activity, police power cases involving restraints on expression, and Commerce Clause cases, the increasingly refined doctrinal distinctions that the Court fashioned in the first three decades of the twentieth century appeared on the brink of collapse. The inability of doctrinal formulas to sustain themselves provided additional evidence of their ideological character to the Court's critics. Despite the difficulties in which the Court found itself in the late 1930s and early 1940s, the Court did not adopt a wholly deferential stance toward the action of the other branches challenged on constitutional grounds. Instead, the Court infused into its approach to constitutional interpretation a new technique designed to shore up the principles of judicial review and departmental discretion. That technique focused on the degree of judicial scrutiny afforded various actions of the other branches of government. Levels of scrutiny became devices by which the Court implicitly designated an action as within the discretion of another branch or subject to a check by the courts. As the Court's scrutiny levels decision became a habitual step in its methodology in constitutional cases, tiers of scrutiny became associated with particular sets of cases. These cases signaled that the Court was likely to defer to the actions of the other branches in some instances but not in others. Eventually it became clear that the Court's scrutiny levels jurisprudence was closely connected to democratic constitutional theory. Three lines of cases, all of which produced major decisions in the late 1930s and early 1940s, serve to illustrate the Court's new scrutiny levels jurisprudence.

IV. THE ORIGINS OF SCRUTINY LEVELS JURISPRUDENCE

A. Incorporated Rights Cases

The idea that provisions of the Bill of Rights were incorporated into the Due Process Clause of the Fourteenth Amendment did not seem to be particularly novel or controversial in the areas in which it was first adopted. In an 1897 eminent

335. After more than forty years of "pricking out the boundary" between public power and private rights in due process cases, the Court, in two decisions in the 1930s, abandoned the affected with a public interest and liberty of contract doctrines that it employed so regularly in boundary tracing. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). Then, in a 1941 decision, the Court signaled that the distinction between direct and indirect effects of an activity on interstate commerce might no longer control the disposition of Commerce Clause cases, and in 1942 the Court abandoned the distinction altogether. See Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941). Meanwhile, the Court struggled to find a doctrinal formula for deciding speech cases, abandoning the bad tendency test in a series of cases in the late 1930s for the clear and present danger test and then experimenting with the idea that some forms of expression were of higher value than others. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937).
domain case, *Chicago, Burlington & Quincy Railroad v. Chicago,* the Court concluded that the Fourteenth Amendment's Due Process Clause required that the state provide just compensation when it took private property for a public use. But the Court did not thereby incorporate the Fifth Amendment's Takings Clause; it merely followed a line of railroad rate regulation decisions holding that states could not use their regulatory powers to "do that which in law amounts to a taking of private property for public use without just compensation." In that setting, a guarantee that the state could not take private property for public use without just compensation was another way of saying that the judiciary had an obligation in police power cases to determine whether the legislature set reasonable rates. Similarly, the Court's decision in *Gitlow* to incorporate the First Amendment's prohibition against the abridgement of free speech seemed unexceptional in light of its *Meyer* and *Pierce* decisions, holding that liberty in the Fourteenth Amendment includes protection for liberties of the mind.

Once the Court began incorporating rights, parties in a line of cases between 1925 and 1938 asked the Court to incorporate additional provisions. In some of those cases, involving the freedom of the press, free exercise of religion and peaceable assembly provisions of the First Amendment, the Court explicitly spoke of a provision's being incorporated. In others, notably ones involving Sixth Amendment provisions identifying the rights of persons accused of crimes to have the assistance of counsel and to be informed of the nature of charges against them, the Court's language was more general, referring to "the conception of due process of law." Although none of those decisions seemed to extend the concept

336. 166 U.S. 226 (1897).
337. *Id.* at 236.
338. *Stone v. Farmers Loan & Trust Co.*, 116 U.S. 307, 331 (1886). See also *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 598 (1896) (holding that tolls on public highways must be just both to the corporation operating the highway and to the public); *Dow v. Beidelman*, 125 U.S. 680, 690-91 (1888) (holding that a rate of three cents per mile did not amount to a taking without due process); *Georgia R.R. & Banking Co. v. Smith*, 128 U.S. 174, 179 (1888) (construing the grant to a railroad corporation of the state's eminent domain rights); *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884) (holding that regulation of water prices does not violate due process).
346. *Powell*, 287 U.S. at 68. In his opinion for the Court in *Powell*, Justice Sutherland said that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action," but this was "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are
of due process beyond conventional limits, they took place in a jurisprudential climate in which some judicial glosses on the Due Process Clause were criticized as ideologically based. A potential inconsistency surfaced between the Court’s analytical techniques in liberty of contract cases and its techniques in incorporation cases. If liberty of contract was a judge-made doctrine that served to invest the Due Process Clause with substantive content, what was incorporation? After all, judges decided which provisions of the Bill of Rights were part of due process.

Aware of this difficulty, Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.* Justice Cardozo attempted to identify criteria for guiding the Court’s analysis in incorporation cases in *Palko v. Connecticut.*

A Connecticut statute provided that prosecutors could appeal rulings of law made at criminal trials and retry defendants who had been acquitted under erroneous rulings. On appeal, the Connecticut Supreme Court ordered a new trial on the ground that the trial judge had mistakenly excluded testimony and erroneously instructed the jury. Palko was retried, convicted of first-degree murder, and sentenced to death. He claimed that he was entitled to the Fifth Amendment’s guarantee that “[n]o person shall be ‘subject for the same offense to be twice put in jeopardy of life or limb.’”

Justice Cardozo, writing for the Court, identified a “line of division” between Bill of Rights provisions that were “of the very essence of a scheme of ordered liberty” and those that were not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” He concluded that subjecting a criminal defendant to being tried “until there shall be a trial free from the corrosion of substantial legal error” was not subjecting that defendant to a hardship so acute and shocking that our polity will not endure it. In contrast, Justice Cardozo felt that “freedom of thought[] and speech” was “the matrix, the indispensable condition, of nearly every other form of freedom,” making Bill of Rights provisions protecting it “fundamental” to the Anglo-American system of ordered liberty. Equally fundamental were provisions ensuring that “ignorant defendants in a capital case” should have the benefit of counsel. The “essence of a scheme of ordered liberty” criterion distinguished those incorporated provisions from ones that the Court had declined to incorporate against the states, such as the Fifth Amendment’s guarantee that no person should be compelled in a criminal case to be a witness against himself or the Sixth and Seventh Amendments’ provisions for jury trials in criminal and some civil cases.

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348. *Id.* at 320–21.
349. *Id.* at 321.
350. *Id.*
351. *Id.* at 321–22.
352. *Id.* at 322 (quoting U.S. CONST. amend. V).
354. *Id.* at 328.
355. *Id.* at 326–27.
356. *Id.* at 327.
357. *Id.* at 325.
After *Palko,* the Court's approach to incorporated rights cases was selective, resembling boundary tracing in police power cases. The Court applied some Bill of Rights provisions against the states, meaning that due process required states to afford persons the same guarantees afforded to individuals by the federal government. The Court did not apply other provisions, meaning that a state could deviate from federal procedures, typically in criminal trials. The result of selective judicial incorporation was to preserve the discretion of state legislatures to fashion some of their own rules in civil and criminal cases. Selective judicial incorporation ensured that parties could challenge other rules as violations of due process and the judiciary would oversee those challenges. *Palko,* from that perspective, was a departmental discretion case.

B. Police Power Cases

Meanwhile, by the late 1930s, the Court showed signs of departing from its methodology of pricking out boundary lines in police power-due process cases. In a 1938 case, *United States v. Carolene Products Co.*, the Court considered the constitutionality of the Filled Milk Act of 1923, in which Congress prohibited the shipment in interstate commerce of skimmed milk that contained fat or oils made from products other than milk. The Carolene Products Company manufactured a version of skimmed milk, Milnut, which replaced butterfat with coconut milk. A federal grand jury in Illinois indicted the Carolene Products Company for violating the Filled Milk Act. The Company claimed the statute exceeded Congress's commerce powers and deprived it of property without due process because there had been no finding that its product lacked nutritional value.

In an opinion by Justice Stone, the Court made short shrift of the commerce power claim—Congress could exclude articles from interstate commerce that it concluded were deleterious to the public health—and concentrated its focus on the due process claim. The Court left no question that legislatures could prohibit the sale of even nutritious products if they concluded that their distribution amounted to a fraud on the public. Justice Stone stressed evidence that Milnut was "indistinguishable" from skimmed milk made with butterfat, "thus making fraudulent distribution easy and protection of the consumer difficult." The only serious issue appeared to be whether Congress needed to base its decision to ban Milnut on some actual findings that the product was unhealthful or deceptive. That

358. 304 U.S. 144 (1938).
359. Id. at 145–46.
360. Id. at 146.
361. Id.
362. Id. at 146–47.
363. Id. at 147. Justice Stone cited *Champion v. Ames (The Lottery Case),* 188 U.S. 321 (1903), and *Hipolite Egg Co. v. United States,* 220 U.S. 45 (1911), for the proposition that Congress could use the commerce power to protect public health, welfare, and morals. *Carolene Prods.,* 304 U.S. at 147.
364. *United States v. Carolene Prods. Co.,* 304 U.S. 144, 148 (1938). Justice Stone cited *Hebe Co. v. Shaw,* 248 U.S. 297 (1919), in which the Court upheld a state statute almost identical to the Filled Milk Act. *Carolene Prods.,* 304 U.S. at 148. The statute prohibited the manufacture and sale of skimmed milk made with coconut oil on the ground that the product was likely to deceive the public, even though there had been no finding that the product lacked nutritional value. *Hebe,* 248 U.S. at 302–03.
issue was not troublesome in *Carolene Products* itself because Congress based its declarations that filled milk was "injurious to health and . . . a fraud on the public" on Senate and House committee reports. But Justice Stone decided to use the case to make some more general comments about the Court's stance toward constitutionally challenged legislation.

He began by stating that "no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by" the use of "opprobrious epithets" characterizing the evils at which the prohibition was directed. Nor could a statute "preclude[] the disproof in judicial proceedings of all facts which would show" that the statute lacked a "rational basis" for its passage. But it was not necessary to base "regulatory legislation affecting ordinary commercial transactions" on factual findings. "[T]he existence of facts supporting the legislative judgment [was] to be presumed" by courts. Only when other facts existed that "preclude[d] the assumption that [the legislation] rest[ed] upon some rational basis within the knowledge and experience of the legislators" was the Court to depart from this presumption of constitutionality. In short, the Court presumed that legislation regulating "ordinary commercial transactions" was grounded on a rational basis. The legislature did not have to supply any basis for such legislation; the burden was on challengers to introduce evidence suggesting that it was not rationally grounded.

This was the first statement in a Supreme Court opinion generalizing the proposition that the Court presumed a whole category of legislation to be constitutional. In operation, that proposition did the same work as the departmental discretion principle in the Court's nineteenth century cases—it served to confer power to regulate a group of activities on another department of government. But Justice Stone's presumption of constitutionality for legislation regulating ordinary commercial transactions came in the wake of a half-century in which the Court routinely scrutinized that sort of legislation under the Due Process Clauses. For every instance in which the Court sustained legislation regulating economic activity or redistributing economic benefits as an appropriate exercise of the police powers, there were instances in which the Court had invalidated that sort of legislation as an impermissible invasion of private rights. Indeed, the methodology of police power cases, as well as Commerce Clause cases, assumed that the Court would decide whether a piece of legislation was constitutional or not. Now Justice Stone was suggesting that the Court would typically not review the constitutionality of legislation regulating ordinary commercial transactions.

Although converting the presumption of constitutionality for a whole category of legislation into a general proposition was a notable feature of Justice Stone's *Carolene Products* opinion, the idea of treating such legislation as constitutional,
if rational rather than arbitrary, had already surfaced in two earlier decisions.\textsuperscript{374} Those decisions indicated that the Court might well abandon boundary tracing in many cases challenging the constitutionality of social and economic legislation. The truly novel feature of Carolene Products was Justice Stone’s intimation in footnote four that the presumption of constitutionality might not extend to another line of cases.\textsuperscript{375}

Justice Stone initially had some difficulty characterizing that line. An early draft of his footnote gathered together a series of cases that he described as challenges to laws “aim[ed] at restricting the corrective political processes which can ordinarily be expected to bring about repeal of undesirable legislation” and suggested that “one attacking the constitutionality of a statute may be thought to bear a lighter burden” when making such challenges.\textsuperscript{376} But most of the cases he cited did not raise concerns about “political processes” in legislatures.\textsuperscript{377} They involved two sorts of free speech claims: those based on incorporated First Amendment provisions and those based on the liberty of mind gloss.\textsuperscript{378} Reacting to Justice Stone’s draft, Chief Justice Hughes asked whether the difference between those cases and cases involving the regulation of ordinary commercial transactions lay “in the nature of the right invoked.”\textsuperscript{379} In “dealing with freedom of speech and of the press,” Chief Justice Hughes maintained, “the legislative action putting the press broadly under license and censorship is directly opposed to the constitutional guaranty and for that reason has no presumption to support it.”\textsuperscript{380} Incorporated rights challenges, unlike other constitutional challenges requiring judges to gloss words such as liberty or commerce, squarely confronted legislation with an allegedly incompatible constitutional provision. In that situation, a presumption of constitutionality seemed inappropriate; if anything, the challenge demonstrated that the legislation should be presumptively unconstitutional.

Justice Stone picked up on Chief Justice Hughes’s suggestion and revised his footnote, inserting a lead paragraph that ran: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”\textsuperscript{381} That paragraph, taken together with Justice Cardozo’s

\begin{itemize}
\item \textsuperscript{374} West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–98 (1937); Nebbia v. New York, 291 U.S. 592, 537 (1934).
\item \textsuperscript{375} Carolene Prods., 304 U.S. at 152 n.4.
\item \textsuperscript{376} MURPHY ET AL., supra note 338, at 486–87.
\item \textsuperscript{377} Id.
\item \textsuperscript{378} Of the cases Justice Stone cited in his Carolene Products footnote four, two cases, South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), alluded to the inability of voters in one state to influence the actions of other states, and two others, Nixon v. Herndon, 273 U.S. 536 (1927) and Nixon v. Condon, 286 U.S. 73 (1932), dealt with efforts by the state of Texas to bar black voters from eligibility to vote in primaries. Carolene Prods., 304 U.S. at 152. Those cases could have been said to involve legislation “restricting . . . political processes.” MURPHY ET AL., supra note 338, at 486. The other twelve cases Justice Stone cited were either liberty of mind cases or cases incorporating First Amendment provisions against states.
\item \textsuperscript{379} Letter from Chief Justice Hughes to Justice Stone (Apr. 18, 1938), quoted in MURPHY ET AL., supra note 338, at 487.
\item \textsuperscript{380} Id.
\item \textsuperscript{381} United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
\end{itemize}
suggestion in *Palko* that “freedom of thought[] and speech” was a fundamental constitutional right,\(^{382}\) intimates that a hierarchy of constitutionally protected rights might exist. Some Justices subsequently explored the idea that First Amendment rights occupied a “preferred position” in constitutional jurisprudence.\(^{385}\) But ultimately the main effect of Justice Stone’s footnote was to create different levels of judicial scrutiny for different types of legislation.

The Court’s scrutiny levels jurisprudence got under way with some scattered comments in cases in the late 1930s and early 1940s. The 1939 case of *Schneider v. State*\(^{384}\) involved an anti-littering ordinance directed at Jehovah’s Witnesses who were distributing religious literature in public.\(^{385}\) Justice Roberts, writing for the Court, treated the case as an ordinary police power case, but he noted that the Court “characterized the freedom of speech and that of the press as fundamental personal rights and liberties.”\(^{386}\) He then suggested that “legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities,” but they were “insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.”\(^{387}\)

Justice Roberts’s formulation in *Schneider* linked three related but distinct propositions. One proposition was that legislation restricting fundamental rights would be treated differently from other legislation.\(^{388}\) A legislative judgment that regulatory legislation would serve public convenience might be sufficient to justify the legislation when the activity being regulated did not involve the exercise of fundamental rights.\(^{389}\) But where the activity did involve the exercise of fundamental rights, the Court required a greater justification.\(^{390}\) That proposition recalled Justice Stone’s first draft of the *Carolene Products* footnote four, where he had suggested that “[d]ifferent considerations may apply, and one attacking the constitutionality of a statute may be thought to bear a lighter burden,” when free speech rights were affected.\(^{391}\) Ultimately, this proposition was about the level of judicial scrutiny to be applied to classes of legislation.

Another proposition contained in Justice Roberts’s opinion in *Schneider* was that freedom of speech and freedom of the press were fundamental constitutional rights.\(^{392}\) This proposition suggested that other rights might be less fundamental, and the Court’s response to legislation might vary, as Chief Justice Hughes had put it in his *Carolene Products* memorandum to Justice Stone, depending on “the nature of the right invoked.”\(^{393}\) Chief Justice Hughes may only have meant that where a provision of the Constitution explicitly protected a right, and legislation was

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384. 308 U.S. 147 (1939).
385. *Id.* at 157–59.
386. *Id.* at 161.
387. *Id.*
388. *Id.* at 161.
389. *Id.*
391. MURPHY ET AL., supra note 338, at 486.
“directly opposed” to that right, a presumption that the legislation was constitutional was inappropriate. However, he might also have meant that rights explicitly guaranteed in the Constitution’s text, as opposed to rights that were the product of judicial glosses, were more fundamental. It also was not clear whether Chief Justice Hughes anticipated that the level of judicial scrutiny of legislation would vary with “the nature of the right invoked” in constitutional challenges. Chief Justice Hughes suggested that the “different considerations” Justice Stone had alluded to where free speech rights were involved did not involve “the test” employed by the Court to evaluate the statute, which Chief Justice Hughes later described as “whether there [was] a rational basis” for the legislation.394

The third proposition in Justice Roberts’s *Schneider* opinion was that freedom of speech and freedom of the press were fundamental rights because they were “vital to the maintenance of democratic institutions.”395 When Commager considered the implications of judicial review for democratic theory in his 1943 book, he eventually concluded that the legislature should resolve tensions between majority rule and minority rights because it was the more democratic forum.396 By the publication of Commager’s book, it was clear that the Court regarded protection for the speech rights of minorities as a foundational principle of democratic constitutionalism, too important to be left to the legislature. In *West Virginia State Board of Education v. Barnette*,397 the Court, reversing a decision handed down three years earlier,398 concluded that the state could not compel the children of Jehovah’s Witnesses to salute the flag in public schools.399 Justice Jackson, writing for the Court, defined “free speech” and “freedom of worship” as “fundamental rights” that had been “withdrawn” by the Bill of Rights “from the vicissitudes of political controversy.”400

Justice Jackson tied together the three propositions announced by Justice Roberts in *Schneider* in the form of a new standard of judicial review for cases that challenged legislation as interfering with fundamental constitutional rights. He made it clear that the Court’s newly relaxed posture toward police power legislation in due process cases would not be followed in incorporated First Amendment cases. “[I]t is important to distinguish,” he wrote in *Barnette*,

between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. . . . Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.401

As an illustration, he noted:

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394. *Id.*
396. *Commager*, *supra* note 327, at 72.
397. 319 U.S. 624 (1943).
400. *Id.* at 638.
401. *Id.* at 639.
The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.402

Thus, by the early 1940s, the Court had made a set of associations between the idea of incorporated rights, democratic theory, and the appropriate standard of review for legislation challenged on constitutional grounds. The Court first gave greater constitutional cachet to specific rights enumerated in the text than to a vague set of rights that were the product of judicial glosses. But not all of the rights specifically listed in Bill of Rights provisions were included in due process, only fundamental rights. The Court defined those rights as "essential to a scheme of ordered liberty," and they were the rights that, by the Barnette decision, came to be associated with the foundational principles of a democratic society.403

When legislation infringed upon fundamental incorporated rights, the Court required the legislature to show more than a rational basis for the infringement. The legislature needed to show, Justice Jackson's Barnette opinion suggested, "grave and immediate danger to interests which the State may lawfully protect."404 Thus, by 1943 Chief Justice Hughes's intimation that "the nature of the right involved" was different when legislation infringed on incorporated rights evolved into a different test for the constitutionality of that legislation. The burden to justify legislation affecting incorporated rights was greater than that required to justify legislation affecting other rights. The Court had begun to develop a jurisprudence of scrutiny levels.

From Palko through Barnette, the Court's scrutiny levels cases had all been police power-due process cases. But two cases in the 1940s suggested that the Court's technique of subjecting different types of legislation to different justificatory burdens would not be confined to police power or due process. In Skinner v. Oklahoma,405 a man who had been convicted once for stealing chickens

402. Id.
403. By 1943, the Court incorporated the free speech, free press, free exercise of religion, and freedom of assembly provisions of the First Amendment into the Fourteenth Amendment's Due Process Clause. In addition, the Court subsumed the right of persons accused of capital crimes to the assistance of counsel for their defense and the right to be informed of the nature of the charges against them into the Fourteenth Amendment's Due Process Clause. See De Jonge v. Oregon, 299 U.S. 353 (1937); Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934); Powell v. Alabama, 287 U.S. 45 (1932); Near v. Minnesota, 283 U.S. 697 (1931); Connally v. Gen. Constr. Co., 269 U.S. 385 (1926). Each of these decisions arguably rested on foundational propositions of democratic theory that majorities had no power to coerce the consent of minorities or to arbitrarily put citizens in peril without affording them procedural safeguards.
404. Barnette, 319 U.S. at 639. This language was reminiscent of the approach then being adopted by the Court in subversive advocacy cases, when the Court required that a legislature demonstrate that speech constituted a "clear and present danger" to the security of the state as a justification for suppressing it. See Bridges v. California, 314 U.S. 252, 261 (1941); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
405. 316 U.S. 533 (1942).
and twice for robberies with firearms challenged a state statute that provided for the sterilization of habitual criminals.\textsuperscript{406} The statute limited sterilization to felonies involving "moral turpitude" with exceptions for several types of felonies, such as embezzlement, violations of prohibition laws, revenue acts, or political offenses.\textsuperscript{407} Although defendants subject to the statute were given notice, a hearing, and afforded jury trials, the only triable issue was whether a defendant's health might be adversely affected by the sterilization procedure.\textsuperscript{408}

\textit{Skinner} posed some difficulties for the Court's police power-due process jurisprudence after \textit{Carolene Products}. Although the Justices—who eventually voted unanimously to invalidate the statute—may have had an intuition that the right to be free from compulsory sterilization by the state was some form of constitutionally protected liberty, they surely could not define it as an incorporated right. Under \textit{Carolene Products}, the Court found no reason to depart from the presumption that the statute was constitutional. The public health and public morals rationales for the legislation in \textit{Skinner} seemed evident, even though the statute's numerous exceptions could have been said to undermine them. Moreover, the procedure for sterilization afforded defendants an opportunity to challenge it. A majority of the Court eventually elected to join an opinion by Justice Douglas that conceptualized \textit{Skinner} not as a police power-due process case but as an equal protection case.

Justice Douglas centered his equal protection argument on the fact that the statute exempted those who committed embezzlement but applied to those who committed "larceny by trespass or trick or fraud."\textsuperscript{409} By doing so, he asserted, the legislature was claiming that those committing larceny had "biologically inheritable traits" that those who committed embezzlement lacked.\textsuperscript{410} That distinction was "clear, pointed, unmistakable discrimination" of an "invidious" nature, Justice Douglas claimed, because "the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other."\textsuperscript{411}

Legislatures, Justice Douglas conceded, could "mark and set apart ... classes and types of problems" without violating the Equal Protection Clause.\textsuperscript{412} Legislatures could, for example, classify different types of crimes and provide for different penalties. The legislation challenged in \textit{Skinner}, however, involved "one of the basic civil rights of man."\textsuperscript{413} Marriage and procreation were "fundamental to the very existence and survival of the race."\textsuperscript{414} The power to sterilize had "subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."\textsuperscript{415} A sterilized person was "forever deprived of a basic liberty."\textsuperscript{416} Thus, "strict scrutiny

\textsuperscript{406} Id. at 536–37.
\textsuperscript{407} Id.
\textsuperscript{408} Id. at 537.
\textsuperscript{409} Id. at 541.
\textsuperscript{410} Id.
\textsuperscript{411} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
\textsuperscript{412} Id. at 540.
\textsuperscript{413} Id. at 541.
\textsuperscript{414} Id.
\textsuperscript{415} Id.
\textsuperscript{416} Id.
of the classification which a State makes in a sterilization law [was] essential," Justice Douglas concluded, "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."  

Skinner suggested that the critical step in determining whether the Court would reverse the presumption of constitutionality was whether the right infringed upon by a statute was incorporated, but whether the right was fundamental. Justice Douglas said that he did not intend to "re-examine the scope of the police power of the States." He implied that prior equal protection cases indicated that state legislatures should be given "large deference" in classifying substantive crimes and their penalties. The difference in Skinner was that the case involved sterilization, and sterilization was an "irreparable injury" with "no redemption for the individual whom the law touches." Strict scrutiny of the Oklahoma statute was essential because it affected a fundamental right.

The Skinner decision was all the more interesting because the Court likely could have reached the same result by treating the case as an ordinary police power due process challenge in which the legislature failed to show even a rational basis for the legislation. The difficulty with the Oklahoma statute invalidated in Skinner was not simply that it made nonsensical distinctions between the eligibility of chicken thieves and embezzlers for sterilization. The difficulty was that the statute assumed that "habitual criminals" had genetic defects they could pass on to offspring and provided no procedure by which affected persons could challenge this assumption. A legislature could decide that larceny, but not embezzlement, was a crime of "moral turpitude." However, a legislature could not conclude that "habitual criminals" convicted of crimes of "moral turpitude" would pass those tendencies on to their children without any evidence that this, in fact, occurred. Oklahoma had no basis for concluding that a chicken thief was likely to father another chicken thief, and the statute gave the affected chicken thief no opportunity to expose that misguided conclusion.

The strict scrutiny language in Skinner, and the suggestion that legislative infringements on fundamental rights triggered strict scrutiny, may simply have been a product of Chief Justice Stone's assignment of the case to Justice Douglas, who was more prepared to resort to an equal protection argument than Chief Justice Stone would have been. But once a doctrinal association is planted in one case, it can recur in another, and in 1944, a legislative classification again was seen as

418. Id.
419. Id.
420. Id.
421. Id.
422. Chief Justice Stone wrote a concurring opinion in Skinner in which he conceptualized the case as a due process case rather than an equal protection case. Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring). He believed that if the presumption of constitutionality was applied to the case, the Oklahoma legislature could decide which criminals to sterilize and even decide "that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals," although "science has been unable to ascertain" that fact. Id. Chief Justice Stone thought, however, that if the Skinner case was conceptualized as a due process case, it illustrated that "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned." Id.
triggering strict scrutiny. The case was *Korematsu v. United States*,\(^{423}\) in which an American citizen of Japanese descent challenged a military order requiring him to report to an “Assembly Center” on the West Coast.\(^{424}\) The military used those centers to detain persons of Japanese ancestry until they were shipped to “Relocation Centers” or allowed to return to their homes if outside of a designated military zone.\(^{425}\) The plaintiff was an American citizen of unchallenged loyalty.\(^{426}\) After being tried and convicted for remaining in his home in defiance of the order, the plaintiff claimed that the order was an unconstitutional violation of the Equal Protection Clause.\(^{427}\) The plaintiff argued that the military based the order on race and not national security because the order singled out persons of Japanese ancestry for detention and relocation rather than persons of German and Italian descent, even though the United States was also at war with Germany and Italy.

Justice Black, writing for the Court, upheld the order, but not before stating that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” and the “courts must subject them to the most rigid scrutiny.”\(^{428}\) Although Justice Black eventually concluded that the plaintiff was excluded from the military zone “because the country [was] at war with the Japanese Empire” rather than because of his race, his language provided another basis for strict scrutiny: “suspect” legislative classifications.\(^{429}\)

Justice Black did not clarify, however, what sort of justification the government needed to provide once a classification was deemed “suspect.” Justice Black’s opinion conceded that the military order singled out Japanese for detention and relocation, but his opinion indicated that the government had evidence that some Japanese refused to swear unqualified allegiance to the United States and others requested repatriation to Japan.\(^{430}\) This suggested that the order was based on military necessity. But Justice Black did not provide evidence that persons of German or Italian descent living in the United States refused to swear allegiance or requested repatriation once the United States declared war against Germany and Italy. Thus, the Court did not ask the government to demonstrate why persons of Japanese ancestry in the United States were more dangerous to national security than persons of German or Italian ancestry. Despite Justice Black’s statement that the Court subjected the order to the “most rigid scrutiny,” the government was able to defend the order largely on the basis of conjectures about the motives of Japanese residents after the United States declared war against Japan.

**C. Cases Involving Executive Discretion in Foreign Relations**

By the close of World War II, it became apparent that the Court had decided to experiment with the idea of scrutiny levels as a substitute for boundary tracing. The Court’s efforts to identify fundamental rights and suspect classifications, its

423. 323 U.S. 214 (1944).
424. Id. at 215–21.
425. Id.
426. Id. at 216.
427. Id. at 215–16.
428. Id.
430. Id. at 219.
language about presumptions of constitutionality and departures from them, and its allusions to the requirement that in most instances legislatures need only demonstrate that statutes allegedly infringing on constitutional rights had a rational basis, seemed directed toward changing its approach to judicial review. Instead of actively involving itself in the classification of every statute challenged on constitutional grounds, the Court employed the *Caroline Products* techniques of avoiding serious engagement with most statutes and departing from the presumption of constitutionality only in a limited set of cases.

The common explanation for the Court’s altered stance in reviewing legislation in the 1940s is that it had gotten itself into political difficulties by blocking some New Deal and state welfare legislation in the 1930s, and realized that a more deferential stance could be self-preservationist.\(^{431}\) It is possible, however, that a majority of the Court’s Justices\(^ {432}\) came to recognize that its boundary tracing methodology, with an emphasis on doctrinal formulas, had become problematic as the formulas were increasingly criticized as being ideologically driven. By shifting the Court’s emphasis from boundary tracing to presumptions—and departures from presumptions—of constitutionality, the Court potentially avoided active engagement with a good deal of legislation. Moreover, the Court could refurbish the departmental discretion principle by delegating to Congress or the states the power to regulate large areas of society and the economy, such as the area dealing with ordinary commercial transactions, while retaining for itself the power to scrutinize the other branches and states when they infringed upon a particular subset of fundamental constitutional rights, mainly rights of expression, that were associated with democratic theory.\(^ {433}\)

If one thinks of the Court’s emerging scrutiny levels jurisprudence as a technique for refurbishing departmental discretion at a time when boundary tracing threatened to obliterare the principle, another set of decisions the Court initiated in the late 1930s can be seen in a different light. Those decisions involved challenges to actions by the Executive in the area of foreign relations.

The 1930s featured an increased number of instances in which Congress chose to explicitly or implicitly delegate its powers to the executive branch or to agencies staffed by the Executive. In the early years of the New Deal, Congress created several new federal agencies by delegation, and in two cases in the mid 1930s the Court struck down provisions of the National Industrial Recovery Act on the ground

\(^{431}\) See the discussion in WHITE, NEW DEAL, *supra* note 269, at 160–61 (outlining “stock explanation”).

\(^{432}\) Changes in the Court’s personnel doubtless affected its changed posture in the early 1940s. Of the justices who had been committed to boundary tracing, which in 1937, included Justices Van Devanter, McReynolds, Sutherland, Butler, Hughes, and Roberts, only Justice Roberts remained on the Court by 1942, and he retired in 1944.

\(^{433}\) The Court’s efforts in the 1940s to distinguish cases involving challenges to legislation regulating speech from challenges to legislation regulating economic activity illustrates the Court’s experimentalist character. The preferred position line of cases provides one illustration. Another can be found in police power due process cases involving economic activity, in which Chief Justice Hughes and Justice Roberts suggested that the Court should presume that legislation which satisfied a reasonableness test was constitutional, but the Court should not submit that legislation to the supine standard of review for challenges to economic legislation that the Court subsequently adopted. For a comparison of the Court’s 1940s experiments in formulating a standard of review for economic legislation with its later supine approach, see Barry Cushman, *Lost Fidelities*, 41 WM & MARY L. REV. 95, 99–145 (1999).
that Congress's delegation of its powers to the Executive did not provide adequate standards for making decisions.434 Meanwhile, Congress delegated powers in the foreign relations arena as well. A joint resolution Congress passed in 1934 gave power to the President to prohibit American arms manufacturers from shipping weapons to foreign nations if he found that the prohibition would "contribute to the reestablishment of peace."435 President Roosevelt prohibited one arms manufacturer, the Curtiss-Wright Export Corporation, from shipping aircraft machine guns to Bolivia. Curtiss-Wright challenged the order as an unconstitutional delegation of legislative power to the Executive branch.436

As we have seen, the Court had long regarded foreign affairs decisions as having been "submitted to the Executive" by the Constitution. But Roosevelt's prohibition of overseas arms sales, which the President could trigger simply by his personal judgments about the effects of those sales, seemed to resemble the standardless delegations that the Court found in the National Industrial Recovery Act cases. Moreover, the 1934 executive order ending arms shipments to Bolivia was not the only example of congressional delegation of power to the Executive in the foreign relations sphere. A year earlier, the United States recognized the Soviet Union after fifteen years of nonrecognition, but the form of recognition was not the traditional form of a treaty with Senate ratification. The recognition took the format of an executive agreement resulting from diplomatic correspondence between Roosevelt and the People's Commissar of Foreign Affairs, Maxim Litvinoff.437 An important feature of the Litvinoff Agreement, as it was known, was the assignment to the United States of all amounts owed by American nationals to the Soviets.438 The basis for most of the assigned obligations was the Soviet Government's confiscation of assets owned by Americans in Russia at the time the Soviets seized power. The Litvinoff Agreement had the effect of legitimating that confiscation and making the United States Government the creditor of a variety of persons that owned property in pre-Soviet Russia.

Between 1937 and 1945, the Court decided three cases related to the exercise of executive power in connection with the 1934 presidential arms embargo and the Litvinoff Agreement. In each case, the Court held that the exercise of power was within the discretion of the President, passed constitutional muster, and represented a policy decision of the United States Government that superseded contrary law and was binding on the courts. The cumulative effect of the decisions was to expand significantly the category of cases "submitted to the executive" under the Constitution.

In the first case, United States v. Curtiss-Wright Export Corp.,439 Justice Sutherland, writing for the Court, propounded the novel theory that the federal

438. Letter from Maxim Litvinoff to President Roosevelt (Nov. 16, 1933), in 28 SUPP. AM. J. INT’L L. 2, 10 (1934).
government’s powers in the area of foreign relations were inherent, deriving from national sovereignty rather than from the Constitution, and thus were not subject to constitutional restraints such as the non-delegation doctrine. In addition, Justice Sutherland’s Curtiss-Wright opinion canvassed reasons for what he called the “plenary and exclusive power of the President . . . in the field of international relations.” He cited the longstanding congressional practice of delegating power to the President to negotiate international treaties as an argument for “the constitutionality of the practice.” Both Justice Sutherland’s inherent powers theory and his argument from practice were subject to the objection that they confused the United States’ status as an international entity with the status of the federal government under the Constitution. The power of the federal Executive to negotiate international agreements presupposes that those agreements, when they affect the states or American citizens, are subject to constitutional limitations.

Few commentators criticized the Court’s conclusion in Curtiss-Wright that the President had discretion to suspend the foreign arms sales of American corporations at his pleasure. The Court then relied on Curtiss-Wright in two subsequent decisions: the 1937 case of United States v. Belmont and the 1942 case of United States v. Pink. In those two cases, the Court held that the Litvinoff Agreement’s assignment provisions represented policies of the United States Government that superseded state law and were not reviewable by the courts. Both cases involved the disposition in New York state of assets confiscated by the Soviet Government and assigned to the United States under the Litvinoff Agreement. In both opinions, the Court concluded that the claims of the United States to the assets originally owned by a Russian metal works corporation and a Russian insurance company prevailed over those of Russian nationals or creditors, even though that disposition was contrary to the rules of New York state for distributing those assets. As Justice Douglas wrote for the Court in the Pink case, “[T]he policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.”

Although the Litvinoff Agreement was not a treaty, it prevailed over competing state law.

The effect of the trilogy of decisions was that the President could negotiate an agreement with a foreign government that affected the assets of American citizens without falling foul of the Fifth Amendment’s Just Compensation Clause or any other constitutional provision. In both Belmont and Pink, New York procedure for distributing assets located within the state consisted of identifying domestic and foreign claimants to those assets and paying out claims according to their priority. The United States, in both cases, intervened under the Litvinoff Agreement to claim the assets. Because the Just Compensation Clause applied to aliens as well as

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440. Id. at 318.
441. Id. at 320.
442. Id. at 324–28.
443. For a discussion of commentary on Curtiss-Wright, most of it favorable, see WHITE, NEW DEAL, supra note 269, at 76–77.
444. 301 U.S. 324 (1937).
446. Id. at 234; Belmont, 301 U.S. at 331–32.
448. Id. at 211; Belmont, 301 U.S. at 326–27.
citizens, the United States Government's claim appeared to be a taking of property for public use under the clause. But Justice Douglas maintained that there was "no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself." He likened the Litvinoff Agreement to a federal treaty, concluding that it superseded state law.

One commentator, Edwin Borchard, called the Pink decision the culmination of an effort "to substitute for the Constitutional treaty the executive agreement, without Congressional approval if possible," in order to "bring about a change in the Constitution." Borchard believed the effort had originated with executive policy-makers in Washington and had "moral support from the Supreme Court." Borchard was correct as a matter of constitutional analysis, but he was swimming against the tide. The proposition that the Executive branch could use international agreements to bypass the Constitution was analytically dubious, but it seemed to make practical sense in a wartime atmosphere that valued speed and flexibility in foreign relations. Moreover, this proposition strongly revived the principle of executive discretion in foreign affairs and thereby took the courts out of the business of supervising the foreign policies of the federal government. The Curtiss-Wright/Belmont/Pink trilogy was another illustration of the Court's efforts to step back from the role of constitutional scrutinizer of the activities of other branches in the early 1940s.

V. CONCLUSION: THE EMERGENCE OF SCRUTINY LEVELS JURISPRUDENCE

By the close of the Second World War, it appeared as if the Court had minimized some of the pressure it placed upon itself by its cumulative boundary tracing efforts of the past fifty-odd years. The Court signaled that in two major areas, state and federal legislation affecting ordinary commercial transactions and foreign relations, it was prepared to defer to the decisions of the other branches. Only in free speech cases did the Court assume a more hands-on posture, and it took pains to justify that posture by invoking the fundamental status of speech rights in a democratic society. The Court may well have contemplated a more modest role for itself—and a more robust status for the departmental discretion principle—as it entered the the second half of the twentieth century.

If so, the Court failed to anticipate that its effort to replace boundary tracing with a posture based on scrutiny levels would result in scrutiny levels jurisprudence taking on a life of its own, indeed becoming a vital element of the Court's later twentieth century constitutional jurisprudence. The 1940s Court might not have foreseen two lines of cases that proved important in the development of scrutiny levels jurisprudence. Equal protection arguments, described as late as 1927 as the "last resort of constitutional" discourse became increasingly important as the Court involved itself with racial segregation cases. The casual language of Skinner, to the effect that invidious discriminations justified more searching judicial review

449. Pink, 315 U.S. at 228.
450. Id. at 228–29.
452. Id.
under the Equal Protection Clause, came to be picked up in cases where states
sought to prevent children of different races from attending the same public
school or persons of different races from marrying. And once the Court
established strict scrutiny in one set of equal protection cases, it felt pressure to
decide whether strict scrutiny should apply to legislative discriminations based on
gender, alienage, or sexual preference. By the 1970s another tier of scrutiny,
intermediate review, had emerged in gender discrimination cases. Scrutiny levels
decisions had become embedded in the Court’s equal protection jurisprudence.

Similarly, the idea of fundamental rights triggering heightened scrutiny, first
employed as an analytical technique in incorporated rights cases, revived itself in
a new line of due process cases beginning in the 1960s. In those cases, the Court
required that statutes preventing the dissemination of birth control information to
married couples or single persons, or preventing women from electing to
terminate pregnancies, rest on more than a rational basis because the Court
deemed the right to make intimate personal choices to be fundamental. This use of
heightened scrutiny meant that a version of boundary tracing had returned to the
Court’s due process decisions, because it continued, during the same time period,
to require that police power legislation affecting economic activity be grounded
only on a rational basis. But instead of boundary tracing being accomplished
through doctrinal formulas, the Court instead employed scrutiny levels, with
heightened scrutiny being triggered by the Court’s positing a set of due process
liberties as fundamental.

By the end of the twentieth century, scrutiny levels decisions had so infiltrated
the Court’s constitutional jurisprudence that some commentators concluded that it
was about to collapse of its own weight. Although the Court had designed the
technique of submitting challenged actions of the other branches to different levels
of scrutiny to prevent it from making the sort of refined doctrinal distinctions that
were susceptible to being attacked as ideologically motivated, the scrutiny levels
decision itself became susceptible to criticism as being outcome-determinative. The
late-twentieth-century history of the Court’s scrutiny levels jurisprudence ultimately
raises two questions. Why did the Court think that it could solve the interpretive
difficulties it confronted in the 1930s by abandoning boundary tracing—along with
its accompanying doctrinal formulas—and by adopting an interpretive posture
emphasizing scrutiny levels? And why has a constitutional jurisprudence based on
scrutiny levels failed to solve the Court’s predicament?

The first question answers itself if one briefly recapitulates the shift from
republican to democratic constitutional theory that took place during the first three

460. See, e.g., Mathews v. De Castro, 429 U.S. 181, 185 (1976) (stating that a law providing for
governmental payments of monetary benefits does not offend the Constitution so long as it has some
reasonable basis); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (upholding a Kansas law dealing with
debt adjusting on the grounds that courts should not substitute their social and economic beliefs for the
judgment of the legislature).
461. See Shaman, Cracks in the Structure, supra note 4, at 163; Massey, supra note 5, at 946.
decades of the twentieth century. Although the Court took on an expanded role as a constitutional interpreter after the passage of the Reconstruction Amendments, the judiciary’s increased presence as guardian of the boundary between public power and private rights was not inconsistent with republican theory. So long as judges were seen as declaring—rather than making—law, and as not entering into the domain of policy, their development of doctrinal formulas to aid in boundary tracing was not problematic.

The difficulties with a constitutional jurisprudence of boundary tracing began when human agency became elevated to a position of causal primacy, when judges began to be regarded as a species of lawmakers, and when the formulas of boundary tracing came to be criticized as ideologically driven. As arguments pointing out the inconsistencies between lawmaking by unelected judges and democratic theory became part of constitutional commentary, courts were asked to justify interpretations that substituted judicial glosses on constitutional provisions for the policies of the elective branches. The vulnerability of the judiciary to arguments premised on democratic theory was heightened by the fact that the expanded role of the courts as constitutional interpreters after Reconstruction reduced the scope of the departmental discretion principle.

From this perspective, the abandonment of boundary tracing for the posture outlined in Carolene Products seemed to compliment democratic constitutional theory. The technique of presuming legislation to be constitutional removed the courts from having to oversee many of the policies of the popularly elected branches. It promised to revive the departmental discretion principle by allowing the legislatures or the Executive to resolve most contested issues of social policy. Those instances in which the Court departed from the presumption of constitutionality and continued to play the role of overseers did not seem numerous at the time the Court decided Carolene Products. To be sure, there were some rights that could not be infringed by majorities, even in a society premised on majority rule, but those were rights self-evidently associated with democratic theory, such as speech rights. For the most part, the Court applied those rights against the states through the Fourteenth Amendment’s Due Process Clause. Judicial departures from the presumption of constitutionality to protect those rights was consistent with democratic constitutionalism. It was not anticipated, when the Court handed down Carolene Products, that there would be many other occasions where judges would depart from the presumption.

In short, the Carolene Products regime did not anticipate an elaborate jurisprudence of scrutiny levels. The tentative blueprint for judicial review Justice Stone sketched in Carolene Products came before racial discrimination cases expanded the importance of the Equal Protection Clause, before the Cold War and anti-Communism ushered in additional efforts to restrict speech, and before altered attitudes toward sexuality rendered the enforcement of public morality a more treacherous enterprise. As legislative efforts to classify persons on the basis of race or other endemic characteristics, to repress unpopular speech, or to enforce sexual taboos came to be seen as inconsistent with one or another tenet of democratic theory, the Court departed from its ordinary posture of deference. As the categories of Carolene Products departures increased, the technique appointed to justify those departures was the Court’s choice of scrutiny levels.

More scrutiny levels choices begat still more, resulting in scrutiny levels decisions becoming a routine feature of the Court’s constitutional decisions. As that
occurred, justifications for scrutiny levels choices began to occupy a role comparable to the doctrinal formulas that accompanied the Court’s earlier efforts at boundary tracing. The justifications for scrutiny levels decisions became vulnerable to the same line of criticism that was directed at boundary tracing formulas—they were simply rationalizations for ideologically determined outcomes.

The history of judicial scrutiny suggests that no definitive solution to the problem of reconciling judicial review with a political theory premised on popular sovereignty is capable of being achieved. All previous “solutions,” whether premised on republican or democratic constitutional theory, whether emphasizing the departmental discretion principle, boundary tracing, or constitutional presumptions and scrutiny level choices, earned their temporary success from tacit understandings that made the lines they mark between the province of the judiciary and that of the other departments seem natural and inevitable instead of artificial and dubious.

At one point in its history, American constitutional jurisprudence presumed that the distinction between judicial and political questions was intelligible. At another point, it presumed that the boundary between public power and private rights could coherently be traced. At another point, it presumed that there was a clear difference between the sort of legislation that required heightened scrutiny and the sort that only required minimal scrutiny. Those presumptions did not come from the Constitution or any other legal source. They came from a set of shared social and political attitudes that shaped conceptions of the role of the judiciary in American constitutionalism. As those attitudes changed, the presumptions changed with them. A robust constitutional principle of departmental discretion gave way to judicial boundary tracing, which gave way to judicially-fashioned levels of scrutiny. None of those regimes of constitutional interpretation should be regarded as cast in stone. None should be regarded as intrinsically superior to the others. The scrutiny regime has been with us for approximately seventy years, and it may have exhausted itself as a helpful technique of constitutional interpretation. If we understand its historical origins, perhaps we can understand its contingent status.