THE CONSTITUTIONAL JOURNEY OF MARBURY V. MADISON

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INTRODUCTION

On February 4, 1901, the centennial of John Marshall's appointment as Chief Justice of the United States Supreme Court, "John Marshall Day" was celebrated across the country, with commemorative proceedings held in the District of Columbia and thirty-seven states and territories. Many of the addresses that paid homage to Marshall's achievements singled out the importance of his opinion in *Marbury v. Madison*.1 The editor of the volumes collecting those "John Marshall Day" addresses, John F. Dillon, stated that "Marbury's Case opened a new chapter in the history of constitutional governments," and described Marshall's opinion as holding that if other branches of government "enact a law in conflict with the Constitution it is utterly void, and the court, although only a co-ordinate department, has the right under the Constitution so to decide, and such decision is authoritative and final, binding throughout the land upon States and people."2 Dillon then went on to use the contemporary example of the "Insular Cases" to demonstrate how deeply entrenched the role for the Supreme Court of the United States associated with *Marbury* had become in the hundred years since Marshall assumed the office of Chief Justice.

The "Insular Cases," raising the question of whether the provisions and requirements of the Constitution applied to overseas territory acquired by the United States, had been argued in the Supreme Court, but had not been decided by the date of the Marshall Day ceremonies.3 The cases were perceived as having great political significance, the two major candidates for president in the 1900

1 5 U.S. (1 Cranch) 137 (1803).
3 Id. at xix–xx.
election having taken opposing positions on whether, in the general parlance of the time, "the Constitution followed the flag" when the United States acquired overseas possessions. That issue was to be decided by the Supreme Court. "The noticeable point," Dillon felt,

[was] that not only was there no jealousy of the jurisdiction and power of the court on the part of the President, or Congress, or the people; but, on the contrary, these were all calmly awaiting the judgment of the court, to be accepted... as authoritative, and to be acted upon accordingly by the Government and the people. This extraordinary spectacle of an expectant Nation waiting for the court's deliverance shows... that the Supreme Court is verily, the living voice of the Constitution.5

Dillon's comments pictured a regime of government in which political issues were invariably converted into constitutional ones, in which the Supreme Court of the United States assumed the power to settle constitutional issues, and in which "the Government and the people" peaceably acquiesced in the Court's decision. One might compare that portrait with one sketched, a hundred years later, by Professor Larry Kramer in a description of "[t]he defining characteristic" of the constitutional jurisprudence of the Rehnquist Court.6 "At the base of its jurisprudence," Kramer claimed,

lies the Justices' conviction that they and they alone are responsible for the Constitution... [A]ny notion that what the Constitution does or permits might best be left for the people to resolve... seems beyond the Rehnquist Court's compass. Politics begins where the Constitution leaves off, and what the Constitution allows the political branches to do is in all events to be decided by the Court. This is judicial sovereignty.7

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5 Dillon, supra note 2, at xx.
6 Larry D. Kramer, The Supreme Court 2000 Term Foreword: We the Court, 115 Harv. L. Rev. 4, 158 (2001).
7 Id.
To illustrate the Court's attitude, Kramer quoted a passage from Chief Justice Rehnquist's opinion in *United States v. Morrison*. 8

"[T]he Framers," Rehnquist wrote, "crafted the federal system of government so that the people's rights would be secured by the division of power."9 They were concerned "that the Constitution's provisions... not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint."10 For those propositions Rehnquist cited *Marbury v. Madison*. "No doubt the political branches have a role in interpreting and applying the Constitution," Rehnquist noted, "but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."11

Kramer called Rehnquist's statement "made without context and grossly oversimplified."12 It was "constitutional history in a funhouse mirror, a warped picture whose features are distorted at precisely those points where it matters most."13 Kramer then elaborated:

The Founding generation did not solve the problem of constitutional interpretation and enforcement by delegating it to judges.... Their structural solutions were meant to operate in politics: elections, bicameralism, an executive veto, political connections between state and national governments, and, above all, the capacity of politicians with competing interests to appeal for support to the people who made the Constitution. An idea of judicial review did eventually emerge, but it was fenced in by concern for preserving the essence of this popular constitutionalism.... And no matter how often the Court repeats that it has been the ultimate expositor of the Constitution since *Marbury*, it still will not have been so.14

What is going on here? In 1901, a commentator identifies *Marbury v. Madison* with a constitutional jurisprudence in which the

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8 529 U.S. 598 (2000).
9 Id. at 616–17 n.7.
10 Id.
11 Id.
12 Kramer, supra note 6, at 162.
13 Id.
14 Id.
other branches of government defer to the Supreme Court’s resolution of contested political issues, transposed into constitutional cases. In 2000, the Chief Justice of the United States cites *Marbury* for that identical proposition. In 2001, a commentator claims that the Chief Justice’s interpretation of *Marbury* ignores the fact that the idea of judicial review in America has always been confined by an overriding commitment to popular constitutionalism, and asserts that for the Court to claim that “what the Constitution allows the political branches to do is in all events to be decided by the Court” amounts to “judicial sovereignty.”

Can *Marbury* fairly be identified with all of the propositions laid down in the excerpts quoted above, or do some of them distort its meaning? In particular, if *Marbury* means, as Rehnquist says and Dillon implies, that the Supreme Court is the “ultimate expositor” of the Constitution, how can there be any appropriate posture for other branches of government other than deference to the Court’s judgments when constitutional issues are raised? How is Kramer able to claim that judicial review has always operated against a backdrop of “popular constitutionalism,” a “domain in which the people are free to settle questions of constitutional law by and for themselves in politics,” and thus conclude that the Court has not been “the ultimate expositor of the Constitution since *Marbury*?”

These questions suggest that, although *Marbury v. Madison* has been seen as foundational to the American constitutional enterprise, there have been widely differing views as to what foundational principle *Marbury* embodies. According to Dillon, the principle is that of the “judicial veto,” or the ongoing appeal of anyone disappointed by a law promulgated by the executive or legislature for a judicial determination of the constitutionality of that law. From the viewpoint attributed to Rehnquist by Kramer, *Marbury* embodies the principle that “[a]part from the narrow political question doctrine and a theoretic possibility of [constitutional] amendment,” there is no room even for constitutional interpretation by the other branches of government. Kramer’s characterization of Rehnquist comes close to suggesting that, in Rehnquist’s
view, judges do not simply “veto” legislation or executive policy-making on constitutional grounds; legislative and executive acts have no constitutional status until the judiciary passes on them. And from the perspective of Marbury that Kramer advances, judicial review means that courts engage in constitutional interpretation within the limited sphere of “cases” and “controversies” in which they are authorized to do so. Outside that sphere is a vast realm where constitutional issues “operate in politics” and are resolved by other actors.

What follows is an effort to sketch successive understandings of Marbury since its initial formulation, and to show how those understandings have been affected by changing views of the relationship of the courts to other actors in the American constitutional order. I will argue that successive understandings of Marbury, and of the relationship of the courts to other constitutional actors, have not pivoted on the legitimacy of “judicial supremacy,” at least as that term has been conventionally understood. They have not pivoted, in other words, on the appropriateness of the courts’ substituting their judgments for those of other branches on political issues transposed into constitutional controversies. They have pivoted, instead, on the scope of judicial supremacy—on the extent to which the Court has tacitly allowed other branches to carve out some space for their own constitutional interpretations.

My interpretation requires “judicial review,” as established in Marbury, to be seen as a composite of two constitutional principles. One is the principle that in “cases” or “controversies” involving interpretations of the Constitution of the United States, the judiciary is the “ultimate expositor.” That principle amounts to judicial supremacy, and was understood as such by early commentators on Marbury. The other is the principle that the range of “cases and controversies” requiring judicial interpretations of the Constitution is comparatively narrow; outside that range is a wide scope for activity by other governmental actors that amounts to constitutional interpretation because it affects the functions, and the relations, of institutions in the American constitutional order.

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19 See id. at 153, 158.
21 Kramer, supra note 6, at 162.
22 See infra notes 88–99 and accompanying text.
This principle, which I am calling "departmental discretion," assumes that, although the judiciary has the power to review implicit constitutional judgments by other actors, that power includes the freedom to decline to do so. In such cases the Court is deliberately leaving the judgments of other branches in place, thereby affirming the legitimacy of those branches as constitutional interpreters.

What I am calling the "constitutional journey" of *Marbury v. Madison* is a narrative in which the two principles of *Marbury* have been consistently understood, while their relationship has been differently interpreted. In some periods of American history the judicial supremacy principle has been thought to require more or less constant constitutional scrutiny of activities of other branches of government by the Supreme Court, resulting in narrow definitions of the departmental discretion principle. In other times the judicial supremacy principle has been thought, because of its tendency to produce judicial sovereignty, to require comparatively broad definitions of the departmental discretion principle. In still other times the two principles seem at equipoise, as if a tacit understanding exists as to what constitutes the appropriate range of judicial supremacy.

Marshall's opinion in *Marbury* did more, of course, than declare judicial supremacy and departmental discretion foundational principles of American constitutional law. It also provided justifications for the foundational status of those principles. By describing the changing reception of *Marbury* as a "constitutional journey," I also intend to suggest that after an initial period in which the *Marbury* principles seemed tacitly accepted and in equipoise, Marshall's justifications for judicial supremacy came to be perceived as less reso-

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23 In his classic article, "Marbury v. Madison and the Doctrine of Judicial Review," Edward Corwin, after quoting a passage from Chief Justice John Marshall's opinion in *Marbury* that referred to "'important political powers' vested by the Constitution in the President, "'in the exercise of which he is to use his own discretion,"" described the passage as articulating "the doctrine of departmental discretion." 12 Mich. L. Rev. 538, 571 (1914) (quoting *Marbury*, 5 U.S. (1 Cranch) at 165-66). That doctrine, Corwin indicated, was subsequently extended to include the proposition that the powers of Congress should be liberally construed and that the President was immune from judicial process. Id. I am treating departmental discretion, in this extended sense, as a constitutional principle that is closely tied to judicial supremacy. It amounts to the principle that the power of the judiciary to serve as the ultimate expositor of the Constitution shall not be extended so as to unduly curtail the power of other branches of government to exercise their core functions.
nant, particularly where they posited a sharp distinction between the power granted to judges to "say what the law is"\(^{24}\) and the powers exercised by "lawmaking" branches of government. When that distinction came to be seen as less intelligible, pressure mounted on the judiciary to narrow the sphere of its expository supremacy, thereby broadening its deference to other constitutional actors. Eventually a new equipoise was reached, in which clear lines were drawn between the constitutional areas in which continued judicial scrutiny of the activities of other actors could be expected and those in which the judiciary would defer to the tacit constitutional interpretations of others.

A version of this equipoise persisted well into the twentieth century. The equipoise was not, however, wholly a product of the collapse of a bright-line distinction between the lawmaking powers of other branches and the powers of constitutional interpretation ascribed to judges. It was also a product of a modern conception of the American constitutional enterprise: that it was framed within the boundaries of democratic theory. Constitutional interpretation by judges needed to be confined within its appropriate limits because the judiciary was not a democratic institution and because judicial supremacy was inconsistent with majority rule. This conception of American constitutionalism had not been held by the Framers or their nineteenth-century successors. Marbury's foundational principles of judicial supremacy and departmental discretion were not derived with that conception in place.

Kramer sees the twentieth-century equipoise on the scope of judicial review as having been abandoned by the current Court. Particularly troubling, for Kramer, are two features of the Court's new version of judicial supremacy. One is that the Court appears to lose sight of the large arena of "popular constitutionalism" anticipated by Marbury's initial formulation of judicial review. The other is that the Court fails to provide a revised justification for Marshall's now-problematic distinction between judicial interpretation and lawmaking. In the absence of some cogent clarification of that distinction, the Rehnquist Court's current understanding of Marbury appears to Kramer as "a grab for power."\(^{25}\)

\(^{24}\) Marbury, 5 U.S. (1 Cranch) at 177.
\(^{25}\) Kramer, supra note 6, at 169.
This Article will conclude with a discussion of the cogency of Kramer's critique. I shall argue that it proceeds from an anachronistic understanding of the foundational principles of Marbury, neither of which were designed to ensure popular sovereignty in constitutional interpretation, nor to respond to the undemocratic status of the judiciary. The departmental discretion principle of Marbury was not derived from democratic theory. It was derived from two premises of late eighteenth- and nineteenth-century republicanism: that power should be diffused among governmental actors, and that the expertise of judges, who were charged with discerning and applying the law, did not extend to decisions that were peculiarly within the purview of other branches of government. To claim, as Kramer does, that questions about the scope of judicial review have always been "fenced in by concern for preserving the essence . . . of popular constitutionalism" is to advance an inaccurate, and loaded, description of the constitutional journey of Marbury v. Madison.

I. EARLY NINETEENTH-CENTURY UNDERSTANDINGS OF MARBURY

A. The Derivation of Marbury's Principles

The peculiar structure of Marshall's opinion in Marbury has been widely discussed by commentators, and their conclusions need only be briefly summarized. Although the ultimate question in the case was whether the Supreme Court of the United States had jurisdiction to hear it—a question whose resolution produced both of the principles for which the case stands—Marshall's opinion took up that question last. The structure of his reasoning placed the earlier portions of his opinion in a somewhat ambiguous state. Marshall had begun with an analysis of whether, under the


27 One could argue that the first issue Marshall should have addressed was whether he should have recused himself from hearing the case at all, since he was the government official whose failure to act had resulted in William Marbury's being deprived of his commission as a justice of the peace. Marshall had been Secretary of State for the John Adams administration during its last days in office in 1801, and his office had been charged with delivering commissions for forty-two justices of the peace in the District of Columbia and Alexandria, Virginia. The appointments for those offices
common law of personal property, Marbury was entitled to his commission. That issue was arguably secondary to the issue of whether the Supreme Court had jurisdiction to entertain Marbury's writ of mandamus against Madison to compel him to deliver the commission. Since Marshall ultimately held that it did not, his analysis of Marbury's legal rights could be regarded as dictum. Thus, some commentators have suggested that Marshall should have avoided the ticklish question of whether a discretionary decision of the President of the United States could be reviewed by the courts by first taking up the question of the Court's power to hear the case.  

It is also possible to argue, however, that Marshall was forced by the case's posture to decide at least one momentous issue of constitutional law—either whether the Supreme Court had power to review the constitutionality of an Act of Congress or whether the Supreme Court had power to second-guess the discretionary judgment of the executive—so that Marshall was entitled to choose the logical structure of his Marbury opinion. It was this logical structure that produced the two principles Marshall derived in the case.

1. Departmental Discretion

Marshall first took up the issue of whether Marbury had a legal right to his commission. That question not only required a determination of whether a right existed, but also of whether any such right was precluded by Jefferson's decision not to deliver the commission to Marbury. Marshall concluded, first, that the Act of Feb-

had been made by Adams at the end of February, 1801, and the appointees were confirmed by the Senate on March 3. The next day, the newly elected government, dominated by Thomas Jefferson's opposition Republican party, was to begin operations. Marshall's office was given the commissions to deliver at the last minute, and at least four commissions, including that of Marbury, had not been delivered when James Madison, Jefferson's Secretary of State, assumed office on March 4. Jefferson, rightly understanding that the appointees to the commissions were Adams loyalists, ordered Madison not to deliver the commissions. See Susan Low Bloch, The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?, 18 Const. Comment. 607, 607-09 (2001).

Marshall was thus clearly an interested party in the case. But he did not recuse himself, nor did he discuss the issue in his Marbury opinion.

28 See, e.g., Van Alstyne, supra note 26, at 6-7.
ruary 27, 1801, by which the Federalist Congress had provided for the appointment of justices of the peace for the District of Colum-
bia, was within Congress's Article I power to exercise legislation over the District, and, second, that evidence produced at trial that Marbury's commission had been signed by Adams and deposited in the office of the Secretary of State meant that the right had vested. Delivery of the commission was not necessary. He added that the commission, being for “five years, independent of the executive,” was “not revocable” by Jefferson. Under this view of Marbury’s commission, Jefferson was an agent of Congress.

There was still a question, however, as to why Jefferson’s order not to deliver the commission was reviewable in the courts. It appeared to be a discretionary judgment made by the president. But that fact alone, Marshall stated, was not dispositive. Some discretionary acts of the executive branch could not be reviewed by the courts, he suggested, but those involved “cases in which the executive possesses a constitutional or legal discretion.” Marbury was not such a case. The Constitution did give the president certain discretionary powers, such as the power to grant pardons or to veto legislation, but revoking a congressional appointment with a specified term of office was not among them. Nor was Jefferson’s instruction to Madison an appropriate case of “legal” discretion by the executive. Marshall had previously determined that Marbury’s right to his commission vested when, after Congress had confirmed his position, President Adams had signed and sealed the commission. Had Adams not done so, Adams’s successor could have been said to have had “legal discretion” to follow or not follow Congress’s directive. But that was not the case. William Marbury, in alleging that he had a vested right to his commission, was in the position of one “who considers himself injured” and “resort[s] to the

29 Marbury, 5 U.S. (1 Cranch) at 155.
30 Id. at 160.
31 Id. at 162. In contrast, if Adams had nominated Marbury to the position and Congress had confirmed him, but Adams had not signed the commission when Jefferson took office, Jefferson’s declining to sign it would not have been a revocation. Marshall’s opinion suggested that Jefferson could have done so, and Marbury would be without any legal recourse. Id. at 167.
32 Id. at 166.
33 U.S. Const. art. II, § 2, cl. 1.
34 Id. art. I, § 7, cls. 2, 3.
laws of his country for a remedy." The question "whether a right has vested" was "in its nature, judicial," Marshall asserted, and "must be tried by the judicial authority."

By placing Marbury in a category of persons whose asserted legal rights, once perfected, could not be revoked at will, Marshall was able to detach Marbury's action from another category of cases that were by their nature inappropriate for judicial consideration. Marshall used quite strong language to describe the unsuitability of such cases for the courts:

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

But Marbury's case was not "an intrusion into the secrets of the cabinet." It was a legal action based on "a paper" (Marbury's signed, sealed commission) that was "upon record, and to a copy of which the law gives a right, on the payment of ten cents."

A principle delegating certain questions to the discretion of other branches of government had thus been derived by Marshall. But it was not at all clear from his language what the category of "departmental discretion" questions encompassed. Marshall identified two sorts of questions in his discussion of executive discretion. One was "[q]uestions, in their nature political." The other was questions "by the constitution and laws, submitted to the executive." He did not give much guidance about either class of questions. And there is the further difficulty of reconciling the departmental discretion principle with another passage in Marbury, which reads as follows:

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those

35 *Marbury*, 5 U.S. (1 Cranch) at 166.
36 Id. at 167.
37 Id. at 170.
38 Id.
39 Id.
40 Id.
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 at all, what part of it are they forbidden to read, or to obey?  

This language has generally been taken to be an argument for judicial interpretation of the Constitution in constitutional cases: judicial review. But it seems also to be an argument for judicial interpretation of all constitutional cases, including cases in which the discretion of the other branches of government is at issue. Thus, Marshall seems to be saying that the departmental discretion principle of *Marbury* is a principle subject to judicial implementation. The mere assertion by another branch of government that it possesses “constitutional” or “legal” discretion to act in a particular area is not sufficient to preclude judicial review. A court must first acquiesce in that assertion, in order to place the contested subject matter in the departmental discretion category.

At this point in his *Marbury* opinion, Marshall had created a category of cases implicating departmental discretion, had decided not to include Marbury’s case in that category, and had signaled that the scope of the category would be determined by the judiciary. But Marshall had still not produced a constitutional justification for anything he had done, because he had still not advanced constitutional arguments for why the Court had jurisdiction over the *Marbury* case in the first place. As he put it, Marbury had legal title to his commission, a vested right, and that refusal to deliver the commission was “a plain violation of that right.”

He was entitled to a remedy. Two questions thus remained: first, whether he had employed the proper writ, that of mandamus, to perfect that remedy, and second, whether he had brought his writ of mandamus in the proper court. The remainder of Marshall’s opinion asserted that authority to resolve definitively both those questions properly lay with the judiciary, even though Congress had spoken to the lat-
ter question. In the process, the opinion established the principle of judicial supremacy.

2. Judicial Supremacy

Marshall had already resolved the first question posed above. Marbury had no other remedy save mandamus—a writ to compel an officer of the executive branch (in this case, Madison) to deliver the commission to him—and he was within his rights in asking Madison to do so. No question of executive discretion was involved; Marbury’s request was merely an effort to get something to which he had become entitled before Madison took office. Nor was the issue of whether the successor of an executive official was required to complete a legal obligation of his predecessor a nonjusticiable political question. Thus, the only question remaining was whether, in Marbury’s case, a writ of mandamus could issue from the Supreme Court of the United States.

The skeleton of Marshall’s argument about the issuance of the writ is as follows. He first quoted a portion of Section 13 of the Judiciary Act of 1789 discussing the jurisdiction of the Supreme Court. Section 13 authorized the Court “to issue writs ... of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States.” Marshall then quoted Article III, Section 2 of the Constitution, which declared that the Supreme Court “shall have original Jurisdiction” in all cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” The same Section stated that “[i]n all ... other Cases ..., the supreme Court shall have appellate Jurisdiction.”

Marshall then argued:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, ... the subse-

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44 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.
45 U.S. Const. art. III, § 2, cl. 2.
46 Id. The clause limited “cases” to those enumerated in Clause 1, and indicated that the Court’s appellate jurisdiction was subject to “such Exceptions ... as the Congress shall make.” Id. The enumerated cases included those “arising under ... the Laws of the United States,” of which Marbury’s was an example. Id. art. III, § 2, cl. 1.
sequent part of the section is mere surplusage. . . . If congress re-
 mains at liberty to give this court appellate jurisdiction, where
 the constitution has declared their jurisdiction shall be original;
 and original jurisdiction where the constitution has declared it
 shall be appellate, the distribution of jurisdiction, made in the
 constitution, is form without substance.\(^47\)

Consequently, Marshall concluded, the Supreme Court could only
issue a writ of mandamus as “an exercise of appellate jurisdic-
tion.”\(^48\) Marbury’s lawyers, acting under the authority of Section 13
of the Judiciary Act, had asked the Court to issue a writ of man-
damus. But that action, Marshall argued, was “in effect the same as
to sustain an original action for that paper”: It belonged “to origi-
nal jurisdiction.”\(^49\) Thus, Section 13 of the Judiciary Act had given
authority to the Supreme Court to issue writs of mandamus with-
out any limitations. This “appear[ed] not to be warranted by the
constitution.”\(^50\)

The syllogism governing Marshall’s discussion of judicial review
in Marbury has become a familiar one for constitutional scholars,
but it seems worth pointing out the meaning that Marshall’s con-
temporaries would have attached to each of its steps. The first step
was an establishment of the proposition that the Constitution was
“the fundamental and paramount law of the nation,” transcending
the powers of ordinary lawmakers.\(^51\) Marshall established the

\(^{47}\) Marbury, 5 U.S. (1 Cranch) at 174.

\(^{48}\) Id. at 175.

\(^{49}\) Id. at 175–76.

\(^{50}\) Id. at 176. Marshall’s argument has been criticized on two grounds. First, the full
text of § 13 of the Judiciary Act strongly suggests that rather than giving the Court
unlimited authority to issue writs of mandamus, Congress intended to confine the
Court’s issuance of those writs to cases where it had been empowered by the Consti-
tution to exercise original jurisdiction, or where it was exercising appellate jurisdic-
tion. Marshall could have thus avoided passing on the constitutionality of the Section
by reading it as giving the Court jurisdiction in Marbury’s case. Second, even if one
assumes that Marshall was required to take up the constitutionality of § 13, a prelimi-
nary inquiry would seem necessary—whether the Supreme Court of the United States
had the authority to review the constitutionality of acts of Congress. This was, of
course, the inquiry that yielded Marbury’s most celebrated principle. Marshall chose
to read § 13 as if it required him to evaluate its constitutionality, and proceeded to re-
solve that issue. But he arguably should have determined the legitimacy of judicial
review of acts of Congress before doing so. For more detailed versions of these two
arguments, see Van Alstyne, supra note 26, at 14–29.

\(^{51}\) Marbury, 5 U.S. (1 Cranch) at 177.
proposition by pointing out that the American Constitution had been written to establish "limits" on the respective powers of departments of government. It would be inconsistent with a government of limited powers if "the legislature [could] alter the constitution by an ordinary act."52 The whole principle of a government of limited powers presupposed "a superior paramount law" restraining the acts of a legislature.53 "[T]he theory of every such government," Marshall argued, "must be, that an act of the legislature, repugnant to the constitution, is void."54

Marshall's description of the Constitution as an embodiment of "fundamental paramount law" appealed to a concept that was deeply evocative for the framing generation of Americans. One was the idea of "fundamental law," a term that in English jurisprudence signified a bundle of "ancient rights" intrinsic in the status of being a citizen.55 The rights were not codified, although perhaps the Magna Carta could be taken as embodying them. They were nonetheless available as checks on Parliament's lawmaking authority. In identifying the Constitution as "forming the fundamental and paramount law of the nation," Marshall was drawing upon this jurisprudential heritage.

"Fundamental law" in England, as noted above, was not embodied in a written constitution. In America, Marshall pointed out, an additional step had been taken: In order that limits on the power of the legislature "may not be mistaken, or forgotten, the constitution is written."56 The enumerated principles of the Constitution's text, many of which posited limits on the powers of the branches of government, were "deemed fundamental," and "designed to be permanent."57 Americans were making sure that they could appeal to fundamental law when they felt oppressed by the exercise of governmental powers. The Constitution would be the source of that appeal. This was step two of Marshall's syllogism.

52 Id.
53 Id.
54 Id.
56 Marbury, 5 U.S. (1 Cranch) at 176.
57 Id.
In order for appeals from a legislative provision to the Constitution to carry any weight, some theory for resolving them was necessary, as well as some mechanism for effectuating the resolution. Marshall's argument, in essence, was that for "every . . . government [that established limits on the legislative power]," this theory must be that "an act of the legislature, repugnant to the [source of fundamental law], is void." Thus, in America, if a legislative provision was in contravention of the Constitution, it was of no effect. But how did one know when an act of legislation was repugnant to the Constitution?

At this point Marshall took the third step in his syllogism. He noted that acts of the legislature ordinarily bound the courts as well as the people. But if legislative acts were repugnant to the Constitution, surely they did not bind the people, because otherwise citizens had no ability to make an appeal to fundamental law. If they did not bind the people, how could they bind the courts? "This," Marshall argued, "would be to overthrow in fact what was established in theory." The courts could not be bound by something that was not law.

The point seemed obvious enough, but Marshall now expanded upon it. Courts could not be bound by something that was not law because it was "emphatically the province and duty of the judicial department to say what the law is." This meant that "[i]f two laws conflict with each other, the courts must decide on the operation of each." Marshall then elaborated upon the implications of that conclusion:

[1]f a law be in opposition to the constitution; . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . . Those . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. . . . It would be giving to the leg-

58 Id. at 177.
59 Id.
60 Id.
61 Id.
islature a practical and real omnipotence. . . . It is prescribing limits, and declaring that those limits may be passed at pleasure.  

At this juncture in his argument, Marshall might be taken to have confused ordinary judicial “duty” with judicial review of the constitutionality of legislation. In ordinary cases courts sometimes needed to reconcile competing laws, but an appeal from legislation to the Constitution was a different sort of reconciliation. It was an appeal to a fundamental law, which rendered null and void any legislation with which it was in conflict. Why should the task of making that determination be entrusted to the courts? Why should it not be delegated to the “people,” whom all the framers of the Constitution identified as the ultimate sovereign power in the American republic?

The fourth step in Marshall’s syllogism in *Marbury* addressed this question. He began by noting that the Constitution had extended “the judicial power of the United States” to “all cases arising under the constitution.” This would seem to mean, at least, that, “in some cases . . . [,] the constitution must be looked into by the judges.” He gave examples—Article I’s proscription of ex post facto laws, bills of attainder, and the laying of taxes or duties on articles exported from a state—of constitutional provisions “prescribing, directly . . . a rule of evidence” for courts should legislation be passed in contravention of principles established in the Constitution. The provisions appeared to anticipate that judges would apply them in cases. That supposition was strengthened by the fact that Article VI required “judicial Officers” to take an oath “to support [the] Constitution [of the United States.]” Why would a judge “swear to discharge his duties agreeably to the constitution of the United States,” Marshall asked rhetorically, “if it is closed upon him, and cannot be inspected by him?”

An additional step in Marshall’s syllogism did not appear explicitly in any part of his opinion, although it might be taken to have

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62 Id. at 178.
63 See Van Alstyne, supra note 26, at 19.
64 *Marbury*, 5 U.S. (1 Cranch) at 178.
65 Id. at 179.
66 Id.
67 U.S. Const. art. VI, cl. 3.
been lurking in the phrase "[i]t is emphatically the province and duty of the judicial department to say what the law is." The step was designed to alleviate a potential concern of the audience for Marbury: how, in a Constitution established but not administered by "the people," in which three departments were given powers and assigned responsibilities, some of which served to limit the powers of other departments, it was the judiciary that emerged to resolve controversies between the Constitution and laws made by the other branches. What gave the judiciary its superior status as constitutional interpreter?

Marshall’s opinion did not raise or even allude to this question, and nowhere in Marbury did he suggest that other branches of government were precluded from interpreting the Constitution for themselves. But it was clear that, after Marbury, Congress's understanding of the Court’s power to issue writs of mandamus, as illustrated in Section 13 of the Judiciary Act, was to yield to the Court’s own understanding of that power. Had Marshall rested his conclusion that the Court could not issue a writ of mandamus in Marbury’s case solely on a reading that Section 13 did not permit it, the case might have been viewed as the straightforward exercise of a well established judicial "duty," that of applying a statute to the facts of a particular case. Instead, Marshall had concluded that Section 13 was unconstitutional. Why were he and his judicial colleagues better suited than Congress to decide that question?

By not directly addressing that issue, Marshall raised the possibility that Marbury was a case, to use modern terminology, establishing judicial supremacy in addition to judicial review. He was not simply saying that the courts could pass on the constitutionality of congressional legislation. He was saying that the judiciary’s interpretations of the Constitution would control those of other branches. The only justification Marshall gave for that conclusion was that the essential function of courts was to declare the law. Taken literally, that justification would not seem to carry much weight. After all, it was also the essential function of Congress to “declare” laws, as it did whenever it passed legislation with a specific text.

\[^{69}\text{Id. at 177.}\]
So the phrase "it is emphatically the province and duty of the judicial department to say what the law is" meant more than "judges decide cases." It also attributed to judges the status of savants. Judges "found" the law before they applied it to cases. "Law" was something external to those who interpreted its meaning. It was something with a tangible identity, something that could be "declared." When judges tested a statute against the "fundamental, paramount law" of the Constitution, they could discern what that "law" was. They were better suited, in fact, to find and declare the law than actors in other branches of government.

We might be hard-pressed to discern why this should be so. One might think, in fact, that the variety of persons involved in the drafting, debating, and ratification of the Constitution would have been better suited than the Justices on the Marshall Court, none of whom had been a delegate to the Constitutional Convention, to ascertain and declare its meaning. Judicial expertise did not come from experience with the making of laws. It came, rather, from something like disinterestedness. Each of the other branches of government, being accountable to the people for their offices, had a vested interest in the laws and policies with which they were associated. Judges did not. Judges were thus better able to discern the meaning of fundamental law because they had no reason to want to turn that meaning to their advantage.

Step five in Marshall's Marbury syllogism was thus to buttress his claim for judicial supremacy in the interpretation of the Constitution through an implicit appeal to a perception of judges shared by his contemporaries. That perception was that, although judges were humans, and thus necessarily partisan figures, they did not act in a partisan fashion when they found and applied the law. The "discretion" afforded to judges, Marshall would later say in Osborn v. Bank of the United States, was "a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law." There was a sharp difference between "the will of the Judge," as a human being, and "the will of the law." Courts were "the mere instruments of the law, and [could] will nothing."
Marbury’s principle of judicial supremacy in constitutional interpretation was articulated against the backdrop of this understanding that, in discerning and applying law, judges were operating as savants rather than as partisans. Understood in that fashion, the last step of Marshall’s syllogism in Marbury was an argument that the judiciary had to be the superior constitutional interpreter because only judges were “mere instruments of the law” rather than interested lawmakers. If that step is included in the Marbury syllogism, two principles may be derived from the opinion. The first principle was that judges, because of their nonpartisan status, did not decide “questions of a political nature” or questions conferred to the departmental discretion of other branches (although they did decide what those questions were). The second was that the judiciary’s interpretations of the Constitution trumped those of other branches. The first principle was simply asserted, and implicitly justified, by a characterization of judges as “the mere instruments of the law” who could “will nothing.” Though the second principle was not mentioned, it followed necessarily from the last, implicit step of Marshall’s syllogism.

It is possible to read Marbury’s judicial supremacy principle as far more modest in its scope. The constitutional question raised in Marbury was one connected to the jurisdiction of a court and its power to issue a particular legal writ. One could argue that Marshall’s claim that the judiciary could prefer its determination of that question to that of Congress only amounted to recognition of the power of courts to decide constitutional questions pertaining to judicial powers and operations. This would have left a potentially vast category of constitutional questions pertaining to the powers and operations of other branches, for which the Court was not claiming any superior status as constitutional interpreter.

The difficulty with this reading of Marbury is that, although Marshall’s opinion signals the existence of “political” and constitu-

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73 See id.
74 See id.
tional questions beyond the scope of judicial resolution, it is clear that he anticipates the judiciary determining which questions fall into that category. Of the various departments created by the Constitution, only the judiciary is privileged to assert its superior status as a constitutional interpreter without review of that status by another branch. In the end, the judicial supremacy principle of *Marbury* is not simply an assertion of supremacy over questions related to the housekeeping powers of the judiciary. Rather, it is connected to a distinction between judicial interpretive power and the interpretive powers of other branches. Only the judiciary has "the province and duty to say what the law is." And only the judiciary can be trusted to interpret fundamental law in a disinterested fashion. This is true whether the judiciary chooses to deliver a final interpretation of a constitutional question, or chooses to delegate that question to the discretion of another branch.

**B. The First Wave of Reactions to Marbury**

The *Marbury* opinion was potentially controversial to contemporaries in three respects. First, in deriving the departmental discretion principle, it made some comments about the constitutional status of executive power that, given its ultimate holding, were seen as gratuitous. Second, it went on to pass upon the constitutionality of Section 13 of the Judiciary Act of 1789, despite subsequently concluding that the Court had no jurisdiction over cases such as Marbury's. Finally, the one portion of the opinion that, arguably, was not extraneous to the Court's actual decision advanced an argument that could well have been understood as deriving a constitutional principle of judicial supremacy. As noted, Marshall did not overtly announce that principle in *Marbury*; the opinion contained no language indicating that the judiciary should be regarded as the *exclusive* or the *superior* interpreter of the Constitution. But I have suggested that if the implicit fifth step of Marshall's syllogism in *Marbury* were taken into account, only the courts could be regarded as capable of "finding" the law in a disinterested fashion. This meant that if the Constitution was fundamental law, trumping other laws, only the judiciary could be trusted to faithfully discern its meaning.

*Marbury* was thus a decision that potentially said a good deal about the judiciary's future relations with the federal executive and
Congress. But of its three potentially controversial propositions, only the first two were given much attention by contemporary commentators. Thomas Jefferson, writing to a friend in 1807, described the Marbury opinion as "gratUITous," and said that he had "long wished for a proper occasion to have [it] brought before the public and denounced as not law."\footnote{Charles Warren, The Supreme Court in United States History 244 (rev. ed. 1926) (quoting letter from Thomas Jefferson to George Hay (June 2, 1897)).} Jefferson's criticism, however, was directed not at the principle of judicial supremacy, but at the portion of the opinion stating that delivery of Marbury's commission was not a prerequisite to his being able to swear out a writ of mandamus for it. "The object," Jefferson complained, "was clearly to instruct any other Court having the jurisdiction what they should do if Marbury should apply to them."\footnote{Id. at 245 (quoting letter from Thomas Jefferson to William Johnson (June 12, 1823)).} He thought that portion of the opinion not only a "gratuitous interference" with executive discretion but also a "perversion of the law."\footnote{Id. (quoting letter from Thomas Jefferson to William Johnson (June 12, 1823)).} By "law" he meant the common law pertaining to when a governmental commission "vested."

Discussion in newspapers around the time of the decision tended to focus on the same point. The New York Evening Post, unsympathetic to Jefferson, chortled that "by withholding the commission from Mr. Marbury after it was signed by the former President, and sealed by the Secretary of State," Jefferson had "been guilty of an act not warranted by law, but violative of a vested right."\footnote{Id. at 247-48 (quoting Constitution Violated by the President, N.Y. Evening Post, Mar. 23, 1803).} The "first act" of Jefferson's administration, the Post concluded, was "to stretch his powers beyond their limits, and... to commit an act of direct violence on the most sacred rights of private property."\footnote{Id. at 248 (quoting Constitution Violated by the President, N.Y. Evening Post, Mar. 23, 1803).}

The Boston Independent Chronicle, a Republican paper, felt, in contrast, that "[t]he attempt of the Supreme Court of the United States, by a mandamus, to control the Executive" was "no less than a commencement of war between the constituted departments."\footnote{Id. at 249 (quoting Indep. Chron. (Boston), Mar. 10, 1803 (emphasis omitted)).}
One correspondent, in letters to the *Virginia Argus*, a paper that supported the Jefferson administration, thought that Marshall’s comments about the legal effect of Jefferson’s decision to withhold Marbury’s commission reflected the generally “extra-judicial” character of his opinion. “[T]hree questions are reported to have been decided” in the *Marbury* opinion, the correspondent maintained. “The last decision was that the Court had no jurisdiction to decide the other two, which they nevertheless decided.” He took exception to Marshall’s remarks about the “vested” status of Marbury’s right to a commission. They had the effect of “encourag[ing] litigation by prejudging a member of the Government on a question that the very act of adjudication advised the applicant to bring before [the courts].” The “extra-judicial opinion” delivered by Marshall would “[s]tir up litigation and [prejudge] a great officer’s conduct,” making it “morally certain” that the case would reappear. But, more generally, the Court in *Marbury* had “decide[d] upon the merits of a cause without jurisdiction to entertain it,” which the correspondent found “contrary to all law, precedent and principle.” Another critic, writing to the Boston *Independent Chronicle*, made the same point. “The Court solemnly decided that they had no constitutional jurisdiction,” he noted, “and yet as solemnly undertook to give a formal opinion on the merits of the question which was not officially before them.” This seemed to be a deliberate effort to “volunteer an extra-judicial opinion for the sake of criminating a rival department of government.”

The gratuitous portions of Marshall’s opinion, and its apparent effort to encourage further litigation on the part of disappointed officeholders, thus tended to attract most of the attention of critics. A few, however, discussed Marshall’s observations on judicial scrutiny of the constitutionality of acts of Congress. One, who described himself as “An Unlearned Layman” in a series of letters to the *Washington Federalist*, alleged that Marshall had taken a
"'clause in the compact which indirectly conferred [the] power [of judicial review],'" and converted it to the "'most dangerous power'" that the Marbury opinion sought to claim for the judiciary.\textsuperscript{88} "'[T]he danger and inconsistency of such a power residing in the Judges,'" he thought, was self-evident.\textsuperscript{89} Another correspondent, responding to the "Unlearned Layman," felt he had missed the point:

The Judges do not pretend to a right to suspend or nullify the acts of the Legislature. But if a law conflict with the Constitution, the Judges are bound to declare which is paramount. The Judges here arrogate no power. It is not they who speak—it is the Constitution, or rather, the people. The Judges have no will; they merely declare what is law, and what is not.\textsuperscript{90}

Here again one sees the issue of judicial review converted to a simple exercise of laying the Constitution alongside the law whose validity was being challenged, and "declaring" which was "paramount." On the one hand, the issue is treated as easily resolvable by savants. On the other, "savancy" is attributed to the judiciary because of its lack of a discernible "interest." Judges "have no will" in the sense that they are not partisan. And if they are not partisan, they can see, without bias, "what is law, and what is not."

An example of how deeply step five of Marshall’s Marbury syllogism had penetrated the consciousness of early nineteenth-century commentators can be found in two observations made about the Supreme Court in 1819 and 1821. The observations came in the wake of a series of important constitutional decisions made by the Court between 1815 and 1821, which included Martin v. Hunter’s Lessee\textsuperscript{91} and Cohens v. Virginia,\textsuperscript{92} extending the scope of the Court’s constitutional review powers to include final decisions of state courts. In 1819, the Court decided Dartmouth College v.

\textsuperscript{88} Id. (quoting Editorial, Wash. Federalist, Apr. 20, 1803; Editorial, Wash. Federalist, Apr. 22, 1803; Editorial, Wash. Federalist, Apr. 27, 1803; Editorial, Wash. Federalist, Apr. 29, 1803).

\textsuperscript{89} Id. (quoting Editorial, Wash. Federalist, Apr. 20, 1803; Editorial, Wash. Federalist, Apr. 22, 1803; Editorial, Wash. Federalist, Apr. 27, 1803; Editorial, Wash. Federalist, Apr. 29, 1803).

\textsuperscript{90} Id. at 253 (quoting Editorial, Wash. Federalist, May 18, 1803).

\textsuperscript{91} 14 U.S. (1 Wheat.) 304 (1816).

\textsuperscript{92} 19 U.S. (6 Wheat.) 264 (1821).
Woodward,\(^9\) holding that the Contracts Clause prevented legislatures from modifying the terms of their relationships with eleemosynary institutions once those terms had been established by prior legal arrangements, including royal charters. The Dartmouth College case, pitting the autonomy of charitable institutions against the freedom of legislatures to enact educational policy measures, received nationwide attention. A correspondent for the Boston Columbian Centinel characterized the decision as ""more important than any which has been made by our judicial tribunals since the adoption of the constitution.""\(^9\)

The correspondent went on to say that Marshall's opinion for the Court in Dartmouth College had established 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.""\(^5\) He then discussed the implications of that principle:

[The courts] may be considered the bulwark of the Constitution to guard it against legislative encroachments. . . . It is their duty to declare all legislative acts, which are repugnant to the Constitution, null and void. They are bound also to consider the Constitution a fundamental law of the land. . . . It is peculiarly within their province to ascertain the meaning of the Constitution.

The theory of our government is now too well understood to admit the absurd doctrine, that the Legislative Body are themselves the constitutional judges of their own powers and acts. . . . To decide upon all other powers is the exclusive privilege of Courts of Justice.\(^*\)

In that passage several of the steps of Marshall's syllogism in Marbury had been internalized. The courts had a "duty" to test legislative acts against the "fundamental law" of the Constitution. It was

\(^5\) Id. at 751 (quoting Miscellany for the Centinel, Columbian Centinel (Boston), Feb. 10, 1819).
\(^*\) Id. (quoting Miscellany for the Centinel, Columbian Centinel (Boston), Feb. 10, 1819).
“peculiarly within their province” to do so. Constitutional interpretation was “the exclusive privilege” of courts. The doctrine that legislatures could be “the constitutional judges of their own powers” was “absurd” and counter to “the theory of our government.”

The only step in the *Marbury* syllogism not alluded to in the Centinel correspondent’s reaction to *Dartmouth College* was step five. The correspondent took it as a “‘matter for rejoicing’” to “‘discover purity and independence’” in judges, and held out the possibility that “‘the Judiciary [might] become[... more corrupt than the Legislative.’” If this were to occur, America “[would] share the common fate of all Republics,” that of disintegration and decay. “Independence” in judges, by this account, was not an innate characteristic of the office, as Marshall had implied in *Marbury*.

A year later, in another account of the *Dartmouth College* decision, however, Warren Dutton, in the course of repeating that the Supreme Court should be regarded as “the ultimate expositor of the constitution,” linked that role to the Framers’ belief that “the judicial power was... a being, separated from the prejudices, the passions, and the interests of men,... wholly intent upon the impartial administration of justice.” This was a statement of the background assumptions Marshall expected his contemporaries to bring to his comment in *Marbury* that it was “emphatically the province of the judicial department to say what the law is.” Judges were savants, finders of “the law,” not only because of their training but because of the nature of their office. They were to be understood as “separated from the prejudices, the passions, and the interests of men.”

One issue remained largely unexplored in the first wave of commentary on *Marbury*. This was the question whether, if the judiciary could interpret the meaning of the Constitution, other branches could as well. It seemed plain after *Marbury* that some nascent form of constitutional interpretation was present in every

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7 Id. (quoting Miscellany for the Centinel, Columbian Centinel (Boston), Feb. 10, 1819).
8 Id. (quoting Miscellany for the Centinel, Columbian Centinel (Boston), Feb. 10, 1819).
9 Henry Wheaton, Reports of Cases argued and adjudged in the Supreme Court of the United States, February term, 1819, 10 N. Am. Rev. 83, 104-05 (1820).
act of legislation. Congress had passed Section 13 of the Judiciary Act of 1789 in the face of Article III, and Congress revised the Section in the wake of *Marbury*. Although there was doubtless some expectation that constitutional interpretation of a sort would be engaged in by other branches of government, there was very little discussion of this issue in the first two decades after *Marbury*.

At least one observer of the Marshall Court's engagement with constitutional issues in the early nineteenth century remained convinced that other branches retained the power to fashion their own interpretations of the Constitution after *Marbury*. In September 1804, Thomas Jefferson responded to a letter from Abigail Adams complaining that he had pardoned several people convicted under the Alien and Sedition Act of 1801 for libeling John Adams. Jefferson responded that since he thought the act unconstitutional, he had chosen not to enforce it. He particularized:

[N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence. . . . But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power had been confined to them by the Constitution. . . . [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.100

Jefferson repeated these views in 1807,101 1815,102 and 1820.103 It is possible to read his position in the letter to Abigail as only saying that judges were the final arbiter of constitutional questions within "their own sphere of action." That view would have allowed him to

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100 Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 The Writings of Thomas Jefferson 49, 50–51 (Andrew Lipscomb ed., 1905).
101 Letter from Thomas Jefferson to George Hay (June 2, 1807), in 11 The Writings of Thomas Jefferson 213, supra note 100, at 213.
see *Marbury* as legitimate, because, as noted, that case turned on the question of whether the Supreme Court could issue a writ of mandamus in a particular set of circumstances, and that question required an investigation of a constitutional provision and a congressional statute defining the Court’s jurisdiction. *Marbury* could have been taken as only standing for the proposition that the Court can undertake constitutional review of congressional legislation pertaining to the judicial branch itself.\(^\text{104}\) His 1807 letter to George Hay was in the same vein: He said, “I shall ever . . . maintain it with the powers of the government, against any control which may be attempted by the judges, in subversion of the independence of the executive and Senate within their peculiar department.”\(^\text{105}\) That qualification, however, while perhaps making some sense as applied to a president’s obligation to enforce laws he thought unconstitutional, was less intelligible when applied to the exercise of legislative powers. *Marbury*, after all, also stood for the proposition that the Supreme Court, rather than Congress, was the final judge of the constitutionality of the Judiciary Act of 1789. In any event, in Jefferson’s 1815 and 1820 assertions of an independent power in the executive to interpret the Constitution, he did not include the qualification of departmental spheres of influence.\(^\text{106}\)

C. Equilibrium

Between 1835, when Marshall died, and 1857, when the Court declared an act of Congress unconstitutional for the first time since *Marbury*, the two principles Marshall had derived appeared to have become embedded in American constitutional jurisprudence, and their coexistence seemed to have produced a rough equilibrium on issues of constitutional interpretation. In that equilibrium, “judicial review,” as established in *Marbury*, was taken to be a combination of judicial supremacy in the interpretation of cases where the constitutionality of state legislation was at issue, and assiduous judicial attention to the departmental discretion principle.

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\(^{104}\) See Van Alstyne, supra note 26, at 34–35.

\(^{105}\) Letter from Thomas Jefferson to George Hay, supra note 101, at 215 (emphasis added).

\(^{106}\) See Letter from Thomas Jefferson to William Charles Jarvis, supra note 103, at 161; Letter from Thomas Jefferson to W.H. Torrance, supra note 102, at 302.
The Court consistently reviewed the constitutionality of acts of state legislatures, occasionally declaring them repugnant to the Constitution and thus void.\textsuperscript{107} At the same time, it also explicitly declined to pass on some state legislation as involving the domain of politics rather than law,\textsuperscript{108} and implicitly relegate other legislation to the domain of departmental discretion by sanctioning its constitutionality.\textsuperscript{109} In the same time period, commentators reasserted the supremacy of the judiciary in constitutional interpretation, and presidents continued to assert that they could make independent interpretations of the Constitution as part of their power to enforce the laws.

Several different sorts of sources support the above generalizations. One is a sequence of opinions written by Justice John Gibson of the Pennsylvania Supreme Court between 1825 and 1845. In the first case, \textit{Eakin v. Raub},\textsuperscript{110} he argued, in a dissenting opinion, that nothing in the Pennsylvania Constitution gave Pennsylvania judges power to review acts of the state legislature.\textsuperscript{111} Gibson distinguished between the “civil” and “political” powers of the judiciary, the former being only those “ordinary and appropriate” powers which are part of the “essence” of judicial office.\textsuperscript{112} These included “such powers and capacities as were incident to [judges] at the common law,” those that were necessary for the “execution of the municipal law” and the “administration of distributive justice.”\textsuperscript{113} The “political” powers of the judiciary, in contrast, were those that allowed it to “control . . . or to exert an influence over” another branch of government.\textsuperscript{114} By making this distinction Gibson was attempting to controvert Marshall’s argument in \textit{Marbury} that the judiciary’s power of constitutional review could be derived from its acknowledged power to decide cases and to “say what the law is.” Constitu-

\textsuperscript{108} See, e.g., \textit{Luther v. Borden}, 48 U.S. (7 How.) 1 (1849) (finding a dispute over the legitimacy of Rhode Island’s government to be a nonjusticiable political question).
\textsuperscript{110} 12 Serg. & Rawle 330, 344 (Pa. 1825).
\textsuperscript{111} Id. at 344 (Gibson, J., dissenting).
\textsuperscript{112} Id. at 346 (Gibson, J., dissenting).
\textsuperscript{113} Id. at 346–47 (Gibson, J., dissenting).
\textsuperscript{114} Id. at 346 (Gibson, J., dissenting).
tional review, involving the potential correction of the acts of other branches of government, was a "political" power. Moreover, Gibson suggested, Marshall's argument proved too much, because it was clear that the power to say what the law was did not provide a justification for courts to "call[] for the election returns, or scrutiniz[e] the qualifications of those who composed the legislature."\footnote{Id. at 349 (Gibson, J., dissenting).}

Gibson did not seem troubled by the fact that if the Pennsylvania judiciary had no power to review state legislation, the judiciary might be thought of as sanctioning laws that were unconstitutional. The "fallacy" of that argument was supposing that in not reviewing legislation the judiciary was taking any position on its constitutionality.\footnote{Id. at 354 (Gibson, J., dissenting).} Since it was "not required to concur in the enactment" of laws, it was not required to concur in any implicit constitutional interpretation resting on that enactment.\footnote{Id. (Gibson, J., dissenting).} If the legislature passed unconstitutional legislation, "the fault [was] imputable to the legislature, and on it the responsibility exclusively rest[ed]."\footnote{Id. (Gibson, J., dissenting).} In other words, the people, through the democratic political process, would correct any errors in constitutional interpretation by the legislature.

Although Gibson's dissent in \textit{Eakin v. Raub} has received considerable attention from commentators,\footnote{Two celebrated examples are Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court and the Bar of Politics 23-26 (1962), and David P. Currie, The Constitution in the Supreme Court 1789-1888, at 72-73 (1985).} it was less of an indication that the \textit{Marbury} principles remained controversial in the early nineteenth century than might first appear. First, Gibson's analysis was based on a Pennsylvania constitution that did not contain any language suggesting that the judicial branch had other than "civil" powers.\footnote{Pa. Const. art. V (1790) (on file with the Virginia Law Review Association). That article defined the powers of Pennsylvania state courts as "oyer terminer," "general jail-delivery," and "common pleas." It spoke of orphans' courts, register's courts, and courts of quarter sessions of the peace. It also spoke of "[t]he supreme court and the several courts of common pleas" as having "the power of a court of chancery," and other powers "to grant relief in equity." It indicated that the legislature could create}
legislation was in potential collision with federal laws or treatises, or with provisions in the Constitution of the United States, the Supremacy Clause provided that it should yield if a conflict existed, and took "the duty of the judiciary" to be to determine whether there was such a conflict.\footnote{1} It is not clear whether the judges associated with that "duty" included state judges, who were to follow the dictates of the Supremacy Clause, as well as federal judges. If so, that would mean that, in the ordinary course, Pennsylvania judges would not review the constitutionality of acts of the state legislature, but they would do so in cases where legislation allegedly conflicted with the U.S. Constitution or a federal statute or treaty. Gibson read the language in the Supremacy Clause as an "express grant of political power[]."\footnote{2} But it is hard to see how that language was different in kind from the language of Article III, which extends federal judicial power to "all Cases . . . arising under th[e] Constitution [of the United States]."\footnote{3}

Finally, Gibson retracted his position in the 1845 case of Norris v. Clymer.\footnote{4} In the interval between Eakin v. Raub and that case, a majority of the Pennsylvania Supreme Court had continued to review the constitutionality of acts of the Pennsylvania legislature, regardless of whether a "federal question" was involved in the constitutional challenge. Moreover, Pennsylvania had called a constitutional convention in 1837 and the delegates had taken no action to change the practice. That was enough for Gibson, who wrote that he had "changed that opinion for two reasons[:] the late Convention, by their silence [had] sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case."\footnote{5} Those last remarks may have signaled a recognition by Gibson that judges were hardly likely to refrain from an activity that gave them some power to intervene on current public issues.
Gibson's dissent in *Eakin v. Raub* suggests that there were at least some members of the early nineteenth-century judiciary who agreed with Jefferson that constitutional review ought not to be a warrant for extensive judicial oversight of legislative activity. The more robust expressions of that point of view, however, came from Jefferson's successors in the executive branch. Their argument boiled down to a claim that the constitutional obligation of the executive to "take care that the laws are faithfully executed" implied discretion not to enforce laws individual presidents took to be unconstitutional.

A vivid statement of that position came in President Andrew Jackson's 1832 message vetoing a congressional statute renewing the charter of the Bank of the United States. The constitutionality of legislation creating a national bank had been sustained by the Marshall Court in the 1819 case of *McCulloch v. Maryland*. That decision represented an implicit recognition by the Court of Congress's discretion to interpret the Necessary and Proper Clause of the Constitution broadly in order to justify the creation of a bank. Jackson, in his veto message, did not limit the grounds for his veto to a belief that a national bank was politically and economically unsound. He also announced that, despite the *McCulloch* decision, he was not convinced that such a bank was authorized by the Constitution.

Jackson rejected the argument that "[the Bank's] constitutionality in all its features ought to be considered as settled by the decision of the Supreme Court [in *McCulloch*]." Furthermore, "if the opinion of the Supreme Court covered the whole ground" of the rechartering legislation, he maintained, "it ought not to control the coordinate authorities of this Government." He then elaborated:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any
bill or resolution . . . as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.\(^{130}\)

The context in which Jackson delivered these remarks made it unclear to what extent they represented a challenge to *Marbury*. Taken at face value, statements such as “[t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both” seem provocative. Surely *Marbury* appeared to establish the proposition that the opinion of the Supreme Court about the constitutionality of Section 13 of the Judiciary Act of 1789 had more authority than that of Congress. It also appeared to establish the proposition that the Supreme Court’s understanding of the requirements triggering a writ of mandamus prevailed over the executive branch’s contrary understanding. But the statements cannot be taken at face value. First, they occurred in a setting in which the Constitution authorized Jackson, as President, to veto an act of Congress for whatever reason he chose. In the terms of Gibson in *Eakin v. Raub*, Article I, Section 7, Clause 2 had given Jackson an “express political power” to override the acts of the federal legislature.\(^{131}\) The President could certainly ignore the constitutional interpretations of Congress and the Supreme Court in the setting of an executive veto, but this was not to say he could do so as a matter of course.

Second, Jackson had said that “[t]he authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive when acting in their legislative capacities.”\(^{132}\) That proposition was not necessarily inconsistent with *Marbury*. *Marbury* was not an effort to say that before passing legislation Congress or the president needed to check with the Supreme Court. Rather, it said

\(^{130}\) Id.

\(^{131}\) *Eakin*, 12 Serg. & Rawle at 356.

\(^{132}\) Id. (emphasis added).
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only that where a case testing the constitutionality of legislative or executive action was properly brought before the Court, such that the Court concededly had jurisdiction over the case, the Court could test that action against the Constitution. The Court was not seeking to, nor did it have any grounds to, review Jackson’s veto message. He was on sound constitutional ground in vetoing the Bank of the United States’s recharter, and he could assert, with impunity, that he disagreed with the Supreme Court about the constitutionality of the Bank. Jackson’s authority to do so was a function of his Article I veto power, not of his unofficial or official status as a constitutional interpreter. Thus, the quoted portion of Jackson’s veto message could be boiled down to the proposition that when the president acts in a “legislative capacity” by vetoing Congressional legislation, the Supreme Court cannot control his conduct. That proposition arguably says nothing about which institution is the superior interpreter in “ordinary” cases testing the constitutionality of legislative or executive acts.

The qualified nature of Jackson’s claim should be juxtaposed against the quite unqualified assertions of Justice Joseph Story, in his capacity as commentator, that the Court was the superior, and supreme, interpreter of the Constitution. A year after Jackson issued his veto message, Story published Commentaries on the Constitution.133 The nullification controversy, in which South Carolina claimed the power to disregard acts of the federal government, was heating up, and contemporaries expected Story’s treatise to advance a strong defense of the Union and of the supremacy of the Constitution against assertions of state power. In April, 1833, after Story’s Commentaries had been published, Marshall wrote Story that “[i]t would give our orthodox nullifier a fever to read the heresies of your Commentaries.”134 “A whole school,” he suggested, “might be infected by the atmosphere if a single copy should be placed on one of the shelves of a bookcase.”135

Story’s position on the primacy of federal power over the states was predictable, but his assertion that the federal courts were the “final and common arbiter” of the Constitution in all cases “capa-

133 Joseph Story, Commentaries on the Constitution of the United States (1833).
135 Id.
ble of judicial inquiry and decision” was perhaps more surprising. He not only maintained that the Supreme Court’s constitutional interpretations bound the states, but that the Courts’ constitutional decisions were “obligatory and conclusive upon all the departments of the federal government, and upon the whole people.”

His argument for judicial supremacy was a composite of three claims. The first was a restatement of Marbury’s assertion that the Constitution was intended to create three separate branches of government, each of which would exercise checks on one another. Story conceded that branch “coordinancy” was a constitutional principle, but argued that having competing decisionmakers might produce inconsistency. In order to achieve uniformity, therefore, it was important to have branch supremacy within the confines of each branch’s competence.

This led Story to his second claim. The supremacy of Congress and the Executive was limited to “measures exclusively of a political, legislative, or executive character.” Such measures “[could not] be reexamined elsewhere.” Where, however, “the question [was] of a different nature, and capable of judicial inquiry and decision, there admit[ed] of a very different consideration.” Judicial supremacy over those questions was required. That the Framers of the Constitution intended courts to be the final arbiter of such questions, Story argued, could be seen in the fact that they were aware of the Anglo-American tradition that “judicial decisions of the highest tribunal... are considered as... establishing the true construction of the laws.” “[T]his conclusive effect of judicial adjudications was in the full view of the framers of the constitution... [A] departure from it would have been justly described as an approach to tyranny and arbitrary power.”

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136 Story, supra note 133, at 125.
137 Id. at 128.
138 Id. at 129.
139 Id.
140 Id.
141 Id. at 124.
142 Id.
143 Id. at 125.
144 Id. at 126.
145 Id. at 127.
In cases capable of "judicial inquiry and decision," then, judicial determinations bound the other branches of government. Story then set out to show that the Framers had intended to include cases interpreting the Constitution among those confined to the judicial branch. Here he simply repeated the citations to Article III—giving the federal judiciary power to decide all cases under the Constitution—and to the Supremacy Clause—binding state judges to the dictates of the Constitution and federal law—that Marshall had made in *Marbury*. Those were "express . . . and determinate provisions upon the very subject."146

Story's arguments for judicial supremacy have been criticized.147 His uniformity argument seems in tension with the separation-of-powers principle itself, and with statements by Madison and Hamilton emphasizing the necessity of some tension among the competing views of coordinate branches of government.148 His argument invoking the Anglo-American tradition of deference to prior judicial adjudications confuses a practice of stare decisis with one of judicial supremacy.149 Neither Article III nor the Supremacy Clause establish judicial supremacy, although they are helpful for judicial review of constitutional questions. From the point of view of this Article, however, Story's analysis in his *Commentaries* provides additional evidence that "judicial review," as established in *Marbury*, was a composite of two principles: judicial supremacy and departmental discretion. Story's treatment is consistent with that understanding. He asserts that the judiciary's interpretation of questions "capable of judicial inquiry and decision" binds all other decisionmakers—but at the same time, he confines the scope of judicial hegemony to that particular category of questions. "[M]easures exclusively of a political, legislative, or executive character" are inappropriate for judicial determination.150

In laying down those propositions Story was well aware that the decision about whether a question was "capable of judicial inquiry"

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146 Id. at 125.
148 See Paulsen, supra note 147, at 234.
149 See Corwin, supra note 147, at 77-78 n.81; Paulsen, supra note 147, at 318.
150 Story, supra note 133, at 124.
or appropriate for another branch lay with the courts. That conclusion can be seen as one of the strategic implications the early nineteenth-century Court drew from the departmental discretion principle of Marbury. Although that Court claimed not only the power to decide all constitutional questions that were not confined to other departments, but also the power to decide what those questions were, it tacitly agreed to wield its assumed powers modestly. By doing so, it carved out a fairly large space in which the other branches of government could make constitutional interpretations with impunity.

If one reviews the activity of the Court during the period of Marshall’s and much of Taney’s tenure, its interpretive stance seems consistent with that strategy. The Court consistently claimed the power to review the constitutionality of federal and state legislation, and of policies by the Executive, such as internal improvements or the acquisition of foreign territory, that raised constitutional issues. In some contexts—notably state efforts to exert control over federal institutions or state laws allegedly infringing on the “vested” property rights of individuals—it interpreted the Constitution as a check on state legislative power. Although some of those decisions were controversial, provoking open criticism of the Court, only one of them threatened to duplicate the ticklish situation presented by Marbury, where the Court was scru-

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151 See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding congressional power to establish a federal bank and declaring that bank immune from state taxation); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (using the Constitution’s Commerce Clause to restrict state economic regulation for the first time); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (striking down a state tax on imports); Willson v. Blackbird Creek Marsh Co., 32 U.S. (2 Pet.) 245 (1829) (extending and qualifying Gibbons); Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830) (construing, for the first time, the constitutional clause limiting the power of the states to issue bills of credit); Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833) (raising the question whether the provisions of the Bill of Rights, as interpreted by the federal judiciary, were themselves limits on state sovereignty).


153 See G. Edward White, The Marshall Court and Cultural Change 656–63 (1988) (detailing the Court’s change from a posture invalidating several state statutes under the Contracts Clause of the Constitution to one tolerating state legislation challenged under that clause).
tinizing the policy decisions of the federal Executive. The others, for the most part, were products of the Court's review of state legislation, an area where its power seemed more firmly rooted in the constitutional text.

The Court did not adopt a uniformly hostile stance toward state legislative power in the early and middle years of the nineteenth century; indeed, it sustained the constitutionality of legislation as often as it invalidated it. Moreover, it did not invalidate a single congressional statute in the period, although Congress did not pass very many statutes (thereby avoiding the delicate subjects of banking, insolvency, and bankruptcy). By reserving the right to scrutinize the actions of other branches, but tolerating a good deal of those actions, the Court conveyed the impression that the Constitution had sufficient flexibility to prevent every issue of political economy from becoming an occasion for the exercise of judicial control over legislative or executive policymaking.

Finally, during the same time period, the Court explicitly established the category of political questions that Marshall had alluded to in *Marbury*. In *Foster v. Neilson*, the Court read the terms of a

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154 This was the situation presented in the Cherokee cases, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Although those cases technically presented the question whether a state of the Union could pass laws affecting the status of persons living on lands owned by Indian tribes within its borders, the Court's position, which was that the federal government, rather than the state of Georgia, had legislative jurisdiction over the territory of the Cherokee Nation, appeared to be a barrier to the policies of the Jackson administration toward southeastern Indian tribes, which encouraged states to forcibly remove those tribes from within their borders to lands west of the Mississippi River. After the *Worcester* case, in which a white resident living within Cherokee territory in Georgia had successfully appealed to the Court after having been convicted of a state crime, the decisions reportedly elicited a comment from President Jackson: "John Marshall has made his decision, now let him enforce it." 1 Warren, supra note 76, at 759. As the *Worcester* defendant lingered in prison, his lawyers planned to ask the Supreme Court, at the opening of its 1833 Term in January, to certify that Georgia had declined to comply with its order to release the prisoner, and to refer the case to the executive branch to enforce the order. This would have placed Jackson, a strong opponent of nullification, in a quandary. But the Governor of Georgia pardoned the defendant, and a potential clash between the Court and state and federal authorities was avoided. See White, supra note 153, at 737-38 (1988).

155 See Swisher, supra note 107, at 128-54, 457-83; White, supra note 153, at 656-73.

156 See Peter Coleman, Debtors and Creditors in America (1974); Bray Hammond, Banks and Politics in America (1957).

treaty by which Spain ceded Florida to the United States in 1818 to say that grants of land made in Florida prior to January 24 of that year "[were to] be ratified and confirmed." Marshall, for the Court, held that the language indicated that the treaty was not self-executing until Congress acted to recognize the titles. Although treaties were expressly made part of the "law of the land" by the Constitution, Marshall argued, when the terms of a treaty "import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department."159

The area of foreign affairs seemed the most intuitively designed to elicit "political questions" for early nineteenth-century courts, given that the typical form of foreign policy decisionmaking in that time period was treaties instituted by the Executive and confirmed by the Senate.160 Between the 1820s and the 1870s, the Court regularly deemed certain examples of foreign policymaking "political" and unreviewable.161

Though Marbury had signaled that the exercise of "political" discretion could occur in the domestic arena as well as in foreign relations, it was not until the Taney Court heard Luther v. Borden162 that this proposition was confirmed. Luther v. Borden was the product of a clash in Rhode Island in the 1840s between supporters of the existing state constitution, which amounted to a re-

158 Id. at 314.
159 Id. The distinction Marshall posited between self-executing and non-self-executing treaties was clarified in United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). That case involved the same treaty, but an examination of the Spanish text of the treaty had revealed that the language Marshall had emphasized in Foster v. Neilson had actually read "shall remain ratified and affirmed." Percheman, 32 U.S. (7 Pet.) at 89. This language meant that the treaty had been drafted to "operate[] of itself without the aid of any legislative provision": it was self-executing. Foster, 27 U.S. (2 Pet.) at 314. In such cases it could "become a rule for the Court" without any act of Congress. Id.
161 See, e.g., Doe v. Braden, 57 U.S. (16 How.) 635 (1853) (addressing the termination of a treaty with a foreign power); The Prize Cases, 67 U.S. (2 Black) 635 (1862) (addressing the determination by Congress of a state of belligerency); The Sapphire, 78 U.S. (11 Wall.) 164 (1870) (involving recognition of a new government); The Protector, 79 U.S. (12 Wall.) 700 (1871) (deferring to a determination by Congress of a state of war).
tention of the colony’s original 1663 royal charter, and the growing movement for the democratization of the franchise, which swept through eastern seaboard states from the 1820s on. The Rhode Island Constitution closely tied voting rights to the possession of freehold land. The state had become an outpost for early nineteenth-century immigrants, particularly those from Ireland, many of whom found jobs in the mill industry but lacked sufficient resources to own land. The result was that over ninety percent of the adult male inhabitants of Providence, the state capital and largest city, were ineligible to vote in the 1840 election.

Efforts in the 1820s and 1830s to reform the Rhode Island Constitution along the lines of New York, Pennsylvania, and Virginia (all of which, in those decades, had held constitutional conventions that broadened voting qualifications) were unsuccessful. Eventually, in 1841 and 1842, suffrage reformers, claiming authority from the Declaration of Independence and the Preamble to the Constitution, drafted a new state constitution (the “People’s Constitution”) and submitted it for ratification to all the adult white males in the state, who overwhelmingly endorsed it. Supporters of the existing Constitution countered by resubmitting it (dubbed the “Freeholders’ Constitution”) to the categories of persons eligible to vote under it, who rejected it. The reform faction took these events as a mandate to govern and organized an election for a new state government, in which Thomas Wilson Dorr was elected governor. The freeholders’ faction continued to maintain a government and declared martial law, arresting Dorr for treason. President John Tyler supported the freeholders, who employed state militia to suppress Dorr’s government. The freeholders also drafted a revised constitution, containing a significant broadening of the franchise, which they successfully submitted for ratification in 1842.

Two Supreme Court cases emerged out of the political chaos in Rhode Island in the 1840s. In the first, Dorr sought a federal writ of habeas corpus to discharge him from prison, and the Court held, in the 1845 case of *Ex parte Dorr*,\(^\text{163}\) that habeas corpus was not available for prisoners convicted of violating provisions in state constitutions. In the second, a Dorr supporter, Martin Luther,
brought suit against a state militiaman, Luther Borden, for entering and searching his home under the authority of martial law. Luther argued that Borden had no authority because the revised and ratified Freeholders' Constitution's massive disenfranchisement of persons amounted to a violation of the Article IV, Section 4 of the U.S. Constitution, which declared that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." Since the Freeholders' Constitution prevented so many persons from exercising their sovereign rights, the argument ran, republican theory allowed them to peacefully take power into their own hands.

When Luther v. Borden came to the Court in 1849, it was obviously a ticklish case. It was not at all clear what the core elements of a "republican government" were, and it was not clear which branch of the government of "the United States" was expected to implement the guaranty announced in Article IV. If the Court accepted the argument of the reformers, it would be declaring the last seven years of Rhode Island government illegitimate; if it accepted the argument of the freeholders, it would have cleared the way for reformers to be tried and conceivably executed for treason. To the extent the federal executive had been involved in the dispute, it had supported the freeholders, but that action had possibly been unauthorized.

Taney, for a unanimous Court, held that the doctrine of political questions prevented the Court from deciding the case. "The inquiry proposed," he asserted, "belonged to the political power and not to the judicial" because the resolution of questions of whether the franchise requirements of the 1842 Rhode Island Constitution satisfied the criteria for a republican form of government "turned upon political rights and political questions." The Court "de-

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164 Luther, 48 U.S. (7 How.) 1.
165 Id. at 26.
166 For the details of the events in Rhode Island that lead to Luther v. Borden, see George M. Dennison, The Dorr War (1976).
167 Justice Levi Woodbury dissented on a question of whether, assuming Borden had been authorized to search Luther's house under martial law, he had conducted the search appropriately. He joined the opinion on the remaining questions. See Luther, 48 U.S. (76 How.) at 51–54 (Woodbury, J., concurring in part and dissenting in part).
168 Id. at 39, 46.
Though the decision was prudent in that it avoided the Court’s becoming entangled in the partisan politics of a state, it left the Guarantee Clause in an attenuated state. The intent of the clause was clearly to prevent a state from failing to conform to the minimum requirements of republican government. In retaining a constitution whose voting rules disenfranchised ninety percent of the white male population (and, in addition, all of the female population and possibly all of the non-white male population), Rhode Island seemed to have violated those minimum requirements. But that was before the Dorrite challenges had produced a revised constitution in 1842 with an expanded suffrage, and so perhaps with the ratification of that constitution a “republican form of government” had returned to Rhode Island. In any event, no branch of the United States government seemed to want to go about the task of “guaranteeing” that form for Rhode Island citizens. In such circumstances the doctrine of political questions was a helpful way for the Court to extract itself from the situation.

If one were to add up the precise situations, between 1803 and the 1870s, when the Court declined to decide a case because it found the issues raised by it to be peculiarly “political” rather than “judicial” in character, the Court’s reliance upon the “political question” doctrine could not be said to be extensive. In that time period the only domestic case in which the Court squarely relied on the doctrine was Luther v. Borden. Marshall had intimated in Marbury that the mere fact that the Secretary of State was electing not to deliver a judicial commission on the instructions of the Executive did not make a suit to recover that commission unsuitable for the judicial branch, but he had suggested that certain questions that went to the heart of executive discretion existed and could not be reviewed by a court. Yet, from the early nineteenth century through the 1870s, the only other cases in which the Court specifically declined to entertain an issue because it was “political” were foreign affairs cases.

The departmental discretion principle of Marbury, however, encompassed far more than a conscious delineation of which questions were “political” and thus not justiciable. It also meant that,
although the line between “political” and “legal” questions would be determined by the Court, the assumption by the Court that it was the arbiter of a particular constitutional controversy involving the acts of another branch did not mean that the discretionary powers of that branch would necessarily be curtailed. After claiming the power to review the constitutionality of acts of Congress in Marbury, and invalidating one, the Court did not strike down another federal statute for the next fifty-four years.

D. Equilibrium Disrupted: Dred Scott v. Sandford

The long period of judicial deference was doubtless part of the reason why the Dred Scott case appeared to some contemporaries as radically disruptive of the state of equilibrium into which American constitutional jurisprudence had settled in the years from 1815 to the 1850s. In Dred Scott, the Court bypassed an opportunity to confine the extremely volatile issue of slavery to the political branches and thereby reaffirm the principle of departmental discretion. To understand how that missed opportunity came about, it is necessary to recapitulate some of the features of the Dred Scott case.

Dred Scott had been the slave of Dr. John Emerson, a resident of Missouri who was an army surgeon. In the course of his military service, Emerson traveled, along with Scott, to Illinois and the Wisconsin Territory, both of which had outlawed slavery. Emerson then returned to Missouri, a slave state, married, and five years later, in 1843, he died. Four years after Emerson’s death, Scott instituted a suit against Emerson’s widow for his freedom. He relied on Missouri law at the time, which held that if the slave of a Missouri citizen traveled to a free state or territory, the slave was entitled to freedom, whether or not the slave returned to Missouri. Although Scott clearly would have won his freedom in his 1847 suit, a mistrial was declared because part of Scott’s allegation that he had resided in Illinois and the Wisconsin Territory was based on hearsay evidence. The suit was not retried until 1850, and during that interval Scott’s wages were held in escrow.

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170 60 U.S. (19 How.) 393 (1856).
171 For the details of the Dred Scott litigation, see Don E. Fehrenbacher, The Dred Scott Case (1978).
By the time of the retrial, Emerson's wife had remarried and had moved out of the state, and her brother, John Sanford, a resident of New York, had assumed control of her Missouri business affairs. When the trial judge, in 1850, held Scott to be free, Sanford was deprived of Scott's accumulated wages. Consequently, he appealed the case to the Missouri Supreme Court, which held, in a 2-1 decision reversing its earlier decisions, that Missouri would not enforce the antislavery laws of other jurisdictions against Missouri citizens.\(^{172}\)

Scott could have appealed from that decision to the Supreme Court of the United States, challenging the constitutionality of Missouri's law. But in a nearly identical case, *Strader v. Graham*,\(^ {173}\) involving Kentucky slaves who had traveled into free states and then returned to Kentucky, the Court had held that Kentucky law, which deemed returned slaves who had resided in free jurisdictions to revert to their slave status on reentering Kentucky, was controlling on the federal courts. Although *Strader v. Graham* involved a suit against a man who had abetted slaves in their journeys rather than a suit for freedom by a slave, Scott's lawyer concluded that the Court would dismiss his appeal on the authority of the Kentucky case.\(^ {174}\) The ruling in *Strader v. Graham* also had the benefit of preventing the federal courts from being used as a vehicle to attack state court rulings on slavery questions.

Scott's lawyer thus chose to bring a new suit for Scott's freedom in a federal circuit court in Missouri against John Sanford.\(^ {175}\) The suit alleged Sanford to be Scott's owner, which may or may not have been the case, and was cognizable in federal court because of diversity of citizenship. Although *Swift v. Tyson*\(^ {176}\) had been decided, the range of that decision seemed confined to commercial law at the time, and so a federal court in Missouri was free to follow Missouri law on the question of Scott's status.\(^ {177}\) In order to

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\(^{172}\) Id. at 264-65.

\(^{173}\) 51 U.S. (10 How.) 82 (1850).

\(^{174}\) See Fehrenbacher, supra note 171, at 268.

\(^{175}\) Sanford's name was incorrectly spelled "Sandford" when the case was filed in the federal circuit court.

\(^{176}\) 41 U.S. (16 Pet.) 1 (1842).

\(^{177}\) In *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856), the Court announced that, although it generally followed the decisions of the highest courts on questions of state law, it did not feel obliged to do so when the pattern of those decisions had not been
maintain the suit, however, Dred Scott himself needed to be a citizen of Missouri. Sanford’s lawyer claimed that, being a slave and of African-American descent, Dred Scott was not a citizen of the state. The trial judge disagreed, instructing the jury that if a person resided within Missouri and was eligible to hold property within the state (such as the wages Scott received for his services), he was a citizen of the state. He also instructed the jury that even though Scott had left the state and resided in jurisdictions that had abolished slavery, once he returned to Missouri, his status was to be determined by the law of that state. The jury thus found that Scott was the slave of Sanford.178

Scott’s lawyer then took the case to the Supreme Court of the United States on a writ of error. As the arguments began in the case, in February of the Court’s 1856 Term, counsel for Sanford advanced an additional argument as to why Scott should not prevail. The argument was that Scott could not claim to have obtained his freedom by residing in the Wisconsin Territory because Congress lacked the power to outlaw slavery in the territories. This argument was the most politically explosive of all the arguments in the Dred Scott case. It suggested that the compromise on slavery that Congress had fashioned in 1820 (the so-called “Missouri Compromise”), in which it assumed the power to outlaw slavery in certain northern territories, was unconstitutional.179 If that were the case, antislavery elements in Congress could not prevent the expansion of slavery into the trans-Mississippi West. Few states existed in that region in the late 1850s, but it was expected to house several new states in the remainder of the century.

The issue of slavery in federal territories seemed ideally designed to be characterized by the Court as implicating the departmental discretion of other branches. The Constitution was silent on the issue, and it had traditionally been settled by popular referendum, so it could have been labeled a “political question.” Alternatively, the Court could have decided the Dred Scott case so as to avoid consideration of the issue, thereby implicitly leaving its reso-

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178 See Fehrenbacher, supra note 171, at 272–79.
179 See id. at 288.
ution to other departments. Recognizing the escalation of the stakes in *Dred Scott*, the Court requested additional arguments on it in December 1856.  

The eventual decision on the part of the Court to issue an "opinion of the Court," written by Chief Justice Taney and subscribed to by seven of the nine Justices, and deciding all of the questions raised in *Dred Scott*, was the result of a bizarre, and nearly unprecedented, fragmentation of the Court. The Court's deliberative process in the case ultimately resulted in Justices scrambling to release their separate opinions to the newspapers and to make changes in the final versions of their drafts in order to respond to points raised by their opponents. The process by which the Court abandoned a narrow opinion in *Dred Scott*, which would have decided the case on the authority of *Strader v. Graham* and avoided the issues of Scott's citizenship and the constitutionality of the Missouri Compromise, has been set forth in detail elsewhere. I am interested in a particular dimension of the Court's fragmentation in *Dred Scott*: the Court's decision to forgo the option of placing the *Dred Scott* case in the category of departmental discretion cases. Had the Court entertained that option, it would have concluded that the central issue in *Dred Scott*, the constitutionality of slavery in federal territories, was a "political" one. Exercising that option would not necessarily have resulted in a speedier or more decisive

180 Id. at 290.
181 See id. at 314–21.
182 See id. at 205–21; Swisher, supra note 107, at 619–38; John S. Vishneski III, What The Court Decided in *Dred Scott v. Sandford*, 32 Am. J. Legal Hist. 373 (1988). In brief, after a narrow opinion authored by Justice Samuel Nelson was produced, two Justices from southern states, Justice James Wayne of Georgia and Justice Peter Daniel of Virginia, moved that, because of the critical status of slavery in federal territories, the Court pass on that issue in *Dred Scott*. The motion was passed, Nelson's opinion was withdrawn, and Taney assigned the opinion to himself. After Taney produced a draft of the opinion, which addressed not only the constitutionality of slavery in the territories but also the citizenship status of African-Americans, Justices John McLean of Ohio and Charles Curtis of Massachusetts produced strong dissents. Curtis's dissent, which controverted Taney's claim that African-Americans were regarded as a "degraded class" of persons at the time of the Constitution's framing, was published in newspapers in March 1857, before Taney's majority opinion had been officially released. Furious, Taney revised his opinion to take into account Curtis's arguments about the status of African-Americans, and refused to allow Curtis to see his revised draft. This incident led to a testy correspondence between Taney and Curtis, and Curtis eventually resigned from the Court in September 1857.
resolution of the issue, nor would it necessarily have played any causal role in the eventual collapse of sectional relations over the slavery issue that produced the Civil War. It would, however, have been consistent with the state of equilibrium in constitutional jurisprudence that had existed since Marbury. Instead the Court decisively constitutionalized the slavery issue in Dred Scott, drew itself prominently into the sectional debate over slavery, identified itself with the proposition that African-Americans were a degraded class of persons, not eligible for citizenship, and brought upon itself a line of critical commentary that encouraged Abraham Lincoln, four years after the decision, to treat it as if it had very little authority. Dred Scott, in retrospect, demonstrated how much the tacit legitimacy of the principle of judicial supremacy rested on a prudent exercise of the principle of departmental discretion.

As an initial consensus among the Justices around a narrow opinion in Dred Scott broke down, that opinion was replaced by one that held that slaves and persons of African-American descent were ineligible to bring suit in the federal courts, and that Congress was prevented by the Fifth Amendment’s Due Process Clause from outlawing slavery in federal territories. The repercussions of that opinion were vast. Justice Charles P. Curtis, whose dissent attacked the assertion in Chief Justice Taney’s majority opinion that African-Americans could not be regarded as eligible for federal citizenship because at the time of the framing of the Constitution they were everywhere regarded as a degraded class of persons, resigned from the Court, in part because he believed that the opinion had significantly damaged the Court’s stature.  

At least one correspondent, reacting to the Dred Scott decision, agreed with Curtis. Writing in the North American Review, Benjamin C. Howard described Taney’s opinion as “an authorized registration of the political heresies of the dominant party of the day” and suggested that the primary effect of Dred Scott would be the “loss of confidence in the sound judicial integrity and strictly legal character” of the Court.  

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183 Id. at 318.
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As a precedent, *Dred Scott* was remarkably short-lived. In June 1862, Congress abolished slavery in all the federal territories.\(^{185}\) Edward Bates, President Abraham Lincoln's Attorney General, issued an opinion later in that year declaring that free men of color born in the United States were citizens of the United States.\(^{186}\) Three years later came the passage of the Thirteenth Amendment, obliterating the last vestiges of *Dred Scott*.

The excursion of the Court beyond the boundaries of settled constitutional equilibrium in *Dred Scott* had one additional effect. In his first inaugural address, in March, 1861, Lincoln reflected upon the authoritativeness of the Constitution and its interpretations by the Court in a nation whose founders had identified the people as the ultimate sovereign. "[N]o organic law," Lincoln said, can ever be framed with a provision specifically applicable to every question which may occur in practical administration. . . . [No] document of reasonable length [can] contain express provisions for all possible questions. . . . May Congress prohibit slavery in the territories? The Constitution does not expressly say. Must Congress protect slavery in the territories? The Constitution does not expressly say. . . .

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel [sic] cases, by all other departments of the government. . . . At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.\(^{187}\)

\(^{185}\) Abolition of Slavery Act (Territories), ch. 111, 12 Stat. 432 (1862); Abolition of Slavery Act (District of Columbia), ch. 54, 12 Stat. 376 (1862).


The juxtaposition of these comments with the response of the Lincoln administration to the issues purportedly resolved in *Dred Scott* was pointed. After signaling in his inaugural address that the Constitution did not definitely resolve the question of slavery in the federal territories, and that slavish adherence to the proposition that decisions of the Supreme Court “fixed... the policy of the government, upon vital questions” would undermine sovereignty in the people, Lincoln, and a Republican-controlled Congress, defied *Dred Scott’s* two leading propositions, precipitating a chain of events that would lead to the abolition of slavery and the granting of citizenship status to free blacks. The lesson of that response seemed clear enough: If the Court used its powers of constitutional review in such a fashion as to invalidate the powers of Congress on an issue that seemed eminently suited to the departmental discretion of other branches, it would be reminded that the Court’s professed supremacy as a constitutional interpreter was always vulnerable to the claim that the ultimate power to interpret the Constitution lay in the American people at large.  

**II. THE LATE NINETEENTH CENTURY: LEGISLATIVE DEFERENCE AND THAYER’S “CLEAR MISTAKE” RULE**

**A. The Reconstructed Constitutional Landscape**

The portrait of early nineteenth-century constitutional jurisprudence sketched above has emphasized two themes. The first is the relatively unproblematic status of the judicial supremacy principle derived in *Marbury*. That principle, we have seen, was not treated as inconsistent with the idea that all the departments of government could serve as constitutional interpreters; it was perceived as conveying superior interpretive status on the judiciary only when the issue was unmistakably one of “law,” that is, one peculiarly suited to resolution by the judicial department. But the founda-

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108 This is not to say, however, that Lincoln was claiming a power in the Executive, or in the people at large, to disregard constitutional interpretations by the Supreme Court. The context of his remarks made it clear that the Constitution’s text did not expressly cover the issue of slavery in federal territories, and that the issue was a “vital question.” In such circumstances, he implied, the Court’s irrevocably fixing policy seemed premature, and precluded the people from having their say. The *Dred Scott* case was the very sort of case, he implied, where the departmental discretion principle was appropriate.
tional status of the Constitution as an authoritative body of law, and the tendency of contested political issues to present themselves as constitutional disputes, meant that the interpretive supremacy of the judiciary was potentially vast. That was why the second theme was equally important. When Jefferson or Jackson or Lincoln claimed the authority to advance their own constitutional interpretations, they did so in a context—notwithstanding the breadth of some of their language—that suggested that the alternative interpretations of nonjudicial departments had enhanced authority when the issue in question appeared to be within the province of the Executive or Congress. Constitutional equilibrium would be reached, their remarks suggested, only if the judiciary was as assiduous in declining interpretive authority as it was in seizing it. From the outset, judicial supremacy and departmental discretion were perceived as interlocking and complementary principles.

Given the heritage of the early nineteenth century, one might have expected that the debacle of *Dred Scott* would have ushered in a chastened approach on the part of the Court to the exercise of its interpretive powers in the decades following the Civil War. To the contrary, however, some other features of constitutional jurisprudence in that time period combined to produce the opposite effect. The first of those was the presence of an expanded constitutional apparatus in the form of the Reconstruction Amendments. Although the impetus for the Thirteenth, Fourteenth, and Fifteenth Amendments was the abolition of slavery and its effects on American race relations, language in those amendments, especially the Fourteenth, was broad enough to suggest that a spate of new constitutional limitations on legislative activity had come into existence.

In addition, a new theory of legislative relations, first articulated by reformers in the Jacksonian period, had taken root. The governing theory of legislative relations in the framing era had been one

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189 One of the more influential constitutional treatises of the period following the Reconstruction Amendments was Thomas Cooley’s *Constitutional Limitations*, which had gone through six editions by 1890. Cooley was the first to recognize that the anti-class principle, which buttressed protection for “vested rights” against legislative regulation in antebellum jurisprudence, had potentially been incorporated into the Fourteenth Amendment’s Due Process Clause. Thomas M. Cooley, Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union, 351–58 (1868).
that emphasized the tendency of legislatures to serve as homes for tyrants or demagogues, unscrupulous persons who might stir up mobs in pursuit of their own self-interest. Given limitations on the franchise, there was less concern about the actual politics of legislation. By the Jacksonian period, the franchise had been extended and political parties had come to exert influence on legislation. Those who remained concerned with the excesses of legislative conduct began to shift the area of their concern from demagoguery to class politics.

In particular, one line of Jacksonian theorists became concerned with the preservation, in a landscape of increasingly broad and partisan political activity, of what they called the anti-class principle. That principle posited that it was inconsistent with the fundamental axioms of republican government for legislatures to pass laws whose sole purpose was the advancement of a particular class or interest at the expense of another. Although the most common example of that sort of legislation was a statute openly taking property from one citizen or group of citizens and giving it to another, the anti-class principle could be violated in more subtle ways. In statutes designed to improve the wages or working conditions of laborers, for example, the anti-class principle was violated if the principal purpose of the legislation appeared to be to interfere with the private rights of contracting employers and their employees, or, by positing minimum wages or maximum working hours for a particular industry, to take money from employers and give it to employees.

Adherence to the anti-class principle thus provided another justification for close judicial review of statutory enactments.

The third distinguishing feature of late nineteenth-century constitutional jurisprudence was the reemergence of the judiciary in a role that was now described as that of “guardians” of individual
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rights in a constitutional republic. This had been the role sketched for the judiciary by the Boston Centinel correspondent in 1820, but it returned in a different context. In the early nineteenth century, the central question had been whether courts could use the Constitution to set limits on the powers of potentially corrupt legislatures. The Dartmouth College decision, which had prompted the Centinel correspondent's comments, had been, from one perspective, a salutary judicial response to a legislative act of sufficient partisanship that it bordered on corruption. By the late nineteenth century, however, the power of legislatures to intervene in a whole host of activities, including public education, was taken for granted. The judiciary's role had subtly shifted from scrutinizing legislative activity to marking out the appropriate boundaries of legislative power. In its late nineteenth-century "guardian" role, the judiciary exercised judicial review for the purpose of preventing legislatures from trampling on private rights and invading the autonomy of private actors.

That, of course, was what supporters of the Dred Scott decision had thought the Court had done. But late nineteenth-century commentators believed that the Court in Dred Scott had misunderstood the guardian role. Judicial review did not exist for the purpose of substituting the judgment of judges for that of legislators on public issues, absent clear language in the Constitution restricting legislative power. Judicial review existed so that judges could ascertain the boundaries of legislative power. The reach of that power was commensurate with the public purpose of the legislation. That was the error the Court had made in Dred Scott. Legislation dealing with slavery was legislation with a public purpose, because slavery, being contrary to the natural rights of humans, was a creation of positive law, a matter of public policy. The property rights of slaveowners may have been affected when antislavery legislation was passed, but such rights could be modified for a legitimate public purpose.

The difficulty with Dred Scott did not lie in the Court's exercising judicial review in the case, or in conceptualizing the rights of

192 See supra notes 94–98 and accompanying text.
slaveowners as "libert[ies]" or "property" within the Fifth Amendment's Due Process Clause. The difficulty was that the Court had erroneously marked out the boundary between public power and private rights. It might have been within the appropriate scope of its function in reviewing, and even in overruling, Missouri law on the question of whether a slave returning from free territory remained a slave. That was a question of municipal law, and Missouri had conflicting decisions on the point. But it had not properly marked out the line between private and public power in overruling Congress in its exercise of legislation outlawing slavery in some federal territories. Although there was a "law" of slavery, the decision whether to permit slavery in a jurisdiction was a matter of policy. As such, it was within the scope of legislative power.\(^{164}\)

*Dred Scott* thus did not serve to disqualify the judiciary as a guardian of the Constitution, exercising judicial review to mark out the boundaries between public power and private rights. It only served to show that courts were capable of botching their role as guardians. Nothing in the Reconstruction Amendments suggested that their framers anticipated a more modest role for the judiciary as constitutional guardian. The Fourteenth Amendment, in particular, was filled with language that anticipated judicial construction in the exercise of review powers. Among the unspecified terms with obvious constitutional import in that Amendment were "privileges and immunities of Citizens of the United States," "due process of law," and "equal protection of the laws." Those terms were specifically designated as limitations on the power of state legislatures that would require interpretation by the courts.

**B. The Slaughter-House Cases as Paradigm**

All three of the principal features of reconstructed late nineteenth-century constitutional jurisprudence were present in the Court's first interpretation of the Reconstruction Amendments,

\(^{164}\) The third major issue in *Dred Scott*, the construction of the meaning of "Citizen of the United States" for Article III purposes, was not so much one of setting boundaries between public power and private rights, but rather one of constitutional law. The difficulty with this aspect of the Court's decision was not that it had overreached itself in deciding the issue, but that, because several states had given citizenship to African-Americans at the time of the Constitution's framing, and additional states had done so in the nineteenth century, it appeared to have made the wrong decision.
the *Slaughter-House Cases*, which were eventually decided in 1873. The cases had come to the Court from the common setting of a police power regulation challenged as violating the anti-class principle. The Louisiana legislature, ostensibly for health reasons, had given the Crescent City Live-Stock Landing and Slaughter-House Company a monopoly over the slaughterhouse business in the city of New Orleans. Other butchers were required to use the Crescent City slaughterhouse facilities, which were located outside the center of the city. The legislation had overtones of politics and corruption, the Crescent City Company being owned by a group of local businessmen and politicians with close ties to the Republican-controlled Louisiana legislature, whose members were part of the efforts of the Republican party to supervise southern states in the Reconstruction period. The Crescent City franchise had also allegedly been obtained through bribery of legislators.

One of the slaughterhouse businesses adversely affected by the legislation, the Butchers Benevolent Association, challenged it in a Louisiana state court, arguing that it was not a health measure, as purported, but rather an effort to create a monopoly that would deprive other butchers of their right to pursue a calling. In addition to attacking the statute as an infringement on private "vested" rights under the Louisiana Constitution, John A. Campbell, a former Justice of the United States Supreme Court who represented the Association, claimed that it was a violation of the Fourteenth Amendment's Privileges and Immunities Clause, asserting that among the "Privileges and Immunities" of citizens of the United States was the right to pursue a lawful calling. The Association asked that the Crescent City Company be enjoined from interfering with its trade. Meanwhile Crescent City sought, in another court, an injunction against the Association. Eventually six cases asking for injunctions on both sides were appealed to the Louisiana Supreme Court, which held in 1870 that the statute was a proper health measure and that Crescent City's monopoly could be enforced.

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195 83 U.S. (16 Wall.) 36 (1872).
196 A detailed account of the *Slaughterhouse Cases* can be found in Charles Fairman, *Reconstruction and Reunion, 1864–88*, Part One 1301–59 (1971).
The Association immediately filed a writ of error in the United States Circuit Court for the New Orleans area, staffed by federal district Judge William B. Woods and Supreme Court Justice Joseph Bradley. Arguments were heard in June 1870, and, two days after hearing argument, Bradley issued a decision, finding that the statute was not a health measure, but “a monopoly of a very odious character” and that it interfered with a “sacred right of citizenship,” that of “pursu[ing] unmolested a lawful employment in a lawful manner.”\(^9\) The critical portion of Bradley’s opinion read as follows:

The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public health, good order, morals, and intelligence; but they cannot [interfere with liberty of conscience, nor with the entire equality of all creeds and religions before the law. Nor can they,] under the pretense of a police regulation, interfere with the fundamental privileges and immunities of American citizens.\(^9\)

The context of Bradley’s remarks made it clear that, although he thought the public health rationale of the statute creating the slaughterhouse monopoly pretextual, he had not only subjected it to review as an ordinary police power case, subject to scrutiny under the anti-class principle, but in addition, he had read the Privileges and Immunities Clause of the Fourteenth Amendment as encompassing “the right to pursue unmolested a lawful occupation in a lawful manner.”\(^2\) Under Bradley’s approach, the Reconstruction Amendments furnished an additional set of constitutional limitations on legislative conduct.

Bradley recognized, however, that his opinion would have no effect on the actual controversy that had spawned the slaughterhouse litigation. This was because of a 1793 statute, intended to supplement the Judiciary Act of 1789, that prohibited the federal courts

\(^9\) Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock & Slaughterhouse Co., 15 F. Cas. 649, 652–53 (C.C.D. La. 1870) (No. 8,408), quoted in Fairman, supra note 196, at 1333.

\(^9\) Id. at 653 (text bracketed in original) (citation omitted), quoted in Fairman, supra note 196, at 1333–34.

\(^2\) Id. at 652, quoted in Fairman, supra note 196, at 1333.
from granting injunctions "to stay proceedings in any court of a State." 201 The only remedy for the Butchers Association was to file a writ of error challenging the constitutionality of the Slaughterhouse statute that had been upheld by the Supreme Court of Louisiana. This meant that in the meantime the Association was obligated to conform to the statute.

It was another three years before the Supreme Court of the United States would pass on the slaughterhouse litigation. During that interval, the Crescent City Company entered into agreements with some of the butchers who had challenged the statute, but the Butchers' Benevolent Association declined to settle. The settling butchers filed a motion to dismiss before the Court in October 1871, and the remaining slaughterhouse litigation was first heard by the Court in January 1872. Eight Justices participated in oral arguments, with Justice Samuel Nelson absent because of illness. In April, the Court, apparently equally divided on the merits, postponed the litigation, now known as the Slaughter-House Cases, until its new Term began in October. In November, Nelson resigned, and in early December, the Court postponed the cases again. Nelson's successor, Ward Hunt of New York, was nominated at the same time and confirmed on December 11. He took his seat in January 1873, and the Court set February 3 for the final arguments in the cases.202

Hunt's vote was to prove decisive. He joined an opinion of the Court written by Justice Samuel Miller, which was also joined by Justices Nathan Clifford, David Davis, and William Strong.203 Dissenting were Chief Justice Salmon Chase and Justices Bradley, Stephen Field, and Noah Swayne. Although Miller's opinion is typically identified with its narrow reading of the scope of the Privileges and Immunities Clause (Miller distinguished the "privileges and immunities" of United States citizens from those of citizens of the states, and indicated that they were extremely limited),204 another portion of it was more important for present

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201 See Fairman, supra note 196, at 1334.
202 Act of Mar. 2, 1793, ch. 12, § 5, 1 Stat. 333, at 335 (1793). See the discussion in Fairman, supra note 196, at 1340–43.
203 See Fairman, supra note 196, at 1340–43.
204 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
205 He cited the right to travel to the seat of government, the right to protection from the federal government when on the high seas, the right to use the navigable waters of
purposes. A broad reading of the Privileges and Immunities Clause, Miller argued, would

transfer the security and protection of all ... civil rights ... from the States to the Federal Government[.]

All this and more must follow, if the [broad reading] be sound. For ... such a construction ... would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of [the Fourteenth] Amendment.\textsuperscript{205}

With this passage one can see all of the elements of reconstructed American constitutional jurisprudence in play. The passage of the post-Civil War Amendments, Miller was suggesting, raised the possibility that an ordinary example of state police power legislation could be made into an opportunity for the Supreme Court of the United States to ascertain whether state legislatures had been adequately protective of the civil rights of United States citizens. His reading of the Amendments was that they enhanced the scope of the Court's powers of constitutional review. Miller did not gainsay what that enhanced review meant: It gave the Court the opportunity to be "a perpetual censor" on all police power legislation should it allegedly infringe civil rights. If this were the case, judicial review would become the equivalent of judicial supremacy on a vast scale. Miller's opinion for the Court in the \textit{Slaughter-House Cases} signaled that the Court was not inclined to play the role of censor. It is ironic, then, that the signal came in an exercise of constitutional interpretation itself.

Thus, despite its modest reading of the substantive impact of the Privileges and Immunities Clause, the Court majority in the \textit{Slaughter-House Cases} was indicating that the Fourteenth Amendment had enhanced the Court's power to act as a censor on state legislation, even if it chose not to do so in a given case. Choosing

\textsuperscript{205}Id. at 77–78.
not to impose a new battery of constitutional limitations on the states was not the same as deciding that the Court lacked the power to do so. Four Justices, in fact, were perfectly willing to act as censors in the *Slaughter-House Cases*. Justice Field, along with Chief Justice Chase, concluded that the Fourteenth Amendment secured "the protection of every citizen of the United States against the creation of any monopoly whatever." Justice Bradley stated that "a law which prohibits a large class of citizens from adopting a lawful employment ... does deprive them of liberty as well as property, without due process of law." Accordingly, "[t]he constitutional question [was] distinctly raised in [the *Slaughter-House Cases*]," and the Court's "jurisdiction and ... duty [were] plain and imperative." Justice Swayne added:

[The Thirteenth, Fourteenth, and Fifteenth] amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies.

Fairly construed, these amendments may be said to rise to the dignity of a new Magna Charta.

... Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed.

Thus, the first opportunity for the Court to assess the impact of the Reconstruction Amendments on post-Civil War constitutional jurisprudence signaled that the Court had embraced a more aggressive review posture. Miller's opinion in the *Slaughter-House Cases* had lightly dismissed a Fourteenth Amendment due process attack on the Louisiana statute. ("[U]nder no construction of that provision that we have ever seen, or that we deem admissible, can [the statute] ... be held to be a deprivation of property within the

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206 Id. at 101 (Field, J., dissenting).
207 Id. at 122 (Bradley, J., dissenting).
208 Id. at 123 (Bradley, J., dissenting).
209 Id. at 125, 129 (Swayne, J., dissenting).
meaning of that provision.\textsuperscript{210} It had also tossed off an attack based on the Equal Protection Clause. ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.\textsuperscript{211}"") Nevertheless, within twenty years the Fourteenth Amendment's Due Process Clause was to become a fixture in the constitutional jurisprudence of political economy cases, and in the next century equal protection arguments were to escalate well beyond a racial context.

\section*{C. Thayer's Critique: The "Clear Mistake" Rule}

In short, the presence of additional amendments to the Constitution had the effect of tempting the judiciary to expand the scope of its constitutional review powers. An early, vivid example of that temptation came in the 1883 \textit{Civil Rights Cases},\textsuperscript{212} where an eight-man Court majority declared unconstitutional the Civil Rights Act of 1875. That statute, based on the enforcement clauses of the Thirteenth and Fourteenth Amendments, had been an effort to prevent private citizens from denying blacks equal access to public accommodations.\textsuperscript{213} In a combined series of cases challenging the application of the Act against innkeepers, theatre owners, and a railroad, the Court found that the statute exceeded Congress's powers. The Fourteenth Amendment, the Court found, only applied to actions by states, as opposed to individuals; it claimed that to hold otherwise would be to "establish a code of municipal law regulative of all private rights between man and man in society," thereby disturbing the balance between state and federal power.\textsuperscript{214} Nor did the

\textsuperscript{210} Id. at 81.
\textsuperscript{211} Id.
\textsuperscript{212} 109 U.S. 3 (1883).
\textsuperscript{213} Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.
\textsuperscript{214} The \textit{Civil Rights Cases}, 109 U.S. at 13. Although the Court majority in the \textit{Civil Rights Cases} used language reminiscent of that in the \textit{Slaughter-House Cases}, the cases were distinguishable in that the position of the dissenters in the \textit{Slaughter-House Cases} was that the Fourteenth Amendment conferred something like a "regulatory" function on the judiciary. No federal statute was involved in the \textit{Slaughter-House Cases}. It was a routine police power case, and the question, for the dissenters, was whether the Fourteenth Amendment had altered the boundary between public power and private rights. See \textit{The Slaughter-House Cases}, 83 U.S. 36, 102 (Field, J., dissenting); id. at 125 (Swayne, J., dissenting).
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Thirteenth Amendment authorize the legislation: It prohibited only slavery, not racial discrimination. 215

In 1884, in a letter to The Nation magazine, Harvard Law Professor James Bradley Thayer expressed concern about the Court's increasingly aggressive review stance. Thayer proposed a standard of review for courts, in which “the precise function of the judiciary” in reviewing legislation of a coordinate branch of government was “not that of declaring the true construction of the Constitution, but that of deciding whether another department has acted unreasonably.” 216 If the “question of [a statute’s] conformity to the Constitution fairly admits of two opinions, . . . then the Legislature is not to be deprived of its choice between them.” 217 He noted that “recent decisions may help to show how great, under our system, . . . is legislative power, and how limited is judicial control.” 218 This meant, for Thayer, that the passage of legislation should be taken by reviewing courts as an implicit judgment on its constitutionality. Courts should respect the implicit legislative “opinion” unless it is clearly inconsistent with some constitutional mandate. Thayer’s formulation has come to be known as the “clear mistake” or “overwhelming constitutional mandate” standard of review.

It is important to understand what Thayer meant, and did not mean, by “recent decisions” in his 1884 letter, and in his far better-known 1893 essay, “The Origin and Scope of the American Doctrine of Constitutional Law.” 219 By “recent decisions,” Thayer did not mean cases in which the Supreme Court claimed power to review the constitutionality of acts of state legislatures. As he made it clear in the 1893 essay, his review standard was proposed only for instances in which courts considered the acts of a coordinate branch of government. 220 The states were subordinate to the federal

217 Id.
218 Id. at 315.
219 James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893). In that article, Thayer proposed the same judicial “rule of administration”: Courts may only “disregard the [a]ct when those who have the right to make laws have not merely made a mistake, but have made a very clear one.” Id. at 144.
220 See id. at 153–55.
government, so the standard only applied to state courts reviewing state legislation or the Supreme Court reviewing acts of Congress.

There had been almost no examples of state courts invoking the language of state constitutions, or the U.S. Constitution, to strike down acts of state legislatures as of 1884. State courts had routinely referred to principles of natural justice, vested rights, or free republican government in invalidating state legislation in nineteenth-century police power cases, but Thayer was not referring to those cases. He had in mind a series of cases, beginning with *Dred Scott* and extending through the *Civil Rights Cases*, in which the Supreme Court had struck down acts of Congress. He was particularly critical of the first *Legal Tender Case* and the *Civil Rights Cases*, writing a commentary on the former case in 1887 and complaining about the majority’s methodology in the latter in his 1884 essay. In his "Origin and Scope of the American Doctrine of Constitutional Law," he made it clear, using the legal tender legislation as an example, why he thought the Court should be very loath to invalidate congressional legislation:

[I]t is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country. . . . So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. . . . Yet it was the legislature that determined this question, not merely primarily, but once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

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221 The first conspicuous example was *In re Jacobs*, 98 N.Y. 98 (1885).
222 For evidence that Thayer took those cases as part of settled constitutional doctrine, see Thomas C. Grey, Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications, 88 Nw. U. L. Rev. 28, 28–31 (1993) (citing James Bradley Thayer, 1 Cases on Constitutional Law 695 (1895)).
223 79 U.S. (12 Wall.) 457 (1870).
224 James B. Thayer, Legal Tender, 1 Harv. L. Rev. 73 (1887).
225 Thayer, supra note 216, at 314–15.
226 Thayer, supra note 219, at 136.
I have elsewhere argued that Thayer’s principal concern in formulating the “clear mistake” standard of review was to encourage legislators to be more attentive to their role as constitutional interpreters. Thayer’s purpose was only secondarily to caution against the judicial “checking and cutting down of legislative power, by numerous detailed provisions in the constitution.” This, Thayer suggested in his 1893 essay, would make “the government petty and incompetent,” and had “already been carried much too far in some of [the] States.”

It is interesting to speculate why Thayer would have cited the aggressive actions of state courts as part of an argument that the primary interpreter of the Constitution should be Congress. He cited no authorities in support of that proposition, and surely no one anticipated that state courts would regularly be reviewing the constitutionality of federal legislation. It was not until 1901, when Thayer published some remarks in the “John Marshall Day” ceremonies, that the connections between his “clear mistake” rule of constitutional review, his claim of legislative interpretive supremacy, and his concern about the aggressiveness of state courts became clearer. The remarks also represent the fullest statement of Thayer’s understanding of the principles derived in *Marbury*. For that reason they need to be set forth at some length.

Thayer began his discussion of *Marbury* by noting that Marshall’s opinion had given only a “short and dry treatment” of the issue of judicial review, and had not touched upon some “grave and far-reaching considerations.” In particular, Marshall did “not remark the grave distinction between the power of a federal court in disregarding the acts of a co-ordinate department, and in dealing thus with the legislation of the local states.” Thayer had stressed that distinction in his 1893 essay. Had Marshall lingered over the distinction, Thayer suggested,

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228 Thayer, supra note 219, at 156.
229 Id.
231 Id. at 60.
232 Id. at 61.
he must also have passed upon certain serious suggestions arising out of the arrangements of our own constitutions and the exigen-
cies of the other departments. All the departments, and not merely the courts, are sworn to support the Constitution. All are bound to decide for themselves, in the first instance, what this in-
strument requires of them. None can have help from the courts unless ... some litigated case should arise; and of some questions it is true that they never can arise in the way of litigation. [Thayer
gave examples of legislation passed over a presidential veto by
two-thirds of Congress, and the House of Representatives ap-
propriating money to implement a treaty made by the president
and ratified by the Senate.] Is the situation necessarily different
when a court is asked to enforce a legislative act? The courts are
not strangers to the case of political questions, where they refuse
to interfere with the action of the other departments. ... A ques-
tion, passed upon by those departments, is ... refused any dis-
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}cussion in the judicial forum, on the ground, to quote the lan-
guage of the Supreme Court, that “the respect due to co-equal
and independent departments requires the judicial department to
act upon this assurance.”

Having reaffirmed *Marbury*’s departmental discretion principle
and subsumed the political question doctrine within it, Thayer then
turned to emphasize the differences between the world in which
Marshall delivered the *Marbury* opinion and his own:

> When one reflects upon ... the portentous and ever increasing
> flood of litigation to which the fourteenth amendment has given
> rise; upon the new problems in business, government, and police
> which have come in with steam and electricity ... ; upon the
> growth of corporations and of wealth; the changes of opinion on
> social questions, such as the relations of capital and labor ... we
> seem to be living in a different world from Marshall’s.

In response to those changes, Thayer thought, “[v]ery serious
things [have been] happening in the region of constitutional law.”
“The people of the states,” Thayer observed,

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233 Id. at 61–63.
234 Id. at 64.
235 Id.
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in making new constitutions have long been adding more and more prohibitions and restraints upon their legislatures. The courts, meantime, often enter into the harvest thus provided for them with a light heart, and promptly and easily proceed to set aside acts of the legislatures. The legislatures grow accustomed to this distrust, and more and more readily incline to justify it, and to shed all consideration of constitutional restraints . . . [by] turning that subject over to the courts. . . .

The people all this while grow careless as to whom they send to the legislature . . . ; and if these unfit persons pass foolish and bad laws, and the courts step in and freely disregard them, the people are glad that these few, wiser gentlemen on the bench, are there to protect them against their more immediate representatives.

From these causes there has developed a vast and growing increase of judicial interference with legislation. 236

This was "a very different state of things from what [the Framers of the Constitution] contemplated," Thayer claimed. 237 "Seldom, . . . as they imagined, would this great, novel, tremendous power of the courts be exerted. . . ." 238 He quoted two comments from Marshall. The first stated that if a case "‘may be determined on other [than constitutional] grounds, a just respect for the Legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.’" 239 The second asserted that his Court had "‘never sought to enlarge the judicial power beyond its proper bounds.’" 240 When the "power of the judiciary to disregard unconstitutional legislation" was exercised, it was "always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people lose the political experience and the moral education . . . that come from . . . correcting their own errors." 241

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236 Id. at 64–65.
237 Id. at 65.
238 Id.
239 Id. at 66 (quoting Thayer).
240 Id. (quoting Thayer).
241 Id. at 66–67.
"What should be done?," Thayer questioned. The courts could "do most to cure the evil." "Let them," he maintained, adhere to first principles, and consider how narrow is the function which the constitutions have conferred on them,—the office merely of deciding litigated cases. How large, therefore, is the duty entrusted to others, and above all to the Legislature. It is this body which is charged, primarily with the duty of judging of the constitutionality of its work. . . . Such a body . . . is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice.

"The judiciary to-day," Thayer concluded, "in dealing with the acts of co-ordinate legislatures, owes to the country no greater or clearer duty than that of keeping its hands off [legislative] acts wherever it is possible to do it." After all, the "remarkable jurisdiction" of American courts to review the constitutionality of the acts of other branches "has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exert it."

In this series of comments Thayer connected up the altered constitutional regime of the late nineteenth century, what he perceived to be the growing aggressiveness of state courts, and his "clear mistake" rule of judicial review. Although each of the departments of the government had a power, and a responsibility, to interpret the Constitution, the "portentous" flood of litigation ushered in by the Fourteenth Amendment, coupled with the vast social and economic changes of the post-Civil War years, had resulted in states passing "more and more prohibitions and restraints" on their legislatures, analogous to the prohibitions and restraints codified in the Reconstruction Amendments. This trend affected all of the constitutional interpreters envisaged by the Constitution. State courts grew accustomed to imposing constitutional limitations on their legislatures. Legislators, used to being scrutinized, became indifferent to their duty to act as "primary" constitutional interpreters.

242 Id. at 68.
243 Id.
244 Id.
245 Id. at 69.
246 Id.
of the legislation they passed. The people became careless about the quality of their legislators and too dependent upon the courts. The result was a departure from the sound attitudes of Marshall's time, when courts used their judicial review powers sparingly. The "vast and growing increase" of judicial invalidation of legislative acts would, ultimately, make the people, and their legislative representatives, less responsible citizens. The remedy was to return to the constitutional understandings of Marshall and his contemporaries through the "clear mistake" standard of review, which would permit legislatures to be the judges of the constitutionality of their own acts so long as their grounds were reasonable.

Thayer had, of course, read Marbury to his advantage. He had stressed the departmental discretion principle of that case and minimized the judicial supremacy principle. He had emphasized the deferential exercise of constitutional review under Marshall; in fact, the Marshall and Taney Court's stance had been selectively aggressive and deferential, in keeping with preserving constitutional equilibrium through the use of both principles. Thayer had treated Marbury as an embodiment of limited judicial review, ignoring the fact that the Marshall Court, in the exercise of its review powers, had produced a series of interpretations of the Constitution that were designed to bind other branches of government. Nonetheless, Thayer's effort to cut Marbury down to a more modest size was evidence that at least one observant late nineteenth-century commentator had come to believe that post-Civil War constitutional jurisprudence was threatening to get out of balance. Thayer's "clear mistake" rule is best understood less as an effort to fashion a vastly expanded domain of departmental discretion than as an attempt to restore some equilibrium to the system.

III. THE TWENTIETH CENTURY: THE POLITICIZATION OF MARBURY AND RESTORED EQUILIBRIUM

A. Historicizing Thayer

When a person exposed to twentieth-century constitutional commentary unpacks Thayer's arguments on behalf of the "clear mistake" standard of review, some surprising omissions in his arguments emerge. But "surprising" turns out, on reflection, to be an anachronistic term. Missing from Thayer's critique of late nine-
teenth-century aggressive review is an assumption that twentieth-century opponents of judicial "activism" have made, that aggressive judicial review raises serious issues for American constitutionalism because it permits judges to pour open-ended content into the broad-gauged provisions of the Constitution, such as "due process," "equal protection," and "speech." "Substantive" judicial interpretations of open-ended provisions amount to ideological readings of the constitutional text by judges with partisan agendas.

Thayer does not list the fear of judicial partisanship among his reasons for discouraging aggressive review through the "clear mistake" rule. His concern is not that a regular practice of searching judicial review will produce inappropriately ideological decisions but that it will deter other branch actors from engaging in their own considered constitutional interpretations. He does not even raise, let alone evaluate, the possibility that allowing judges to pour substantive content into constitutional provisions might be inherently risky. He is against aggressive review because it shifts the work of constitutional interpretation almost exclusively to the judiciary, resulting in other branches becoming careless or lazy or timid in their civic obligations.

Why does Thayer not extend his critique of aggressive judging to include the risk that it furthers free-wheeling substantive judicial glosses of the Constitution? It appears that Thayer thought that shifting the locus of constitutional interpretation did not mean removing constraints from the interpreters. He appeared to believe that although judges might get into the habit of taking over constitutional interpretation from others, it did not follow that they would therefore render illegitimate, partisan decisions. Thayer appears to have retained the dominant nineteenth-century view of judges as being constrained by "the law" itself. Although judges, being humans, were partisan, they were also savants. They remained "guardians" of the constitutional order in that their function remained that of discerning and applying fundamental constitutional principles, including those that restrained the actions of other branch actors. Thayer did not find the view of judges as guardians wrongheaded, he simply thought that it was not inconsistent with the exercise of interpretive power by other branches, and that it should not be an excuse for legislative abdication of the role of constitutional interpreters.
Because Thayer retained a view of judges as guardians constrained by their obligation to discern and to apply a corpus of pre-existing foundational law, he did not posit, let alone worry about, a "counter-majoritarian difficulty."\(^{247}\) Although he held a robust view of citizen participation in republican governance, and wanted to encourage that participation through the "clear mistake" rule, Thayer did not find judicial glosses of the Constitution inconsistent with democratic theory. This was in part because he did not adopt the theories of democratic constitutionalism, with its emphasis on majority rule, the counter-majoritarian status of appointed judges with life tenure, and the absence of political checks on those judges, which became starting points for the commentary of twentieth-century constitutional theorists. Thayer's perspective remained embedded in the assumptions of nineteenth-century republican constitutionalism, with its emphasis on guardian review, foundational constitutional principles, and a role for the judiciary of pricking out the boundary between legitimate exercises of state police powers or their congressional analogs and illegitimate trespassing on inalienable private rights.\(^{248}\) Thayer's approach was designed to locate that boundary in such a fashion as to give legislatures wide scope for considered, reasonable, public regulation. It was not designed to question the judiciary's guardian status.

**B. Corwin's Reframing of Marbury**

In 1914, Edward Corwin decided to revisit the *Marbury* decision and the question of the legitimacy of judicial review.\(^{249}\) Corwin was thirty-six years old at the time. He had studied constitutional history as an undergraduate at the University of Michigan, and received his Ph.D. in history from the University of Pennsylvania in 1905, working with the social historian John Bach McMaster. The

\(^{247}\) That phrase was coined by Alexander Bickel in *The Least Dangerous Branch*, but, as we will subsequently see, the argument that the judicial branch was undemocratic had surfaced in American constitutional commentary by the 1940s. Bickel, supra note 119, at 16.


next year Woodrow Wilson, the president of Princeton, hired Corwin as a preceptor in the department of politics. In the next four decades, Corwin was to emerge as the leading constitutional scholar of the early- and mid-twentieth century.\(^{250}\)

Corwin's representativeness among his generation of constitutional commentators is not just a function of his stature. Although he was a visible critic of the Supreme Court's initial resistance to New Deal legislation in the 1930s, he was not markedly ideological in his approach. He was a political independent, and most of his work, although written with contemporary constitutional issues in mind, consisted of a detailed examination of historical ideas Corwin identified as driving forces in American constitutionalism. Although he operated in the realm of history, Corwin was very far from being an originalist in his constitutional jurisprudence. He was a thoroughgoing historicist in his view of constitutional development, and he resisted efforts on the part of contemporary policymakers to enlist judicial or political figures from past generations in support of current agendas.\(^{251}\)

Corwin had begun to write on constitutional history topics as early as 1906, showing a particular interest in judicial review. He had noted, in pursuing that subject, that "the most basic assump-

\(^{250}\) Corwin's reputation was based not only on his numerous books and articles, but on his 1920 treatise (issued in a fourteenth edition in 1978), *The Constitution and What It Means Today*. Edward S. Corwin, *The Constitution and What It Means Today* (14th ed. 1978). The treatise consisted of an annotation of each of the provisions of the constitutional text, written in language accessible to non-lawyers. For most of Corwin's life (he wrote consistently from the first decade of the twentieth century through the mid-1950s), the methodological emphasis of political science was qualitative, and constitutional history was a statured specialty in history departments. At the same time, most of Corwin's articles appeared in law journals. His work was thus influential among several scholarly and lay audiences.

\(^{251}\) For an example, see Edward S. Corwin, John Marshall, Revolutionist *Malgré Lui*, 104 U. Pa. L. Rev. 9 (1955), *reprinted in* 2 Corwin on the Constitution 379 (Richard Loss ed., 1987), in which he argued that Marshall could not fairly be conscripted as a supporter of the New Deal. "Liberty, . . . not social equality," Corwin concluded, was "the lode-star of [Marshall]'s political philosophy." Corwin, supra, at 22, *reprinted in* 2 Corwin on the Constitution, supra, at 379, 391. Throughout this Article, my citations to Corwin's work are from Loss's collection, a three volume set published between 1985 and 1988, and from the journals where Corwin's articles originally appeared.
tion of the argument for judicial paramountcy” was “the assumption of the impersonality of the courts.” But, he continued,

it is perfectly obvious that the impersonality of the Supreme Court is merely fictional and tautological. It always speaks the language of the Constitution, merely because its opinion of the Constitution is the Constitution. But would any one assert that the Constitution has not been extended and amended by the Supreme Court? . . . The truth is that the major premise of most of the great decisions of the Supreme Court is a concealed bias of some sort—a highly laudable bias perhaps, yet a bias.

In these remarks, written just five years after Thayer’s last articulation of his “clear mistake” standard of constitutional review, one can observe the vast gulf between Thayer’s and Corwin’s starting premises. Although Thayer would have agreed with Corwin that the Constitution had been “extended” by Supreme Court decisions interpreting it, he would have denied all of Corwin’s other claims. Thayer did not find the “impersonality” Corwin attributed to the Court “fictional” because for Thayer it represented a considered attempt to discern and apply the content of fundamental law by persons whose first, and paramount, task was to arrive at correct interpretations. Nor did he find it “tautological,” because the whole point of his “American Doctrine” essay had been to show that the Constitution was not synonymous with the Supreme Court’s interpretations of it, that there were other constitutional interpreters, and that sometimes the Court’s interpretations were wrong. Finally, Thayer would not have described the Court’s decisions as examples of “a concealed bias.” He posited an intelligible separation between the principles of foundational law and human partisanship. He anticipated a practice of constitutional review in which the Court regularly declined to invalidate legislation that a majority of its members thought foolish or misguided, because, when submitted to scrutiny, the legislation was not clearly inconsistent with constitutional principles.

253 Corwin, supra note 252, at 625.
Corwin, in contrast, saw American constitutional law as a shifting series of "biased" interpretations of the provisions of the Constitution by successive generations of Justices. He did not think this phenomenon a bad thing; on the contrary, he thought it inevitable. When Marshall concluded, in *McCulloch v. Maryland*, that the phrase "necessary and proper" in the Constitution meant "convenient" rather than "absolutely necessary," Corwin believed, he did so "because he was a nationalist." The "real question at issue" when the Court engaged in constitutional review of an act of Congress was "not whether the fundamental Constitution shall give way to [that act], but whether Congress's interpretation of the fundamental Constitution shall prevail or whether it shall yield to that of another human, and therefore presumably fallible, institution—a bench of judges." Thayer would have maintained that the question was precisely that which Corwin discarded, because Thayer believed that, when a statute was placed alongside "the fundamental Constitution," the question of compatibility was susceptible to a definitive legal answer. His "clear mistake" rule was designed to ensure, for reasons related to the virtue of citizen and legislator participation in constitutional governance, that only obviously incompatible statutes be invalidated. Corwin, in contrast, thought that the question of compatibility would be decided by human bias.

The result was a revised description of *Marbury v. Madison*. Corwin started his analysis of that opinion by advancing a criticism of it similar to that of Thayer. He wondered how the principle of judicial supremacy in constitutional interpretation could be reconciled with the theory of separation of powers, and he noted that "the power to question the validity of federal legislation" had not been expressly conferred on the judiciary in the Constitution. More fundamentally, he thought that the alleged status of the Constitution as a body of "fundamental law," to which acts of Congress should conform, was itself a product of judicial decisions, and it was perfectly feasible to have a governmental constitution in which legislative supremacy was taken as a given.

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255 Corwin, supra note 252, at 625.
256 Id.
257 Id. at 624.
258 Id. at 625.
Thus far Corwin had followed Thayer in finding that the *Marbury* opinion appeared to beg some of the questions it purported to decide. But then Corwin took another tack. *Marbury* was part and parcel, he argued, of a political struggle between Jefferson's Republican party, which had assumed control of the Executive and Congress after the election of 1800, and the Federalist party, which, through the late-term judicial appointments of John Adams, had, in Jefferson's words, ""retired into the judiciary as a stronghold." 259

The signal of the Federalists' efforts to preserve "the remains of federalism" in the courts was the Judiciary Act of 1801, passed at the close of the Adams administration. 260 The Judiciary Act significantly increased the number of federal district and circuit courts, which were quickly staffed with Federalists. 261 The Republicans countered by repealing the Judiciary Act, establishing the power of Congress to control the lower federal courts, but at the same time highlighting the fact that the Supreme Court had been created by the Constitution and was not subject to being abolished by another branch of government. 262

*Marbury* was another skirmish in the battle: Not only could Congress not abolish the Court, the Court could invalidate congressional legislation. Moreover, Corwin suggested, Marshall taunted Jefferson in the decision by intimating that the Court could review acts of the executive—in this case the decision to withhold Marbury's commission—even though, technically speaking, the Court could not bind the Jefferson administration in Marbury's case because it did not have original jurisdiction to issue a writ of mandamus. "Regarded merely as a judicial decision," Corwin commented, "the decision of *Marbury* v. Madison must be considered as most extraordinary, but regarded as a pamphlet designed to irritate an enemy to the very limit of endurance, it must be considered a huge success." 263

260 Corwin, supra note 259, at 286.
261 Id.
262 Id. at 290.
263 Id. at 292.
Corwin's last comment was made in his second article on judicial review, published in 1910 and 1911. In 1914, in his third and most comprehensive article on the subject, he was even more pointed. After criticizing Marshall's reasoning on the constitutionality of Section 13 of the Judiciary Act of 1789—he argued that the Section was merely designed to allow the Court to use a writ of mandamus as a remedy connected to its existing jurisdiction, not to enlarge the jurisdiction itself—Corwin concluded that the Section did not conflict with Article III of the Constitution, and there had been no occasion for Marshall to consider the power of the Court to review acts of Congress.  

"Why, then," Corwin asked, "did the Court make such an inquiry?"

To speak quite frankly, [Marbury] bears many of the earmarks of a deliberate partisan coup. The Court was bent on reading the president a lecture on his legal and moral duty to recent Federalist appointees to judicial office, whose commissions the last administration had not had time to deliver, but at the same time hesitated to invite a snub by actually asserting jurisdiction of the matter. It therefore took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendent power.

Corwin then repeated the political explanation of Marbury that he had previously advanced, claiming that the Republicans' repeal of the Judiciary Act of 1801 was part of "a possible larger program of definitely subordinating the judiciary to the political branches of the government." But that effort produced a "Pyrrhic victory," as the Federalists, responding to the repeal, "speedily developed the argument that, inasmuch as the Constitution designed the judiciary to act as a check upon Congress, the latter was under constitutional obligation not to weaken the independence of the former in any

265 Corwin, supra note 264, at 542.
266 Id. at 542–43.
267 Id. at 569.
way.” The “true color” of *Marbury*, Corwin claimed, could be seen “against this background.” But Marshall’s performance was still masterful, he thought, because it vindicated judicial review as part of the “fundamental and paramount law” of the Constitution. Moreover, Corwin noted,

in the very process of vindicating judicial review [the *Marbury* opinion] admitted to a degree the principle that had thus far been contended for only by opponents of judicial review.... [This was] the doctrine of departmental discretion, . . . supplemented by the doctrine that the powers of Congress must be liberally construed, and . . . by the doctrine of the immunity of the president from judicial process.

The departmental discretion principle of *Marbury*, Corwin felt, was “plainly [a] concession[] to the necessity of making the Constitution flexible and adaptable while still keeping it legal.” Although he admired Marshall for “the spirit of accommodation” that feature of *Marbury* embodied, Corwin’s account had thus far primarily advanced a political explanation for *Marbury*. He had not explained how, if judicial review was simply one contested doctrine in a struggle between the Federalist and Republican parties in the early 1800s, it had become so incontrovertible a feature of American constitutional law. His explanation, ultimately, was that judicial review rested on deeply embedded conceptions of law and judging in American society. Those conceptions “sharply distinguish[ed] law-making from law-interpreting,” assigned the latter “exclusively to the courts,” and rested on “the assumption . . . that the judges alone really know the law.”

But Corwin had previously suggested that Marshall’s effort to place the ultimate responsibility for constitutional interpretation in the courts had been partisan and question-begging. If so, one might wonder why judicial review had become so fundamental a practice

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268 Id.
269 Id. at 571.
270 Id.
271 Id.
272 Id.
273 Id.
274 Id. at 572.
Corwin was attempting to historicize the idea of judicial review as culturally foundational at the same time that he was seeking to put forth a political interpretation of *Marbury*.

**C. The “Living Constitution” and the Counter-Majoritarian Difficulty**

1. **The Reconceptualization of American Constitutional Jurisprudence**

Because the issue of judicial review has been framed for several decades in terms of democratic theory, majority rule, and the unelective status of the federal judiciary, there has been a tendency, embodied by Corwin’s emphasis on the political context of *Marbury*, to see debates on the scope of judicial review as debates about the legitimacy of an unaccountable set of political actors usurping the prerogatives of the elected branches to decide con-

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275 Id.
276 Id.
277 Id.
tested public issues. The purpose of this Section is to explore how this reframing of *Marbury v. Madison* came about.

We have seen that from the initial reactions of commentators to *Marbury* through Thayer's derivation of his "clear mistake" standard of review, the focus of discussion about judicial review was how judicial supremacy could be reconciled with the principles of departmentalism and the power of each branch to interpret the Constitution. In a series of decisions stretching from *Marbury* to *Dred Scott*, the Court sought to effectuate a reconciliation by paying close attention to both of the central principles of *Marbury*, judicial supremacy and departmental discretion. The result, for several decades, was a constitutional jurisprudence designed to produce a rough interpretive equilibrium among the branches.

By the late nineteenth century, Thayer concluded that this equilibrium had been upset by broad readings of the Reconstruction Amendments by courts and too facile abdication by legislatures of their role as constitutional interpreters. But it is important to recall what issues did not figure in Thayer's calculus. He did not claim that courts should give greater deference to legislative interpretations because the Constitution was a document whose meaning, as embodied in judicial readings of constitutional provisions, was designed to change over time, and legislatures were better suited to reflect changing public attitudes. And he did not center the "clear mistake" rule in democratic theory. Part of the basis of Thayer's belief that legislatures could interpret the Constitution as well as courts (so long as legislators paid serious attention to this task) was his assumption that the foundational principles of the Constitution remained constant over time and only needed continual "adaptation" to new conditions. Thayer's view of constitutional adaptivity was that of Marshall: The ability of the Constitution to "endure" over time was connected to its ability to be "adapted to the various *crises* in human affairs." Adaptivity was achieved by frequent recurrence, in the context of those crises, to constitutional principles.

Nor did Thayer believe that the limited exercise of judicial review by courts was necessary to preserve the primacy of majori-

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278 See White, supra note 193, at 204–09.
tarian governmental institutions in a constitutional democracy. He believed it was necessary to encourage participation in public issues by citizens and legislators in a republic. Thayer agreed with Marshall, and with other nineteenth-century commentators, that the Constitution had been designed to secure the liberties of individual citizens against oppression by government. The structure of the Constitution could be seen as an effort to diffuse power among governmental entities in order to prevent tyranny. On occasion, Thayer felt, the judiciary needed to intervene in the name of the Constitution to protect invasions of liberty by majorities. He simply felt that a judicial mandate to protect liberty should not deter legislatures from seeking to protect the health, safety, or morals of the public.

The arena of debate in which Thayer and his contemporaries participated thus remained the same arena in which the Marshall Court had confronted its critics: one in which the central question was when, in a universe in which constitutional principles remained intelligible and fixed over time, judicial supremacy should yield to, or supercede, departmental discretion. By the mid-point of Corwin's career, the arena of debate had been reconceptualized. Judicial supremacy came to be debated in a universe in which constitutional principles were seen as less ineluctable, and more dependent on changing social conditions, and in which the question of interpretive deference, whether on the part of courts or legislatures, came to be seen as connected to the "democratic" status of governmental institutions.

The change took place in two discernable stages. The first stage is easily recognizable in Corwin's scholarship in the first three decades of the twentieth century. It featured a change in the conventional meaning of constitutional adaptivity, in which Marshall's and Thayer's view of the relationship of constitutional principles to successive public "crises" was abandoned. I am calling this stage in the early twentieth-century reconceptualization of constitutional jurisprudence the "living Constitution" stage. The second stage occurred during Corwin's scholarly career but did not occupy much of his attention. It tied judicial deference not only to the malleability of constitutional principles but to the unrepresentative, unaccountable character of the judicial branch. I am calling this the "counter-majoritarian difficulty" stage.
In the 1920s, a debate surfaced over the nature of constitutional adaptivity.\(^{280}\) One side consisted of commentators who continued to believe, with Marshall and Thayer, that the meaning of the Constitution did not change with time. The capacity of the Constitution to "adapt" to new "crises" rested in the fundamentality of its foundational principles. When new cases arose, judges fitted them within the framework of those principles. This resulted in new applications of law, but not new law itself. A familiar example was the Supreme Court's methodology in police power cases where a state statute was challenged as an invasion of "liberty" or a denial of "property" under the Fourteenth Amendment's Due Process Clause. A majority of the Court, from the first years of the twentieth century through the late 1930s, saw themselves as engaged, in those cases, in "pricking out" the "boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty."\(^{281}\) The methodology presupposed that, as new legislation and new challenges arose, boundary lines might be located in different places. But the fundamental constitutional principles resorted to in the boundary-pricking exercise—the inviolability of private rights against legislative interference and the power of legislatures to advance the health, safety, and morals of their citizens—remained constant.

The regime of traditional constitutional adaptivity was erected on a pivotal distinction between the authority of legal sources and that of their interpreters. The Constitution was acknowledged to be the most authoritative of American legal sources. Its provisions trumped competing laws. But most of its provisions were not self-executing: They required interpretation in changing contexts. Judges had a degree of authority to interpret the Constitution, stemming from their status as savants, but they did not have any authority to modify the principles they applied to resolve constitutional disputes. Constitutional adaptivity was a process in which judges demonstrated the capacity of existing principles to resolve

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\(^{280}\) For detail on the debate, with citations to early twentieth-century constitutional commentators, see White, supra note 193, at 204–11, 215–18.

new disputes, not one in which the pressure of a dispute resulted in the judicial alteration of a principle. This was why constitutional adaptivity was not the same as constitutional change. One proponent of the traditional view of constitutional adaptivity likened the Constitution to a floating dock, which adjusted to changing tides without altering its character or losing its moorings.\textsuperscript{282}

A critic of the "floating dock" metaphor said that the "idea seems to be that while [the Constitution] does not move forward or backward, it jiggles up and down."\textsuperscript{283} His ridiculing of the metaphor was designed to ridicule the distinction underlying it. To advocates of a "living Constitution" theory of adaptivity, any separation of the authority of legal sources and that of interpreters of those sources was fruitless. The sources were their interpretations: The Constitution was the collection of decisions interpreting it.

A modernist assumption lay behind the "living Constitution" advocates' attack on the traditional view of constitutional adaptivity. If constitutional law was the aggregate of decisions interpreting the Constitution by judges, those judges were "making" the corpus of that law. Moreover, the corpus changed with time, as some decisions were overruled and others were ignored or distinguished away. By rejecting a conception of law as independent of the officials who made or interpreted it, "living Constitution" theorists were relocating causal agency in the realm of jurisprudence. By rejecting a conception of constitutional principles as static, they were advancing a historicist explanation of constitutional development. As new conditions surfaced and new judges were appointed to the Court, new cases produced new "meanings" of the Constitution. "[J]udges are men," Howard McBain wrote in his 1927 book, \textit{The Living Constitution}, "made of human stuff," and laws are "man-made, man-executed, man-interpreted."\textsuperscript{284} The Constitution was interpreted by "human means," and its changing content was dictated by "those who [held] the throttle of power at the moment."\textsuperscript{285}

In 1925, Corwin wrote an article in the \textit{American Political Science Review} that demonstrated his clear commitment to the "living

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\item[284] Howard Lee McBain, \textit{The Living Constitution} 2 (1927).
\item[285] Id. at 272.
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Constitution" theory of constitutional adaptivity. He took as beyond dispute the proposition that judges, in the guise of acting as interpreters of the Constitution's text, "made" constitutional law. "No student would care to deny the force of [the] view[,]" Corwin wrote, "[that] judges are often at least the partisans of identifiable economic interests, and that precedent and theory are only a camouflage in the shadow of which matters of choice take on the delusive appearance of inevitability." "Nowadays," he continued, "almost everybody admits, however grudgingly, that the judges make law, and that not merely in the sense of adding to or subtracting from the supposititious intention of a more or less supposititious law-giver, but also in the sense of determining such additions and subtractions by their own preferences."

Although Corwin conceded that "intelligent judges . . . deny . . . that they do make law," this was because the Constitution had a capacity for embracing opposing governmental principles, such as what Corwin termed "competitive" and "cooperative" federalism, and those principles had produced "two lines of precedents" that judges, interested in a particular outcome, could draw upon. The existence in the Constitution of "standardized, but conflicting" theories of government gave judges "perfect freedom of decision," and at the same time "set[] up a defense against any attack" suggesting judicial bias.

But in the end, whether judges admitted it or not, the corpus of constitutional law was altered by shifting judicial preferences. For Corwin this was entirely appropriate. "The Constitution," he declared, "is a living statute, to be interpreted in the light of living conditions." When it was taken to offer "[r]esistance . . . to . . . social forces," this was only because its language was being taken

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287 Corwin, supra note 286, at 298.
288 Id. at 297.
289 Id. at 298.
290 Id. at 298-99.
291 Id. at 299.
292 Id. at 302.
to reflect "a point of view which is sympathetic with the aspirations of the existing generation of American people."293

Corwin summarized his position as follows. "For many practical purposes," he asserted, "the Constitution is the judicial version of it—constitutional law."294 The "main business of constitutional interpretation" by judges is "to keep the Constitution adjusted to the advancing needs of the time."295 And the "proper point of view" by which judges should "approach the task of interpreting the Constitution" is to "regard[] it as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people."296

Although Corwin revealed himself in the article to be a thoroughgoing modernist in his conception of the judicial function, and a thoroughgoing historicist in his approach to constitutional interpretation, his version of "living Constitution" theory paid almost no attention to democratic theory. An argument based on democratic theory would suggest that the obligation on the part of judges to interpret the Constitution "in the light of living conditions" was connected to the importance, in a democracy, of conforming constitutional law to the current needs of the people. Corwin hinted at the argument in two places, but did not develop it. At one point, he said that "the American people" had a "primitive right to determine their institutions," and that the Constitution's conformity to the popular will was "its sole claim to validity ... under our system."297 At another, he spoke of the Supreme Court's using its interpretive power "to legislate without assuming the due responsibilities of legislators."298 But he failed to connect the two comments, and thus stopped well short of suggesting that a "living Constitution" approach to interpretation should be more responsive to majoritarian popular opinion.

Furthermore, throughout his participation in the "Court-packing" controversy of 1937, Corwin never advanced an argument from democratic theory. Corwin supported the Roosevelt administra-

293 Id.
294 Id. at 303.
295 Id.
296 Id.
297 Id.
298 Id. at 304.
tion's proposal to add more judges to the existing Court if its sitting judges declined to retire at the age of seventy. He felt that "Court-packing" was necessary for two principal reasons: A majority of the current Court had failed to adopt a "living Constitution" theory of constitutional adaptivity, and it had done so because the "social philosophy" of its members was insufficiently "modern." As Corwin put it in testimony before the Senate Judiciary Committee:

I think the realities of the situation are these: In the first place, the doctrines of constitutional law of the majority of the Court involve the entire program of the administration in a fog of doubt as to constitutionality; and second, that cloud [of] doubt can be dispelled within a reasonable time only by reestablishing that mode of reading the Constitution which adapts it to present needs . . . .

The "fog of doubt" about the constitutionality of New Deal legislation, Corwin claimed, was a product of the fact that, although "[m]odern principles of constitutional law" needed to be "decided by men whose social philosophy [was] modern," the Court majority lacked that social philosophy. Instead it had "been endeavoring to elevate into constitutional law a particular economic bias," 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." Corwin suggested. "The experience that elderly judges have had in life is inapplicable to changing conditions. There ought to be constant refreshment of knowledge of life and of new currents of thought available to the entire bench."

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302 Id.

303 Id.
In the course of elaborating his criticism of the Court that was invalidating New Deal programs on constitutional grounds, Corwin made an additional argument. The Court-packing proposal, he claimed, "was required to correct a serious unbalance in the Constitution, resulting from the undue extension of judicial review." He felt that in the "last 40 or 50 years," the Court had "in the exercise of judicial review dissolved every limitation upon the exercise of its power." He subsequently noted that the Court had "projected itself into [the] political field," thereby "sinn[ing] against the fundamental maxim of judicial review; namely all doubts will be resolved in favor of the legislature." He did not, however, indicate that the "serious unbalance" offended principles of democratic theory, or that the presumption of constitutionality, which he identified, without explanation, as "the fundamental maxim" of a system in which judges reviewed legislation on constitutional grounds, was objectionable on similar grounds. In short, Corwin's arguments on behalf of Court-packing were modernist-inspired arguments and historicist arguments ("living Constitution" arguments), but they were not arguments premised on the existence of a counter-majoritarian difficulty.

It is interesting, in this vein, to compare the arguments advanced by President Franklin Roosevelt in a speech on March 9, 1937, defending the Court-packing plan. They were identical to those of Corwin, including the absence of any attempt to tie the idea of an expanded Court to democratic theory. Roosevelt noted that "since the rise of the modern movement for social and economic progress through legislation," the Court had "cast aside ... the sound rule of giving statutes the benefit of all reasonable doubt." It had "improperly set itself up as a third House of the Congress—a superleg-

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308 Id. at 42.
islation... reading into the Constitution words and implications which are not there." The Court-packing plan was designed to ensure "a Supreme Court... that will refuse to amend the Constitution by the arbitrary exercise of judicial power."

The reason his plan emphasized age, Roosevelt noted, was to "bring[] into the judicial system a steady and continuing stream of new and younger blood." By bringing "to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances," the plan was designed to "save our National Constitution from hardening of the judicial arteries." In sum, the plan would "confirm Justices... who understand... modern conditions," who would "not undertake to override the judgment of the Congress on legislative policy," and who would "act as Justices and not as legislators." Such justices would "restore the Court to... its high task of building anew on the Constitution 'a system of living law.'"

Corwin's and Roosevelt's comments underscore the fact that the "constitutional crisis" allegedly precipitated by the Court's invalidation of New Deal legislation in the 1934 and 1935 Terms was seen by opponents of the Court as the product of a rigid resistance by judges with antiquated judicial philosophies to legislation designed to respond to modern social and economic problems. The

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309 Id.
310 Id. at 43.
311 Id.
312 Id.
313 Id. at 44.
314 Id.
Court majority resisting the New Deal was behaving inappropriately, supporters of Court-packing claimed, because it was substituting its obsolete constitutional philosophies for more enlightened legislative responses. But the claim was not that judicial invalidation of laws generated by more majoritarian institutions was itself inappropriate. It was simply that the Court was not adequately responsive to the goals of the legislation. As Roosevelt put it, the Court-packing plan was designed to put judges on the Court who would help build "on the Constitution a system of living law." He was not objecting to judicial glossing of constitutional provisions, just to the substantive implications of the glosses.

3. Commager and Judicial Review in a Democracy

In 1943 the historian Henry Steele Commager, after examining the Senate Judiciary Committee's six volumes of hearings on the Court-packing plan, concluded that they raised a theme which had not been highlighted in the debate over the Roosevelt administration's proposal to reorganize the Court. The theme was the identification of judicial review with the theory that "the principal function of our constitutional system is to protect minority rights against infringement" by majorities.\(^{36}\) "So persuasive is this theory," Commager suggested, "that many Americans have come to believe that our constitutional system is not, in fact, based upon the principle of majority rule."\(^{37}\) Throughout the nineteenth century, Commager claimed, the theory "was formulated in defense of property interests... who put property rights above human rights," by "those who already had political privileges and were determined that the common man should not share them," and "in defense of slavery in the just fear that slavery and majority rule were ultimately incompatible."\(^{38}\)

Commager found it odd that this theory, which identified the Constitution as an anti-majoritarian document and judicial review with protection against the tyranny of majorities, should continue to be attractive to twentieth-century Americans, particularly because it had been "formulated... by those who proved themselves

\(^{36}\) Henry Steele Commager, Majority Rule and Minority Rights 9 (1943).
\(^{37}\) Id.
\(^{38}\) Id. at 13–14.
completely out of harmony with the fundamental tendencies of American society." If one reflected on "[t]he court reform proposal of 1937," he argued, it could be seen as a "promising opportunity offered our generation for an analysis of the relation of judicial review to democracy." But no such analysis had emerged. Commager proposed to supply one.

He began by stating that "[a] moment's reflection" would reveal that "the problem of judicial review is the problem of democracy." This was because "[t]he function—and effect—of judicial review is to give or deny judicial sanction to an act passed by a majority of a legislative body and approved by an executive." Because "[e]very act adjudicated by the court" had not only been ratified by a majority but also implicitly subjected "to scrutiny in regard to its conformity with the Constitution," when courts reviewed legislation they were not investigating "a majority vote for its wisdom but a majority vote for its constitutionality." When a court invalidated legislation on constitutional grounds, the "one non-elective and non-removable element in the government [was rejecting] the conclusions on constitutionality arrived at by the two elective and removable branches."

Here was the "counter-majoritarian difficulty" argument in explicit form. Commager then turned to the question of why, when "differing interpretations of the meaning of the Constitution" existed, that of the judiciary should prevail. He rehearsed the arguments. One was that courts, being trained "to know the law and to know the Constitution," were "peculiarly fitted" to interpret constitutional provisions. Another, related argument was that courts "alone are independent and unbiased." He attempted to challenge both arguments. As to the first, even if judges were "more learned in the law than legislators or executives," most exercises of constitutional interpretation involved "vague and am-

319 Id. at 14.
320 Id. at 39.
321 Id. at 40.
322 Id.
323 Id.
324 Id.
325 Id. at 41.
326 Id. at 42.
327 Id.
biguous clauses of the Constitution,” whose “meaning is not to be
determined by legal research but by ‘considerations of policy.'” Their interpretation was fundamentally a matter of “discretion.”
The second was that constitutional interpretations, on the part of
both legislators and judges, were more a product of “unconscious”
than of “conscious ... passion or prejudice,” and it was not clear
that judges were any less susceptible to that form of bias than legis-
lators.

The final argument for the established theory of judicial review,
Commager claimed, was that it was necessary to protect minority
rights against the tyranny of the majority. He sought to respond to
that argument by showing that in the relatively few instances in
which the Supreme Court had invalidated acts of Congress since
Marbury, the Court’s decisions, when they had not been “cancelled
out by amendment, by ... more acceptable legislation, or ... by ju-
dicial reversal,” had almost never been protective of “personal lib-
erties.” There was “not a single case,” in the period from Mar-
bury through the late 1930s, where the Court had “protected
freedom of speech, press, assembly, or petition” against congres-
sional restrictions. There was “no instance ... where [it] ha[d] in-
tervened on behalf of the underprivileged.” On the contrary, the
Court had “intervened again and again to defeat congressional ef-
forts to free slaves, guarantee civil rights to Negroes, to protect
workingmen, outlaw child labor, assist hard-pressed farmers, and
to democratize the tax system.” Commager concluded that the
branch of government most dedicated to “the realization of the
guarantees of the bill of rights” had not been the Court but Con-
gress.

None of Commager’s arguments were particularly telling. They
required that one make the same set of assumptions as to what
sorts of “personal liberties” should be protected, what constituted
the core “guarantees of the bill of rights,” and what inferences

328 Id. at 42–43.
329 Id. at 43.
330 Id. at 44.
331 Id. at 47.
332 Id. at 55.
333 Id.
334 Id.
335 Id.
about constitutional interpretation could be drawn from the passage of legislation that Commager made. If one believed that when legislatures enacted statutes they gave serious consideration to the constitutionality of their enactments (rather than simply delegating the issue to the courts), or that the appropriate "liberties" of minorities to receive constitutional protection were those connected to free speech and early twentieth-century liberal policymaking (so that liberties of property and contract were not worthy of protection, and outlawing child labor and democratizing the tax system were compelled by the Constitution), Commager's arguments may have been resonant. But his argument that the Court had not adequately protected minorities amounted to a claim that it had not been responsive to a class of minority rights to which Commager was sympathetic. As to his argument that the expertise of judges could not furnish an argument for the supremacy of the judiciary as a constitutional interpreter because many important constitutional provisions were vague and open-ended, those who believed in a guardian role for judges drew precisely the opposite conclusion. The breadth of such provisions, they believed, required that they be interpreted by persons who understood the corpus of constitutional law. One wonders how the Court, in Fourteenth Amendment police power cases, could "prick out the boundary" between public power and private rights without some knowledge of previous cases on opposite sides of the boundary line.

Commager's attack on judicial review was thus to an important extent value-laden. But it nonetheless added another reason why the judicial supremacy principle of Marbury was posing difficulties for commentators as the twentieth century entered its fourth decade. The logic of Commager's position, in fact, suggested that perhaps the judiciary should consider abdicating its role as primary constitutional interpreter. If judges were biased, whether consciously or unconsciously, if judicial expertise was no particular advantage since the interpretation of open-ended constitutional provisions amounted to policymaking, if legislators had been conscientious constitutional interpreters all along, if the Court had either proved ineffectual or wrong-headed in protecting minorities, and if judicial supremacy in constitutional interpretation was inconsistent with democratic theory, perhaps the Court's interpretive primacy should be reserved for those instances in which a legisla-
ture, in violation of an overwhelming constitutional mandate, had oppressed the rights of a particularly sympathetic minority.

Commager initially seemed tempted by a “distinction between judicial review of legislative acts having to do with ordinary administrative or economic matters” and judicial review of legislation affecting “what we call ‘civil liberties.’” He cited Justice Harlan Fiske Stone’s *United States v. Carolene Products* footnote for the proposition that the presumption of legislative constitutionality might be reversed when “laws . . . limit . . . the power of the electorate to reconsider.” Commager noted that the “logic behind such a distinction” was that ordinary legislation could be corrected by a subsequent legislature “representing the electorate that first authorized the law,” but a “law that changes the electorate or that denies it access to proper information” could not “be reviewed by the same electorate.” On reflection, however, he was concerned that the distinction, in operation, would rob citizens of the power to discuss questions involving the access of minorities to the legislative forum in that forum itself. “[T]he place to meet, and to defeat, unwise or unconstitutional legislation,” he asserted, “is in the legislature or in the arena of public opinion.” If “issues of personal liberty” were decided “in the judicial arena alone,” the public might be “lull[ed] . . . into apathy towards issues that are fundamentally [its] concern.” In the end, Commager felt that a combination of education and the responsibility of majorities for preserving the rights of minorities would encourage “the people’s active and intelligent interest in these matters.”

Commager dedicated *Majority Rule and Minority Rights* to Justice Felix Frankfurter, “whose opinions confess an undismayed faith in democracy,” and opened the book with a quote from Frankfurter’s majority opinion for the Court in *Minersville School*...
District v. Gobitis, a case sustaining the constitutionality of legislation making a salute to the American flag a compulsory ceremony in state public schools. Ironically, the same year Commager's book appeared, the Court, in another flag salute case, overruled Gobitis, adopting the dissenting position of Chief Justice Stone in that case. The flag salute sequence of decisions revealed that even though, by the 1940s, the Court had retreated from its guardian role in "ordinary legislation" cases, and had endorsed the idea that such legislation should be presumed constitutional, it had retained something like a guardian posture in another set of cases. Just which cases would be placed in that set was an uncertain matter in the 1940s, and most of the time the set seemed reserved for the sorts of cases Stone cited in footnote 4 of Carolene Products—restrictions on speech, religion, or voting.

It was possible to see the Court's disinclination to adopt a wholly deferential standard of constitutional review as evidence that the argument from democracatic theory had penetrated, rather than as evidence that the argument had been partially resisted. The cases in which the presumption of legislative constitutionality were reversed fell into two categories: cases in which legislation seemed in direct conflict with an explicit constitutional provision and cases in which legislation appeared to be designed to restrict the access of some groups to the legislative process itself. The free speech and religion cases were evidence of the first category; the voting rights cases, and, over time, the equal protection cases, were evidence of the second. Statutes making "invidious" discriminations between persons on the basis of race, which the Court subjected to high levels of scrutiny after Brown v. Board of Education, could be seen as directed against minorities whose restricted access to the legislature was a result of their disadvantaged status and the systematic indifference of the majority to their interests. By 1980, Professor

345 310 U.S. 586 (1940).
347 Minersville School Dist., 310 U.S. at 601 (Stone, J., dissenting).
348 See Carolene Prods., 304 U.S. at 152-53 n.4 (listing cases that implicate heightened scrutiny).
350 See, e.g., Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").
John Hart Ely had propounded a theory that almost all of the Warren Court's "activist" decisions, which ranged from race cases to reapportionment cases, free speech cases, and criminal procedure cases, were evidence that the Court had read *Carolene Products* as resting on democratic theory.\(^{351}\)

**D. Cooper v. Aaron, “Principled” Judicial Supremacy, and Restored Equilibrium**

Commager's repackaging of the mid-twentieth-century argument against judicial supremacy to focus on democratic theory, rather than on the "living Constitution" approach to constitutional adaptivity, came to resonate, even though it did not produce the wholly deferential review Commager, and some justices, supported.\(^{352}\) But despite the general acknowledgment by commentators from the 1950s on that constitutional review by the Court of the decisions of popularly elected governmental branches posed a "counter-majoritarian difficulty," the Court continued to treat itself as the superior constitutional interpreter in *all* cases, and to decline to follow the principle of departmental discretion in some highly charged cases.

**1. Cooper v. Aaron: Marbury as Judicial Supremacy**

The most conspicuous example was *Cooper v. Aaron*,\(^ {353}\) the 1958 case arising out of the Arkansas legislature and Governor's defiance of the *Brown* decision mandating desegregation of the state's public schools. When the Little Rock, Arkansas school board made plans gradually to integrate that city's schools, the Arkansas legislature passed statutes designed to avoid compliance with *Brown* and the Governor called out the National Guard to prevent African-American children from attending Little Rock's principal high

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\(^{351}\) "The Warren Court's approach was foreshadowed in a famous footnote in *United States v. Carolene Products Co.*" John Hart Ely, Democracy and Distrust 75 (1980).

\(^{352}\) It was clear to Felix Frankfurter, by 1943, that a majority of his colleagues were adopting something like the *Carolene Products* standard of bifurcated review. "The Constitution," he wrote in his dissent in the second flag salute case, "does not give us greater veto power when dealing with one phase of 'liberty' than with another." *Barnette*, 319 U.S. at 648. "Judicial restraint is equally necessary whenever an exercise of political or legislative power is challenged." Id.

\(^{353}\) 358 U.S. 1 (1958).
school. The result was a sufficient amount of racial tension that the Little Rock school board asked the federal district court, charged with implementing the *Brown* decree, to postpone desegregation for two years. The district court agreed, but the Court of Appeals for the Eighth Circuit reversed, holding that the school board had to proceed with its original desegregation plan.\(^3\) After setting an expedited hearing, the Supreme Court unanimously upheld the court of appeals in an opinion to which each of the nine justices openly identified himself as subscribing.

As a judicial supremacy case, *Cooper v. Aaron* was comparatively straightforward because it involved an effort on the part of state officials to formulate their own interpretations of a constitutional provision. Here not only did the separation-of-powers and judicial independence arguments made by Marshall in *Marbury* come into play, but the Supremacy Clause and considerations of federalism did as well. Thayer had not claimed an interpretive power for state officials comparable to that which he claimed for Congress and the federal Executive. Nonetheless, the Court's language in *Cooper* was broad and categorical:

> It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, . . . declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . \(^3\)

The Court did not even think it necessary to supply any reasoning connecting the citations of Article VI, and the reference to the

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\(^3\) See id. at 4.

\(^3\) Id. at 17–18 (internal citations omitted).
judicial powers created by Article III, to the judicial supremacy principle. And although in Marbury Marshall had stopped well short of Cooper's broad proposition, judicial supremacy, we have seen, was one of Marbury's core principles. What else necessitated the practice of courts reviewing the constitutionality of legislation? If a legislature's view of the constitutionality of its own acts was to be afforded equal authority to that of a court, judicial review would seem a pointless exercise. The fact that Marshall intended judicial supremacy to be tempered with the departmental discretion principle did not mean that he had not endorsed judicial supremacy.

Cooper was thus, despite its categorical language, neither a novel decision nor a striking extension of Marbury. But it came at a time when constitutional commentators, for two reasons, were finding the principle of judicial supremacy difficult to swallow. The first reason was the resonance of the counter-majoritarian difficulty argument. The second was the problematic status of Marshall's arguments about judicial independence and judicial expertise in a jurisprudential universe where the "living Constitution" theory of constitutional adaptivity, with its modernist epistemological overtones, had become widely accepted.

2. The Process Theorists and Judicial Supremacy

A line of commentary typically labeled "process theory," which began in the years after World War II, achieved its greatest influence in the late 1950s and early 1960s, and was revitalized in John Hart Ely's 1980 book, Democracy and Distrust, has evoked numerous scholarly reactions since it first appeared. At one point, commentators identified process theorists as conservative critics of

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358 Ely, supra note 351.
the Warren Court. With the perspective of time, however, it is possible to see process theory in broader terms. As applied to constitutional interpretation, it is best understood as an effort to provide an altered rationale for judicial supremacy that would respond to modernist conceptions of judicial interpretation and to the counter-majoritarian difficulty.

The early examples of process commentary stressed the problem, as Professor Lon Fuller put it in 1946, of judicial fiat. Fuller had partially accepted the theories of Realists about judicial decisionmaking, which stressed its human, subjective dimensions. Nonetheless, he believed that judges were constrained by the obligation to provide reasoned justifications for their decisions. “Reason,” in Fuller’s view, was the aggregate of professionally credible justifications for results. Since properly trained lawyers could distinguish justifications that were cogent from those that failed to survive analytical scrutiny, the fact that judging had subjective elements did not mean that it was a naked power exercise. But the legitimacy of judicial supremacy was tied to the ability of judges to provide adequate reasons for their interpretations.

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360 Process theorists did not confine their work to constitutional issues. The most influential treatise associated with process theory in the late twentieth century, Henry M. Hart & Albert Sacks, The Legal Process (tent. ed. 1958), devoted only a comparatively small portion of its coverage to constitutional interpretation.

361 See Fuller, supra note 356, at 387.

362 Id.

363 Id. at 387–88.

364 Id. at 388.

365 Id.

366 See id.
Much of the early critical commentary on Supreme Court decisions by process theorists followed Fuller in focusing on the inadequacy of the justifications in leading Vinson and Warren Court cases, which critics sometimes tied to the hasty or ill-considered deliberative process of the Court. In 1958, however, Judge Learned Hand extended the scope of the process-inspired critique by arguing that judicial supremacy in constitutional interpretation was often of dubious legitimacy. Although some provisions of the Constitution, such as the Speech and Religion Clauses of the First Amendment, Hand argued, are specific in their content, many, including the Due Process and Equal Protection Clauses, are not.\footnote{Learned Hand, The Bill of Rights 57 (1958).} When courts cannot discern a specific constitutional command, or derive the clear meaning of constitutional provisions from their history, Hand argued, they should enforce legislative acts.\footnote{Id. at 66.} Outside the realm of specific constitutional mandates or clear historical evidence from which those mandates can be derived, judicial review of legislation should only take place when, as in free speech cases, the legislation can be shown to be based solely on hostility on the part of "a majority of voters . . . to the dissidents against whom the statute is directed."\footnote{Id. at 69.} Hand’s approach amounted to an endorsement of Commager’s view that judicial supremacy was inconsistent with democratic theory.

3. Wechsler’s “Neutral Principles of Constitutional Law” and Bickel’s The Least Dangerous Branch

Six years after Hand propounded his approach to judicial review in its most fully developed form, a federal judge wrote that “Hand’s thesis has not yet been supported by a single eminent judge or professor.”\footnote{Charles E. Wyzanski, Jr., Introduction to Learned Hand, The Bill of Rights, at v, viii (Atheneum 1964) (1958).} This was true. Moreover, the two most influential examples of mid twentieth-century process commentary on constitutional interpretation, Professor Herbert Wechsler’s “Toward Neutral Principles of Constitutional Law” (1959)\footnote{Wechsler, supra note 357.} and Pro-
Professor Alexander Bickel's *The Least Dangerous Branch* (1962), can both be seen as efforts to advance a refurbished version of judicial supremacy. Wechsler, who directed the initial portions of his "Neutral Principles" article to a criticism of Hand's limited conception of judicial review, anchored his version in the capacity of courts to derive "entirely principled" constitutional decisions. The paragraph in which Wechsler linked his historical claims about judicial review to his conception of "principled" constitutional decisionmaking reads as follows:

[I have previously shown that] [t]he courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invaritably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reason of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. Otherwise, as Holmes said in his first opinion for the Court, "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions."

In this passage Wechsler sought to show that even though constitutional interpretations by judges necessarily involved value choices, those interpretations could be justified if the choices were buttressed by a reasoning process deriving them from "neutral" constitutional principles. When such reasoning took place, he claimed, judges had demonstrated that the results they reached

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372 Bickel, supra note 119.
373 Wechsler, supra note 357, at 2–5.
374 Id. at 19 (quoting Otis v. Parker, 187 U.S. 606, 609 (1903)).
were not the product of partisan opinions. Such reasoning was not possible in all cases, because sometimes the constitutional authority for judicial overturning of "value choices of the other branches of the government" could not be derived. In those instances, deference was the only option.

Wechsler's idea of "neutral principles," serving to limit unauthorized judicial value choices amounted to a modern version of Marshall's conception of judges as savants. Wechsler posited a sharp distinction between courts as "naked power organ[s]" and "courts of law." Judicial decisions that had a "legal quality" were justifiable if those decisions rested on transcendent general and neutral principles; Wechsler assumed that in many cases the judiciary had the technical capacity to derive such principles. Thus the heart of judicial legitimacy lay in the same place Marshall had placed it in Marbury: the "province and duty" of courts "to say what the law is." Wechsler claimed that "[t]he virtue or demerit of a judgment turns ... entirely on the reasons that support it and their adequacy to maintain any choice of values that it decrees."375 He urged that academic commentators engage in "the sustained, disinterested, merciless examination of the reasons that the courts advance."376 This process of justification and criticism amounted to a modern version of the savant function of judges in Marshall's era. Even though in the process of constitutional interpretation judges made law and engaged in value choices, their justifications of their decisions had to satisfy the professional standards of savants.

Wechsler had implicitly accepted the argument from democratic theory in his assertion that, if courts could not derive appropriately "principled" reasons for invalidating a decision by one of the popular branches of government, that decision should be left in place. He did not say much about the technique of deriving such reasons, or that of deferring to the decisions of other branches. This was to be the principal focus of Bickel's The Least Dangerous Branch.

Before discussing techniques of justification and deference, however, Bickel devoted three chapters to Marbury v. Madison, late nineteenth- and twentieth-century commentary on judicial review, and the emergence of theories positing a limited scope for

375 Id. at 19–20.
376 Id. at 20.
the Court's interpretive power in light of modernist conceptions of judicial decisionmaking and democratic theory.377 Along the way, Bickel identified himself with three propositions. The first was that Marshall's opinion in Marbury did not itself authoritatively establish judicial review, but the continued practice of constitutional interpretations by judges and deference to those interpretations by other branches had the effect of establishing it.378 The second was that judicial review, being inconsistent with democratic theory, posed a "counter-majoritarian difficulty."379 Abdication of the review function by courts, however, would leave Americans bereft of a sense that fundamental constitutional principles existed and were periodically reaffirmed by judges.380 The third was that the tension between judicial review and democratic theory could not be resolved by appeals to history, because the Constitution was continually changing with the times.381

These propositions led Bickel to promulgate various techniques by which the Court could alleviate the tension between judicial review and democratic theory. Taken together, the techniques were designed to help the Court distinguish between controversial issues that were "ripe" for full-blown, "principled" decisionmaking, and issues that were best postponed and implicitly left to germinate in the political branches until they seemed capable of authoritative resolution by the courts.382 Those techniques included the Court's power to decline to hear a case because the Court lacked jurisdiction, because a litigant lacked standing, because the case was not ripe for review, or because the case raised a "political question."383 Bickel saw these "passive devices" as "lesser rational alternatives to an otherwise unavoidable principled judgment."384 They "work[ed]... no binding interference with the democratic process."385

377 Bickel, supra note 119, at 1–23.
378 Id. at 1–14.
379 Id. at 16.
380 Id.
381 Id. at 28.
382 Id. at 205.
383 Id.
384 Id. at 206.
385 Id.
Wechsler's and Bickel's treatment of *Marbury* had retained some vitality for judicial supremacy in the face of the argument from democratic theory. Judicial review was legitimate not because Marshall had satisfactorily derived it from the Constitution, or because a guardian role for the courts was anticipated by a republican political order, but because what courts did best was to remind the popularly elected branches of foundational constitutional principles that they needed to respect. Wechsler and Bickel assumed that the different institutions of American government were competent at different tasks. Legislatures and the executive were competent at canvassing public opinion and making policy; courts, in contrast, were not. The popularly elected branches of government, however, could not be entrusted with the task of deriving and articulating foundational constitutional principles. The text of the Constitution was too open-ended, and the political interests and agendas of those branches too well developed, for them to serve as disinterested constitutional interpreters. Judges, Bickel and Wechsler believed, were essentially concerned with resolving legal disputes. They operated in the realm of legal rules and doctrines rather than in the realm of politics. To be sure, they "made law" in the sense that the process of applying doctrines to cases was not automatic and had its creative elements. But the process was bounded by the obligation to furnish reasoned justifications for results. If judges failed to meet that obligation, academic critics would point out their deficiencies.

If one emphasized the familiarity of judges with the realm of legal analysis, the need for the popularly elected branches to be reminded of foundational constitutional principles that provided the framework for their decisions, and the capacity of academics to serve as critical checks on the judiciary, the posture of virtual abdication that Hand proposed for judges in constitutional cases seemed less necessary. In fact, for Wechsler and Bickel, *Marbury* continued to stand for a limited form of judicial supremacy. In some cases, the shortsightedness and self-interest of legislators led

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386 In this assumption of the "competence" of the different institutions of American government to perform different tasks Wechsler and Bickel were influenced by Hart & Sacks's *The Legal Process*. Hart & Sacks, supra note 360. Hart and Sacks's prescriptions for effective lawmaking were tied to judgments about institutional competence.
them to ignore fundamental constitutional principles. The judiciary was there to remind them, so long as it could produce opinions in which those principles were affirmed through reasoning that "transcend[ed] any immediate result that [was] involved." Such opinions were more likely if academics engaged in "sustained, disinterested, merciless examination" of the reasoning of judges in constitutional cases.

For Wechsler and Bickel, *Brown v. Board of Education* represented a test of whether their refurbished version of judicial supremacy could flourish in the world of the counter-majoritarian difficulty. *Brown* was a classic instance of legislative shortsightedness and self-interest at work. The legislatures that had passed Jim Crow statutes had been motivated by racial prejudice, and African-Americans had systematically been excluded from the legislative process. This was the situation in which the judiciary should step in to remind legislators of their constitutional obligations. But what was the constitutional principle in *Brown* that "in [its] generality and neutrality" transcended the results in the case? Wechsler and Bickel agonized over that question. Wechsler thought that *Brown* posed a conflict between "a denial of equality to the minority" and the "freedom of association" that was infringed when a state required persons to attend public schools with persons of a different race. 387 "[I]s there a basis in neutral principles for holding that the Constitution demands [integration]?" Wechsler asked. 388 "I should like to think there is, but I confess I have not yet written the opinion." 389

In emphasizing that the ability to articulate foundational constitutional principles in an analytically defensible fashion was the judiciary's best argument for the continued importance of judicial supremacy in a democratic constitutional polity, Wechsler revealed the importance of a continued distinction between law and politics in an age when judges were regarded as a species of lawmakers. There was a significant difference between Marshall's assertion that the province of the judiciary to say what the law is presupposed that the "will of the judge" would not enter into such decla-

387 Wechsler, supra note 357, at 34.
388 Id.
389 Id.
rations and Wechsler's assertion that analytical reasoning by legally trained professionals could result in the derivation of constitutional principles of sufficient neutrality and generality to transcend the results that accompanied them. But in both formulations, legal principles, properly discerned, could serve as a brake on the passions and agendas of humans.

Bickel's approach to the problem of judicial review in a democracy sought to move beyond that circle of reasoning. Brown, for Bickel, was a pivotal case because it illustrated "discretionary accommodation between principle and expediency . . . that fits . . . the unique function of judicial review in the American system." The constitutional principle announced in Brown was that the Equal Protection Clause required racial integration of students in the public schools. But having declared that principle and, "having required a measure of initial compliance, [the Court then] resumed its posture of passive receptiveness to the complaints of litigants."

This allowed "[t]he political institutions to work out their compromises." The "all deliberate speed" formula governing the Court's decree in the second Brown v. Board of Education case, Bickel suggested, amounted to a colloquy between the Court and institutions charged with implementing the decree. It was an example of "the passive devices to ease the way to . . . acceptance and effectuation" of a Court decision. Cooper v. Aaron could be subjected to a similar analysis. It represented "a suggested expedient," proposed by the Little Rock school board in response to pressures, which "amounted to the abandonment of principle." As such, the Court announced that it was the supreme expositor of the Constitution, and insisted on compliance with its decree.

The sequence of events from Brown to Cooper v. Aaron illustrated, for Bickel, that "judicial review is consistent with the theory and practice of political democracy" because the Supreme Court was "presumptively only" a court of last resort. Despite the au-

390 Bickel, supra note 119, at 253–54.
391 Id. at 254.
392 Id.
394 Id.
395 Id.
396 Id. at 258.
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Authoritative status of constitutional interpretations by the Court, they could lose, or never gain, legitimacy if they "ran counter to deeply felt popular needs or convictions," or even if they were "opposed by a determined and substantial minority and received with indifference by the rest of the country."397 Had that been the case with Brown, compulsory integration of public facilities might not have taken place. But the integration principle, although vigorously opposed by some residents of the South, was, ultimately, not received with indifference elsewhere. By the time of the Kennedy administration, it had become a principle of politics as well as constitutional law.398

Thus, for Bickel, Marbury's legacy of judicial supremacy had not just one, but two, sets of checks. The constitutional interpretations fashioned by the Court in its role as "supreme expositor of the Constitution" not only needed to withstand analytical scrutiny in Wechsler's sense, they needed to gain enough public acceptance so that when political consequences followed from them, the popularly elected branches would acquiesce in those consequences. The significance of the Brown-Cooper sequence, in Bickel's view, was not the Court's assertion of its interpretive supremacy. It was that when officials in Arkansas attempted to resist integration, the federal executive and ultimately Congress and the American people at large treated that resistance as illegitimate because they believed the Court's interpretation in Brown was correct.

The principal area of interpretive tension in constitutional law, for Wechsler and Bickel, involved situations where the Court had to decide whether it was obligated to invoke judicial supremacy in the name of a foundational constitutional principle, or whether it was better off resorting to one of Bickel's "passive devices" to avoid a definitive constitutional pronouncement, thereby implicitly deferring the question to another branch of government. But even though many constitutional commentators in the 1960s and early 1970s agreed with Wechsler and Bickel that such choices lay at the heart of constitutional interpretation,399 neither the Warren nor the Burger Courts seemed particularly devoted to deriving "neutral

397 Id.
398 Id. at 258–68.
399 For more detail, see White, supra note 359.
principles" of constitutional law or to perfecting the use of passive
techniques to avoid decision.\footnote{Two sets of cases vividly illustrate the Warren and Burger Courts' rejection of a constitutional jurisprudence inspired by process theory. The first was the line of cases, stretching from Poe v. Ullman, 367 U.S. 497 (1961) through Roe v. Wade, 410 U.S. 113 (1973), in which the Court moved from a "passive" approach to the issue of whether a constitutional right to intimate personal or sexual expression existed, reflected by its declining to hear Poe v. Ullman on the grounds that a person accused of violating a Connecticut statute forbidding the use or distribution of birth control bills to married persons had no reasonable fear of prosecution, to an approach in which it constitutionalized the right under the Fourteenth Amendment's Due Process Clause in Griswold v. Connecticut, 381 U.S. 479 (1965), thus reviving the apparently discredited view that that clause could be given substantive content by judges. The second was the line of cases extending from N.Y. Times v. Sullivan, 376 U.S. 254 (1965) though Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), Time Inc. v. Firestone, 424 U.S. 448 (1976) and Greenmoss v. Dun & Bradstreet, 472 U.S. 749 (1985), in which the Court found that after almost two centuries, the First Amendment applied to state defamation law, and that the judges could fashion the constitutional categories determining privileges against tort suits in that area. Neither development was based on any explicit textual support in the Constitution or on any historical evidence that the Due Process Clause or the First Amendment applied to intimate personal decisions or to the law of libel and slander.}{400}

\section*{4. Ely's Democracy and Distrust and Constitutional Equilibrium}

Finally, in the late 1970s, John Hart Ely decided that, although the appropriate focus of constitutional theory should remain on issues of the allocation of interpretive power between courts and popularly elected branches, those issues had been approached from the wrong perspective.\footnote{Ely, supra note 352.}{401} His proposed reconciliation of judicial supremacy to democratic theory abandoned any efforts to derive a set of canons for constitutional interpretation and asked in what instances judicial supremacy actually furthered democratic values. His answer was an extended version of Carolene Products review: Courts should carefully scrutinize, and potentially invalidate, the acts of legislatures only when the legislative process itself restricted "the channels of political change," or when it openly discriminated against, or unduly disadvantaged, minorities.\footnote{Id. at 103.}{402} Ely's approach, which he claimed represented the general stance of the Warren Court, was designed to illustrate the capacity of the judiciary as an agent of democratic theory.
My concern here is only with the place of Ely’s approach—which can be said to have set the boundaries for constitutional theory in the 1980s— in the constitutional journey of *Marbury v. Madison*. Ely’s reframing of judicial review among *Carolene Products* lines was accompanied by an extended critique of all approaches to constitutional interpretation that emphasized the determinate meaning of the Constitution’s text, the primacy of history (or anything like the “original intent” of the framers of constitutional provisions), or “neutral” constitutional principles of any variety, however derived. As Ely put it, there was an “inevitable futility” in asking the question, “Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou [sic] to be vindicated by the Court against other values affirmed by legislative acts?” Even if one could find “adequately neutral and general” principles in the Constitution (something Ely doubted), how did one know that they were the sorts of principles that compelled restraints on legislatures? Ely’s focus on the “democratic” dimensions of judicial supremacy had been a response to what he took to be the impossibility of deriving restraining principles in any other fashion.

This meant that, if Ely’s model of constitutional discourse were to be followed, the legitimacy of judicial supremacy no longer turned on the expository powers of the judiciary, with all the attendant baggage of disinterestedness, professional training, and analytical rigor, as honed by academic criticism. Judicial supremacy was justified when it furthered the values of democratic theory—the most central of which, to Ely, was citizen participation in governmental decisionmaking—and unjustified in all other circumstances. All other judicial efforts to derive constitutional principles that restrained legislatures amounted to the impermissible imposition of judges’ own values.

Ely’s effort to reframe *Marbury* had the virtue of clarity in implementation, provided one made a couple of central assumptions. If one believed that legislative outcomes were not so much illustrations of the will of majorities as tradeoffs among special interests,
all of which were concerned with excluding other groups from access to desirable goods and services, courts would be intervening a lot under Ely's model. Or, if one took stated legislative purposes at face value, and did not probe for tainted underlying motivation, courts would not be intervening very much at all. But if one assumed that Ely's approach would produce a robust, but limited, form of constitutional review, it appeared to be capable of producing a side effect that was arguably consistent with the original meaning of *Marbury*. That side effect was a restored, and relatively predictable, constitutional equilibrium, in which the Court intervened and overturned a predictable set of legislation and otherwise affirmed the principle of departmental discretion.

Ironically, then, Ely's reduction of *Marbury* to a decision affirming judicial supremacy as the servant of democratic theory had the intended effect of decisively restoring a regime of constitutional equilibrium that had seemingly gotten out of balance with *Dred Scott* and the judicial construction of the Reconstruction Amendments. Although judges and commentators since the early twentieth century had been concerned with this imbalance, their approaches to the problem had been all over the lot, ranging from the Court majority's gutting of the first two major pieces of New Deal legislation to Learned Hand's proposal that judges, on the whole, abdicate their review function. But in Ely's hands another narrative of twentieth-century constitutional developments was produced. *Carolene Products* had first internalized the argument from democratic theory and recognized that it was possible for the Court to use its expository power to promote democratic values; the Warren Court had expanded the *Carolene Products* agenda, finding more blocked channels of political change and more powerless minorities in need of protection. Outside this swath of judicial supremacy, however, a lot of departmental discretion remained. The point was for commentators to recognize what was going on and stop their obsession with deriving foundational constitutional principles. The only principles that counted were those of democratic theory.

**CONCLUSION: MARBURY ENTERS THE TWENTY-FIRST CENTURY**

*Marbury* proponents might have taken some heart from the new constitutional domain Ely offered. Both of the *Marbury* principles
Constitutional Journey could flourish in that domain, and there was less awkwardness about which values the judiciary was to affirm in the face of legislative acts. But Marbury purists might have been given pause by the fact that the sole rationale Ely offered in defense of judicial supremacy was one that had not even been mentioned in Marbury. Not only that, but had the proposition that judicial review was necessary to further democratic theory been suggested, Marshall and his contemporaries would have rejected it. Marshall was an opponent of democratic theory. In his view, the constitutional republic erected by the Framers was designed as a buffer against democracy as much as against tyranny. Of all of Marshall’s contemporaries, the one most attracted to democratic forms of government was Jefferson, and he eventually became a skeptic of judicial review, at least as practiced by the Marshall Court.

Unfortunately, Ely’s refurbishing of Marbury can be seen as both anachronistic and dated. If Marbury is now to be seen as the first great affirmation of the Court’s dedication to democratic theory, and equilibrium is achieved by a theory of constitutional review in which both the principle of judicial supremacy and that of departmental discretion are subsumed in the overriding goal of promoting democratic values, one has to reckon with the fact that that goal played no part in the consciousness of the framing generation. If, alternatively, one adopts the “living Constitution” approach, arguing that whatever Marbury’s original design, we are now in the world of democratic rather than republican constitutionalism, it does not necessarily follow that an approach to judicial review modeled on Carolene Products is most responsive to currently contested areas of constitutional jurisprudence.

Carolene Products review was designed to achieve constitutional equilibrium by creating predictable areas where departmental discretion would govern and equally predictable areas where the Court would assert its superior interpretive status. The success of Carolene Products review, versions of which are still in place, was its apparent congruence with democratic theory. It highlighted constitutional claims that seemed to go to the essence of a democratic form of government—claims related to communication, political participation, and equal treatment for certain minority groups—from claims that invoked less essential “rights” or “liberties.” It was highly responsive to a constitutional domain featuring
increased legislative regulation of economic activity and continued legislative intolerance toward persons without political or social capital. It helped demarcate the comparative constitutional stature of those two types of legislation.

*Carolene Products* review was designed to alleviate an imbalance that had occurred when the judiciary became accustomed to exercising a continual scrutiny of social and economic legislation as part of its assumed responsibility to prick out the boundary between public power and private rights. It was responding to the line of *Lochner*-style police power cases. It had little to do with the type of constitutional conundrum represented by *Marbury*, *Dred Scott*, and the *Civil Rights Cases*: When should the Court defer to the departmental discretion of Congress or the executive? By the time *Carolene Products* was decided, the Court was well on its way to letting Congress, in the area of economic activity, and the executive, in the area of foreign affairs, do pretty much what they wanted.  

It is not at all clear that the Court’s decision to scrutinize efforts on the part of Congress to override the regulatory authority of the states raises the same sorts of implications for democratic theory as the Court’s decision to scrutinize legislative efforts to regulate individual activity. But it is clear that the *Marbury* principles emerged at a time when connections between judicial review and democracy were not drawn. Judicial review was associated with the preservation of separated powers and federalism in a constitutional republic. Judicial supremacy and departmental discretion were derived with those goals in mind.

From the 1990s on, the Court has seemed increasingly interested in separation-of-powers and federalism questions. The most conspicuous example has been its increased scrutiny of Congress’s efforts to restrict or commandeer the powers of local and state governments.  

Professor Kramer has associated the Rehnquist

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Court's insistence on declaring its primacy as a constitutional expositor primarily with that line of cases, and has taken its intervention in *Bush v. Gore* as an effort to keep the other branches of government from making definitive resolutions of vital constitutional issues.

With the principles and context of *Marbury* in mind, there seem to be two ways to think about the legitimacy of the Court's current effort, assuming that Kramer has fairly described it. One is to emphasize the importance of matching up judicial supremacy with democratic theory, or at least with some version of what Kramer calls "popular constitutionalism," in which "the people are free to settle questions of constitutional law by and for themselves in politics." If one pursues that tack, *Cooper v. Aaron* remains in good standing, but the Court's power as supreme expositor needs to be carefully tailored to those instances in which popular sovereignty seems thwarted by the popular branches. *Bush v. Gore*, in this light, seems well off-course because an alternative existed in which a state legislature, Congress, and presidential electors would have resolved an issue about voting in a presidential election. Kramer might well seem justified in describing *Bush v. Gore* as a grab for power.

Another way to think about the Court's current version of judicial supremacy, however, is to recall that for most of the constitutional journey of *Marbury v. Madison* the argument from democratic theory played no part in debates about the nature and legitimacy of the judicial supremacy principle. The concern of opponents of *Marbury* was, first, with its apparent inconsistency with the principles of separation of powers and departmentalism, next, with the imbalance in the domain of constitutional discourse that habitual legislative deference to courts on issues of constitutional interpretation would produce, and, finally, with the failure of those exercising judicial review powers to understand that constitutional interpreters needed to be mindful of the changing conditions of American life. Only in the 1940s did the argument from democratic theory emerge, and then it was taken to be an argument against ju-

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49 Kramer, supra note 6, at 152–54.
49 Id. at 162.
dicial supremacy. Thus, of all the refurbishings that Marbury has encountered over the last two centuries, the least faithful to its history is the refurbishing that justifies judicial supremacy as a technique for implementing democratic theory.

Kramer might be inclined to respond that the departmental discretion principle is concerned with ensuring that governmental branches more directly responsive to the people are granted autonomy as constitutional actors. But that is not the same as saying that, from the Marbury decision on, judicial review has been fenced in by theories of popular sovereignty. The Framers wanted a representative, not a democratic, form of government. They were fearful of the people at large. The branch actors they anticipated exercising departmental discretion were elite actors. Judicial review was available so that a branch of savants could protect individual citizens from tyrants or demagogues who derived their power from popular excesses.

Claims that the Rehnquist Court is somehow seeking to fundamentally alter the meaning of judicial review—to turn judicial supremacy into judicial sovereignty—may need to widen their perspective. The fact that the Rehnquist Court may be seeking to create new boundary lines in the area of federalism does not seem all that revolutionary when one considers that the virtual hegemony of Congress on federalism issues is a product of the years after 1940. The fact that Bush v. Gore cannot even be forced into a decision facilitating democratic theory does not in itself suggest that the decision was illegitimate. The fact that to some people the domain of constitutional law feels out of balance, with the Court purportedly usurping the prerogatives of other constitutional interpreters, does not mean that it is out of balance. Just as the scope of judicial review can change with time, so can the areas a particular Court finds appropriate for departmental discretion.

The point is to recognize that from its origin Marbury has been about both judicial supremacy and departmental discretion, and that, although neither principle can accurately be connected to democratic theory, the two principles are closely tied together and mutually constraining. When the Court has failed to grasp when it should affirm the departmental discretion principle and let some other branch of government deal with a contested issue of constitutional law and politics, its reputation has been adversely affected.
But it has also suffered when it has been too cautious in overriding departmental discretion. *Dred Scott* was an embarrassing decision because the Court sought to preclude Congress and the States from resolving the slavery issue, but *Korematsu v. United States*,\textsuperscript{411} where the Court declined to invalidate the federal government’s incarceration of American citizens of Japanese descent (even though Americans of German and Italian descent were not incarcerated), was also embarrassing.

Being sensitive to departmental discretion is not the same thing as facilitating democratic theory, or affirming the idea of "popular constitutionalism." That idea, if it can be thought of as a constitutional principle at all, does not make "the people" the ultimate expositor of the Constitution. It only suggests that there will always be limits on the legitimacy of the Court’s expositions if they fail to resonate with enough members of the public.

The judicial supremacy principle of *Marbury* was derived because the Framers’ republic required a check on legislative and executive power, and thought that the savant status of judges, and disinterestedness would be its own check. The departmental discretion principle was derived to keep the judiciary within the imagined bounds of its own expertise. No principle of majority rule, or popular sovereignty, was part of the original jurisprudence of *Marbury*. We can try to makeover *Marbury* into something more up-to-date and congenial; it has been refurbished before. But before blithely concluding that judicial supremacy has always been "fenced in by concern for preserving the essence of... popular constitutionalism,"\textsuperscript{412} perhaps we ought to remind ourselves of the details of *Marbury*'s constitutional journey.

\textsuperscript{411} 324 U.S. 885 (1945).
\textsuperscript{412} Kramer, supra note 6, at 162.
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