

HEINONLINE

Citation: 84 Va. L. Rev. 333 1998

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Fri Sep 3 11:57:58 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0042-6601](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0042-6601)

VIRGINIA LAW REVIEW

VOLUME 84

APRIL 1998

NUMBER 3

ARTICLES

THE CONSTITUTIONAL ORIGINS AND IMPLICATIONS OF JUDICIAL REVIEW

*John Harrison**

AT the center of American constitutional law is the principle that courts should not always decide cases in accordance with properly enacted congressional statutes. Why that principle follows from the Constitution, and what it implies, remain open to debate.

An answer to the first question is found in *Marbury v. Madison*,¹ but commentators continue to discuss whether Chief Justice Marshall's arguments are really persuasive.² Defenders of *Marbury's*

* Associate Professor of Law, University of Virginia School of Law. Thanks to those who commented on earlier drafts, including Jack Goldsmith, John Jeffries, Mike Klarman, Bill Stuntz, and Ted White.

¹ 5 U.S. (1 Cranch) 137 (1803).

² David Currie, for example, thinks *Marbury's* result persuasive and much of its reasoning instructive but still finds that the opinion provides "no obvious peg on which to hang Marshall's conclusion." David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 73 (1985). William Van Alstyne, after a close and powerful reading that picks apart many of the details of Marshall's reasoning, concludes that the whole may be more than the sum of its parts: "Each argument, and each textual fragment on which the argument rested, may not seem especially compelling by itself. However, perhaps the separate pieces support each other, the fragments draw together, and the 'whole' of Marshall's argument is much better than each part separately considered." William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 29.

result have had particular trouble with the venerable criticism raised by Justice John Gibson of the Supreme Court of Pennsylvania. In *Eakin v. Raub*,³ Justice Gibson challenged Marshall's claim that statutes are invalid when inconsistent with one of the Constitution's affirmative limitations on the legislature, limitations such as the Ex Post Facto Clause.⁴ According to Justice Gibson, it is perfectly reasonable to regard such limitations as political rules for the legislature, rules that are to be enforced politically but that do not invalidate acts that violate them.⁵ Gibson apparently was later reconciled to Chief Justice Marshall's position.⁶

More than a century after Gibson stopped worrying and learned to love judicial review, Alexander Bickel provided what is now the classic formulation of another criticism.⁷ According to Bickel, Marshall begged the most important question.⁸ The real issue, Bickel suggested, is not what happens when a statute conflicts with the Constitution.⁹ Rather, what matters is who decides whether the Constitution is such that the statute conflicts with it.¹⁰ Marshall, goes the argument, needed but neglected to show that the Constitution does not give Congress authority finally to decide what it means in such contexts.¹¹

The propriety of judicial review in light of the text is of considerable theoretical but, at the moment, little practical importance.¹²

³ 12 Serg. & Rawle 330 (Pa. 1825). This decision was delivered seriatim; Justice Gibson's opinion begins *id.* at 344.

⁴ See *Marbury*, 5 U.S. (1 Cranch) at 179-80. The Ex Post Facto Clause that applies to Congress appears in Article I, § 9, cl. 3.

⁵ *Eakin*, 12 Serg. & Rawle at 353-55 (Gibson, J., dissenting). Gibson's reasoning is set out in more detail below. See *infra* notes 16-36 and accompanying text.

⁶ In 1846, when *Eakin* was discussed during oral argument, Gibson, by then Chief Justice, is reported as having said from the bench: "I have changed that opinion for two reasons. The late Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case." *Norris v. Clymer*, 2 Pa. 277, 281 (1846) (reporter's summary of argument).

⁷ Alexander M. Bickel, *The Least Dangerous Branch* 3 (2d ed. 1986).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² While *Marbury* seems well-rooted now, it has not always seemed so and may not again. The late nineteenth and early twentieth centuries saw one round of debate about the legitimacy of judicial review and the soundness of *Marbury*. See Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 161-91 (1989); Andrew C. McLaughlin, *The Courts, the Constitution, and Parties* 3-7 (1912). During the hearings

The answer to the *Marbury* question, however, is taken to have implications for a related issue of constitutional structure that is generally less well settled: whether what is good for the judicial goose is good for the executive gander. From time to time, presidents have taken the controversial position that they should treat some acts of Congress as legal nullities because of what they find to be a conflict with the Constitution.¹³

This Article has two purposes. First, it seeks to provide a clear and persuasive derivation of *Marbury's* conclusion from the constitutional text.¹⁴ The improved version is specifically designed to answer Gibson and Bickel, at least insofar as their challenges were about constitutional interpretation rather than constitutional design. I will not enter into the question with which Bickel in

on President Roosevelt's 1937 plan to expand the Court, Senator Matthew Neely asked Edward Corwin:

Professor Corwin, do you believe that the founding fathers ever intended to authorize, either expressly or by implication, five members of the Supreme Court of the United States to declare acts of the Congress null and void on the ground of unconstitutionality; particularly in a case in which the act had been supported by 48 lawyers in the Senate and 190 lawyers in the House, and the President, a distinguished lawyer, had by the affixing of his signature certified his faith in the constitutionality of the measure?

Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong., pt. 2, at 176 (1937). Corwin replied, "Well, nobody did propose it in the way the question is now put." *Id.* The constitutional soundness of judicial review was a matter of extensive discussion at the hearings. See, e.g., *id.* at 335 (statement of Professor Charles Grove Haines).

¹³ In signing the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18, and 47 U.S.C.A.), President Clinton said of a provision limiting the transmission of abortion-related messages: "[T]his and related abortion provisions in current law are unconstitutional and will not be enforced because they violate the First Amendment." Statement on Signing the Telecommunications Act of 1996, 2 Pub. Papers 188, 190 (Feb. 8, 1996). The Department of Justice, on the advice of which he relied, would "continue to decline to enforce that provision of current law, amended by this legislation, as applied to abortion-related speech." *Id.*

The most important recent defense of executive nonenforcement is Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1989-90). The practice is attacked in Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865 (1994).

¹⁴ This Article is limited to the central and difficult question of whether courts must refuse to implement acts of Congress because of inconsistency with the Constitution. It does not deal with the proper treatment of executive action that is either authorized by a constitutionally dubious statute or is itself possibly inconsistent with a constitutional provision directed specifically to the executive, such as the Search and Seizure Clause of the Fourth Amendment.

particular may have been primarily concerned: whether judicial review is consistent with democracy or majoritarianism as he understood them.¹⁵ I will try to show that Chief Justice Marshall's conclusion was correct on the interpretive question. Part I explains how the text leads most naturally to his result rather than Justice Gibson's while Part II responds to Bickel, maintaining that the document does not make congressional determinations as to constitutionality binding on later interpreters. Part III ties the essentially textual arguments in Parts I and II to the basic structural features of the plan adopted by the Federal Convention.

Second, by my account the logic of judicial review is also the logic of executive review and, for that matter, of review by anyone. I conclude that statutes inconsistent with the Constitution are legally ineffective and that Congress has no power to bind anyone else to its presumed view that its statutes are consistent with the Constitution. This conclusion implies that no court is obliged to treat such statutes as law because no one is so obliged. This position has implications for the conduct of the federal executive, although it is perhaps not quite obvious what those implications are. Part IV contends that as far as the Constitution's text is concerned, the President and his subordinates are no more bound by congressional determinations of constitutionality than are the courts. As I will explain, though, it is important not to confuse the conclusion that Congress's views about constitutionality can bind neither the executive nor the courts with the conclusion that one branch can never bind another, and in particular with the conclusion that the executive is never to treat as final a determination made by the courts. I will seek, in Part V, to situate the relationship between the executive and judiciary in the larger constitutional structure, after disentangling it from the relationship between the legislature and the other branches.

I. GIBSON'S PROBLEM

Justice Gibson in *Eakin* made two important contributions to the debate over judicial review. First, he identified a plausible alternative to Chief Justice Marshall's reading of the Constitution's

¹⁵ Bickel, *supra* note 7, at 16 ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

prohibitions. According to Marshall, the ban on retrospective punitive laws imposed by the Ex Post Facto Clause implies that such laws are legal nullities.¹⁶ Justice Gibson replied that those prohibitions might be political and not legal, with the remedy for their violation at the polls, not in the law courts.¹⁷ Second, Gibson distinguished between limitations like the Ex Post Facto Clause, which are primarily addressed to the legislature, and provisions that are immediately addressed to the courts. Legislation inconsistent with the latter, he maintained, was properly disregarded by the courts.¹⁸

This Part seeks to answer Gibson's challenge. Section A. begins by expanding on his basic insights, first explicating what it would mean to say that a legislature has a legal power and a political duty not to exercise it. Section B. then develops Gibson's second insight, identifying three (rather than just two) different contexts in which an act of Congress could be said to conflict with the Constitution. Section C. asks, in each of those three contexts, whether the Constitution better matches Gibson's configuration or Marshall's. The latter in my view prevails, although the situation Marshall thought to be easiest seems to me the most difficult.

A. Power and Duty

Chief Justice Marshall in *Marbury* indicated that an ex post facto law passed by Congress in the teeth of the Ex Post Facto Clause would be an especially easy case for him.¹⁹ The Constitution says that no such laws are to be made. If Congress goes ahead and makes one anyway, surely it cannot be legally effective. It is probably the standard criticism of Marshall's reasoning to say that this move is not logically necessary.²⁰ As David Currie has pointed out, not only is there nothing illogical about the arrangement

¹⁶ *Marbury*, 5 U.S. (1 Cranch) at 179.

¹⁷ *Eakin*, 12 Serg. & Rawle at 355 (Gibson, J., dissenting).

¹⁸ *Id.* at 353 (Gibson, J., dissenting).

¹⁹ After quoting the Ex Post Facto Clause, Marshall asked, "If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?" *Marbury*, 5 U.S. (1 Cranch) at 179.

²⁰ See, e.g., Van Alstyne, *supra* note 2, at 18-19.

Marshall rejects, but the French had it for many years.²¹ French constitutions imposed limitations on the legislature that were not judicially enforceable.²²

While this point is familiar, further analysis will prove useful. According to Gibson, a provision like the Ex Post Facto Clause can be meaningful, and its inclusion in a constitution worth the trouble, even if it does not affect the validity of legislative acts. Instead, it can impose a political obligation that voters will enforce politically.²³ By placing such a rule in a constitution, the people will impress on their agents that they really mean it. Moreover, through its clarity the rule will facilitate a coordinated response by the voters. They may not agree on what good government is, but they may

²¹ Currie writes: "Indeed, Marshall overstated his case badly by asserting that judicial review was 'essentially attached to a written constitution.' Not only is it possible to conceive of a written constitution that limits legislative power while precluding judicial review, but European experience has given us concrete examples." Currie, *supra* note 2, at 71 n.49 (citation omitted) (quoting 5 U.S. (1 Cranch) at 177). Currie then cites the French Constitution of 1789, under which "[t]he tribunals cannot interfere in the exercise of legislative power, nor suspend the execution of laws." *Id.*

²² A classic American discussion of French practice is in Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 648-54 (2d ed. 1932).

²³ Gibson maintained that the courts should exercise what we would call judicial review only in "the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute [the constitution's] provisions." *Eakin*, 12 Serg. & Rawle at 353 (Gibson, J., dissenting). Under those circumstances he thought the courts "are bound by [the constitution] in preference to any act of assembly to the contrary." *Id.* (Gibson, J., dissenting). He distinguished the more common provisions, both those of "positive command" and "prohibitions," as being addressed to the legislature, and said that "the same authority must enforce both." *Id.* at 354 (Gibson, J., dissenting). That authority was not in the courts: "I am of opinion that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act." *Id.* at 355 (Gibson, J., dissenting). Although Gibson contrasted his position with Marshall's, he was actually discussing the role of the Pennsylvania courts with respect to Pennsylvania legislation under the Pennsylvania Constitution. The federal-state parallel is quite close, however, as he recognized.

One of Gibson's earliest boosters was Thayer. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 129-30 (1893). Haines characterized Gibson's opinion as "[o]ne of the most effective attacks upon the doctrine of judicial review of legislative acts." Haines, *supra* note 22, at 272. More recently Dean Alfange takes Gibson as his guide in concluding that Marshall's reasoning in *Marbury* "fails." Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329, 413.

well be able to agree on what an *ex post facto* law is. Agents who violate their instructions will be liable to punishment at the polls (or otherwise).²⁴

Characterizing the legislature as the people's agent reminds us that the legal configuration Gibson had in mind is well known in private law. An agent with apparent authority has the power to bind the principal to third parties, even in violation of instructions privately given to the agent.²⁵ To say that the agent's action on the principal's behalf is legally effective, however, is not to say that it is not wrongful or that the principal has no remedy. On the contrary, the principal can recover damages from the agent.²⁶ An action can be a legal wrong and at the same time be legally effective in changing obligations and entitlements.

An agent with authority has power to bind the principal contrary to the principal's private instructions but also has a duty not to do so. Behind legal arrangements that fit this pattern, and Gibson's suggestion that a provision like the *Ex Post Facto* Clause is such an arrangement, is a distinction between fundamental legal conceptions. Wesley Newcomb Hohfeld's analytical scheme distinguishes between two categories of legal rules.²⁷ In Hohfeld's first set of

²⁴ Justice Gibson concluded:

But it has been said, that this construction would deprive the citizen of the advantages which are peculiar to a written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great.

Eakin, 12 Serg. & Rawle at 354-55 (Gibson, J., dissenting).

²⁵ Restatement (Second) of Agency § 159 (1958).

²⁶ *Id.* §§ 383, 401; Joseph Story, Commentaries on the Law of Agency 144-45, 262-63 (Boston, Little Brown 3d ed. 1846).

²⁷ Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913).

four legal conceptions are rights (or claims), duties, no-rights, and privileges (or liberties); in the second set are powers, liabilities, disabilities, and immunities.²⁸

As Hart and Sacks explained, when considering laws that regulate conduct the concept of duty is more central than that of right, because duties are addressed to potential actors.²⁹ Rules about duty determine what one ought to do or is allowed to do.³⁰ For Hohfeld, a theorist of private law, the classic example of a duty is the rule against trespass on another's property. The owner of the property holds the right (or claim) with which that duty correlates and is entitled to demand compliance with the duty.³¹ If one is under no duty not to perform an action, one has an Hohfeldian liberty to do so.³² Rights and duties are about obligation, about what is permitted or required.

Most basic of Hohfeld's second set of conceptions is that of power.³³ Rules about power determine how individuals may make changes in other rules, especially rules about duty. For private law, classic examples of rules about power are those that determine how property interests may be transferred and how contracts may be formed. A valid transfer changes people's duties concerning trespass: After a transfer, the new owner has a right to demand compliance with the duty not to enter the property, and the former owner now has that duty along with other third parties.³⁴ In similar fashion, the law of contract enables people to generate obligations and entitlements that they did not have before.

Rules about duty and rules about power differ importantly, especially with respect to the consequences of their violation. Indeed, one way of capturing the distinction is to say that one cannot really violate rules about power. One who fails to comply with

²⁸ *Id.*

²⁹ Henry M. Hart, Jr., & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law 130-32* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Hart and Sacks distilled Hohfeld's typology down to only four significant positions: primary private duties, primary private liberties, primary private powers, and private remedial rights of action. *Id.* at 130.

³⁰ *Id.* at 130-32.

³¹ Hohfeld, *supra* note 27, at 32.

³² *Id.* at 32-33.

³³ Hart & Sacks, *supra* note 29, at 133-34.

³⁴ Hohfeld, *supra* note 27, at 44-47.

such a rule, for example by failing to seal one's contract for the sale of land, has not done anything bad and is not made any worse off as a result. Rather, the action that fails to satisfy the rule about power is simply a legal nullity. It is as if a private person said, referring to a lawsuit between A and B, I give judgment for B. Such conduct is mere eccentricity; it is not wrongful in the sense that trespass or crime is unlawful. Criminals are punished, and trespassers must provide compensation, but the law attaches no price to an act that fails to comply with a power rule.

We can now formulate more precisely the dispute between Marshall and Gibson about the Ex Post Facto Clause. According to Gibson, the clause is limited to imposing a duty on the legislature. That duty is evidently political because the sanction for its violation is electoral. Members of Congress do not go to jail for voting in favor of an ex post facto law, and there is a good case that the Constitution itself protects them from such punishment.³⁵ The duty is nonetheless real, because the clause makes it possible to say that the legislature has done wrong and thus provides a standard by which the voters can measure their agents.

According to Marshall, however, the clause is about the power of the legislature.³⁶ Affirmative limitations qualify the authority otherwise granted to the legislature, with the result that even properly enacted ex post facto laws are invalid and legally ineffective, to be treated by the courts as legal nullities. Whether or not Marshall's conclusion is correct, the distinction between power and duty is enough by itself to show that simply equating them moves too quickly. Faced with limitations that might be about only duty, only power, or both, Marshall seems immediately to have concluded that they are about both. That conclusion is a matter of interpretation, not pure logical inference.

B. Constitutional Conflicts

It is common to talk about statutes that violate the Constitution and to assume that the question of judicial review is the question of

³⁵ "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

³⁶ *Marbury*, 5 U.S. (1 Cranch) at 179-80. Most likely, Marshall thought that such clauses also impose duties, so that a legislator who votes in favor of an ex post facto law violates the oath required by Article VI.

how to treat such enactments. While that way of thinking fits with ordinary legal configurations, in particular the configuration of duties respecting conduct, it does not fit so easily with other configurations or with a constitution. Consider, for example, a law providing that someone other than the person elected in accordance with the Twelfth Amendment shall be President. Such a law violates the Constitution only in a rough sense. It is of course inconsistent with the Constitution in that Article II speaks of "a" President and refers to that officeholder in the singular.³⁷ It is not, however, a violation in the sense that torching a building violates the law against arson because the Constitution nowhere commands Congress not to create a second President the way it commands the body not to pass *ex post facto* laws. It seems that there are different kinds of unconstitutionality, not all of which fit easily in the scheme of prohibitions and violations.

In fact, there are three different ways in which the Constitution and an act of Congress can conflict. First, they can both directly address the same legal question and provide different answers. Second, the statute can be beyond the powers granted Congress by the Constitution. Third, the statute can run afoul of one of the Constitution's affirmative prohibitions, like the *Ex Post Facto* Clause. That three-way division in turn reflects two distinctions. First, there is a difference between constitutional norms that directly answer a legal question and those that operate at a conceptually higher level. The *Ex Post Facto* Clause is an example of the more familiar kind of constitutional norm, one that is higher-order in that it is about other legal norms. Depending on whether one agrees with Gibson or Marshall, the clause either condemns the adoption of certain legal rules or goes beyond that and nullifies such rules, keeping them from becoming legally effective.

One of the Constitution's less familiar provisions, the definition of treason, provides a contrast with the *Ex Post Facto* Clause. Treason consists only of levying war against the United States or "adhering to their enemies."³⁸ In order to know what the crime of treason consists of, one need not consult any other legal norm. The Treason Clause answers that question directly, not mediately, not

³⁷ U.S. Const. art. II, § 1.

³⁸ U.S. Const. art. III, § 3, cl. 1.

by constraining the possible rules about conduct but by providing one. As the treason provision demonstrates, this arrangement is not confined to substantive rules of conduct. The Treason Clause also provides a rule of evidence in judicial proceedings. In order to know what evidence is required to prove treason, a court need consult only the Constitution, not any other rule of evidence.³⁹

A second distinction involving conflicts between the Constitution and a statute arises because there are two different constitutional strategies for restricting the legislature without actually laying down the rule ultimately in question.⁴⁰ One is the system of enumerated power. This approach combines positive and negative norms. The positive norms describe authorized legislation; Article I, Section 8 is the original Constitution's primary collection of rules like this.⁴¹ The negative norm is that any legislation that does not meet the description of one of the positive norms is unauthorized. The Federal Convention evidently concluded that

³⁹ Id. ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."). This distinction is derived from but may not be identical to Gibson's. He speaks of legal rules addressed directly to the courts, *supra* note 18 and accompanying text, whereas I have in mind legal rules that operate directly rather than by providing rules about other legal rules. If one thinks of the courts as the usual appliers of the law, Gibson's formulation is natural. This Article, however, will stress that courts are not alone in needing to know what the law is. The Treason Clause is directed to potential traitors just as the law against arson is directed to potential arsonists.

Judge St. George Tucker, in the important 1793 case of *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793) (*seriatim*), announced in favor of some form of judicial review and addressed these issues, although not with perfect clarity. *Id.* at 66-98 (Tucker, J.). Tucker rejected the notion "that the constitution of a state is a rule to the *legislature only*," with the result that the legislature is "bound not to transgress it" but the executive and judiciary may not "resort to it to enquire whether they do transgress it, or not." *Id.* at 77 (Tucker, J.). He also used some examples that Gibson and I both would characterize as being addressed primarily to the courts, such as Virginia's constitutional provision guaranteeing the jury trial. *Id.* at 79 (Tucker, J.). On the other hand, he seems not to have distinguished between that case and another of his examples, the protection against legislation interfering with religious exercise. *Id.* at 80 (Tucker, J.). It is thus difficult to say whether Tucker meant to accept a Gibson-like distinction while rejecting the conclusion that Gibson was to draw from it, which is what I do.

⁴⁰ I use the phrase "restricting the legislature," rather than "limiting its power," for example, because the question Gibson poses is whether restrictions on the legislature are limitations on its power.

⁴¹ See U.S. Const. art. I, § 8 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . .").

the use of positive norms implied the negative norm and did not actually state it.⁴² Anti-Federalist paranoia eventually led to an explicit formulation of the negative norm in the Tenth Amendment.⁴³ While the negative norm does the work of restriction, the positive norms contain most of the information.

The strategy of enumerated powers locates restrictions on legislation in the empty space left over from affirmations of authority. A more direct way of imposing restrictions is to state them. Affirmative limitations on the legislature take the form of negative norms describing disfavored legislation. Constitutional rights, as currently understood, normally appear in this guise. The Ex Post Facto Clause and the First Amendment describe kinds of laws that are not to be made. They convey the relevant information under this approach. Provisions like this provided easy cases for Marshall, but they are the turf on which Gibson disputed *Marbury*.

C. *The Constitution and Statutes at Odds*

1. *One Question, Two Answers*

The question in *Marbury* was whether the Supreme Court had jurisdiction over a petition for a mandamus to the Secretary of State. According to the Court's reading of Article III, which I will assume to be correct, the answer was that the Court could not exercise such jurisdiction. The Chief Justice read the provision governing the Court's original jurisdiction to include an implicit "only" and concluded that the Constitution therefore denied the Court jurisdiction over *Marbury's* case.⁴⁴ On Marshall's reading of

⁴² This viewpoint resurfaced in the Federalist argument against a Bill of Rights. Alexander Hamilton asked: "[W]hy declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴³ See Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, in *Constitutional Government in America* 331 (Ronald K.L. Collins ed., 1980).

⁴⁴ *Marbury*, 5 U.S. (1 Cranch) at 174-76. It is a little tricky to untangle the question of Article III's meaning from the larger question of the relation between the Constitution and contrary statutes. The difficulty arises because any particular constitutional provision can explicitly provide a default rule that is subject to statutory modification. Indeed, Article III itself contains that very configuration. It sets out the appellate jurisdiction of the Supreme Court but explicitly authorizes Congress to

the Judiciary Act of 1789, which I will also assume to be correct, the Court did have jurisdiction because Section 13 granted it.⁴⁵

Here is a straightforward inconsistency. Two sources of law purport to provide an answer to the question posed in the case, but the answers are different. The Constitution says there is no jurisdiction; the statute says there is. The situation would be the same if Congress passed a statute denouncing waste of public funds as treason. A jury confronted with proof of waste would be instructed by the statute to convict of treason, by the Constitution to acquit. The Constitution and the statute operate at the same level, each purporting to answer the same legal question. Which rule was the Court to follow?

In order to do the job, the judge must know what the law is. In particular, to decide any case the judge must know whether the court has jurisdiction. A judge who has taken an oath to support the Constitution of the United States and who therefore, in performing official functions, turns to it first will find that it calls itself law.⁴⁶ Moreover, the passage in which it calls itself law specifically contemplates that it will be the kind of law that a judge can apply, because judges in the states "shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁴⁷ So the judge cannot simply turn away from the Constitution, confident that it cannot answer a legal question that arises in a case. It might.

make exceptions and regulations. U.S. Const. art. III, § 2, para. 2. This arrangement does not raise the question of what happens when the Constitution and a statute are actually inconsistent with one another. That question arises when Congress's attempt to change the constitutional rule rests, not on the claim that some particular provision is explicitly subject to such alteration, but on the general principle that statutes that conflict with the Constitution prevail. As will appear more fully below, that principle is different from the rule that Congress is final in construing the Constitution and thus in deciding whether there is a conflict. See Section II.B.

In order to make *Marbury* out to be a case of logical inconsistency Marshall thus had to conclude that Article III provides both a rule of inclusion and a rule of exclusion for the Court's original jurisdiction and that it does not authorize Congress to alter the rule of exclusion. That seems to have been his reading of the original jurisdiction clause. *Marbury*, 5 U.S. (1 Cranch) at 173-75. It is also possible that Marshall meant to liken Article III to the Ex Post Facto Clause and to find therein an affirmative prohibition on statutes adding to the original jurisdiction. Most likely he was not drawing such fine distinctions at all.

⁴⁵ *Marbury*, 5 U.S. (1 Cranch) at 173.

⁴⁶ U.S. Const. art. VI, para. 2.

⁴⁷ *Id.*

In *Marbury* it did, at least if we accept John Marshall's interpretation. On his reading, Article III means that if a case does not fall into one of the listed categories, the Supreme Court does not have original jurisdiction over it. But while the Constitution seems to answer this question, it also seems to unanswer it. The same Supremacy Clause that tells the judge that the Constitution is the kind of law that applies in cases also says that acts of Congress are the supreme law of the land, apparently just as supreme as the Constitution itself.⁴⁸ And an act of Congress, according to Marshall's reading, provided that the Court did have jurisdiction, just as much as the Constitution provided that it did not.

Now we are in the fix described by Hamilton in *The Federalist* No. 78.⁴⁹ The Court's own premise that the Constitution is law has led to contradictory answers. The Constitution says that the Supreme Court does not have jurisdiction over *Marbury's* case, but it also says that the Judiciary Act of 1789 is supreme law. Section 13 of the Act says that the Court does have jurisdiction. That is one rule too many.

Hamilton's answer was that the principal is superior to the agent, and since the people are the principal and the legislature is their agent, the will of the people prevails.⁵⁰ That argument assumes its

⁴⁸ Id. The premise that the Constitution supplies rules judges can follow is necessary to both sides of the conflict. If the Constitution does not supply any such legal rules, where did the judges get the notion that writings produced by a group of politicians are relevant to their work? If Article I, § 7 and the Supremacy Clause are not legal rules that courts can apply, then the doings of those politicians are no more interesting than manifestos issued by the local Masonic lodge. Article III tells courts what cases to decide, and Article I supplies rules to decide them by.

The Supremacy Clause attributes supreme status only to laws enacted in pursuance of the Constitution. At the least, that phrase alludes to the Article I, § 7 process, so that the clause applies only to those writings that have been duly adopted. One might think that it goes farther, and in particular that a statute inconsistent with the Constitution is not adopted pursuant to it. So to reason, however, is to beg the question posed by the possibility that a statute and the Constitution can be inconsistent, which is whether the Constitution's implicit rule is that it prevails when in conflict with a statute. Amendments adopted through the Article V process are made in pursuance of the Constitution, and they prevail when in conflict with the original text, thus they are amendments.

⁴⁹ "It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression." *The Federalist* No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁵⁰ Id. at 524-26.

conclusion. The will of the people does indeed govern for anyone who takes the Constitution to be law because the Constitution says that the people made it, but that does not tell us what the people's will is. Maybe they want acts of the legislature to prevail when inconsistent with what they have said in the Constitution. If that seems simply unthinkable, inconsistent with the status of the Constitution as a limitation on the legislature, *Marbury* is the right context in which to think it anyway. *Marbury* is not about limitations on the legislature if by limitations we mean provisions like the Ex Post Facto Clause. And if by limitation on the legislature we mean any provision in the Constitution with which an act of the legislature might come into conflict, then, like Hamilton, we are thinking in a circle.

Hamilton moved too fast in deriving his conclusion simply from popular sovereignty. While the people are the boss and the judiciary will do what they want, it is necessary to look at the text of the Constitution to uncover the popular will. It is not far below the surface. Article III itself appears to presuppose that Congress's statutes do not prevail over contrary constitutional provisions. If those statutes did, then the grant of authority to make exceptions to the Court's appellate jurisdiction⁵¹ would be unnecessary. Article V, which provides the mechanism for amendment, shows this principle writ large. If the conflict rule worked the other way, so that acts of Congress prevailed over the Constitution, then Congress would have power to amend the Constitution. The power to change the law, after all, is nothing other than the rule that the powerholder's decisions override earlier, inconsistent law.⁵² Article V, however, sets out a procedure by which to adopt rules that override earlier, inconsistent rules from the Constitution. Congress does have a role in that process, but the role is not that of simple lawmaker as set out in Section 7 of Article I.

⁵¹ U.S. Const. art. III, § 2.

⁵² Article I, § 7 gives every Congress the power to make law. It says nothing about unmaking law. The power to repeal earlier laws follows from the principle that resolves intertemporal conflicts: The most recent law prevails. Without such a principle, what would keep one Congress from permanently freezing the law by repealing any act by any future Congress inconsistent with what it had done? The ability to alter the law is a combination of the power to make law and the conflict rules.

Because of the hold *Marbury* has on American legal thought, and because, following Bickel, it is so common to understand judicial review as a who-decides question, it is easy to fall into confusion. I am trying to infer the Constitution's conflict rule, the rule that tells us what the law is when two seemingly authoritative sources of law conflict. We assume in the typical intertemporal case that the more recent law prevails. But what about conflicts between the Constitution and a statute? My argument is that a rule under which the statute prevails would be equivalent to—not simply practically similar to, but the same as—a rule under which Congress could change the Constitution. Article V, however, shows that Congress may not change the Constitution through ordinary legislation. Therefore, the conflict rule cannot be that the act of Congress prevails.

While the argument from Article V to a *Marbury*-style conflict rule is profoundly important, there is a similar argument from Article V that is fallacious in a way that indicates the soundness of the argument I advance. The fallacious argument does not respond to a claim about the conflict rule, but rather to the different claim that whatever the law may be, Congress's interpretation of it is final and binding on the courts. According to the fallacious argument, that proposition cannot be correct because of Article V: The power finally to interpret the Constitution is the same as the power to amend it, and we know that Congress cannot amend the Constitution.

Putting it that way should expose the error because that argument works just as well against judicial review or executive review. The courts and the President have no more power to amend the Constitution than Congress does, so neither of them can have the last word either. The error at work here is the conflation of finality and infallibility. As H.L.A. Hart explained, it is wrong to say that the law simply is what the person or institution charged with interpreting it says it is.⁵³ That claim is false because finality can coexist with fallibility and does in most legal systems. Lawyers and dissenting Justices, for example, routinely say that the Supreme Court was wrong, even though the Court finally decides cases before it. Because there is a standard by which one can say that the final

⁵³ H.L.A. Hart, *The Concept of Law* 141-47 (2d ed. 1994).

decider was wrong, the final decider is not infallible. An umpire who makes a bad call is final but can properly be arraigned as an incompetent or, if the call was deliberately incorrect, a wrongdoer. The situation of the umpire is quite close to that of the agent who finally binds the principal but has still done wrong and is subject to sanction.⁵⁴

Finality and infallibility are not the same when there is a standard by which to judge the final decider's decision. If the Court has the last word on what the Constitution means in a case, we can still appeal to the Constitution as the standard according to which the Court was wrong. That works fine when power comes from interpretive finality. It does not work if power comes from a conflict rule. Suppose the Constitution said, not that Congress has the last word in interpreting the Constitution, but that acts of Congress prevail when in conflict with the Constitution. One would not then say that Congress was charged with finally deciding on the consistency of the Constitution and the statute and might have erred in doing so. Under those circumstances, Congress would have no occasion to ask about consistency because nothing in the Constitution would set it up as the standard for statutes. Indeed, the only provision bearing on that issue would be the conflict rule itself, which favors acts of Congress. If the power to amend the ordinary law were given to Congress through an explicit intertemporal conflict rule, no one would say that subsequent repealing statutes were incorrect interpretations of the earlier law that were nevertheless binding because of a rule of interpretive finality. Instead, all would say that the conflict rule is simply another way of stating the power to amend. And if the power to amend the Constitution is not in Congress, then the conflict rule cannot be that acts of Congress prevail over the Constitution.

Article V very strongly implies that the Constitution prevails when it conflicts with any other form of law. Article VI implies the same conclusion, although perhaps less strongly. The Supremacy Clause, whatever it may explicitly say about the relations of different kinds of federal law, makes clear the relation of state and federal law: In case of conflict, federal law prevails.⁵⁵

⁵⁴ See *supra* notes 25-26 and accompanying text.

⁵⁵ U.S. Const. art VI, para. 2.

Judges, including in particular state judges, evidently are to follow the federal law, which is made supreme “notwithstanding”⁵⁶ anything to the contrary in state law. The word “notwithstanding” is the word a lawyer uses when two sources of decision might come into conflict.

Federal law wins when it conflicts with state law, the notwithstanding clause confirms. Yet the main body of the Supremacy Clause asserts, eponymously enough, supremacy. The primary rule, the implication of which is confirmed by the notwithstanding clause, is simply that federal law is superior to state law. Evidently the Constitution takes superiority as implying preference in the case of conflict. The Supremacy Clause tells us that federal law wins when it contradicts state law, and it tells us that by saying that federal law is superior.⁵⁷

If the Constitution implies that it is superior to other forms of federal law, then the Supremacy Clause in turn implies that the Constitution trumps other forms of federal law. Although the question seems more doubtful to me than it probably does to most readers, the better view is indeed the common one, that the Constitution is higher in authority than statutes or treaties. The strongest indication of this is the presence of affirmative limitations on legislation, such as the Ex Post Facto Clause, that cannot themselves be altered by statute.⁵⁸ Such provisions provide a standard

⁵⁶ Id.

⁵⁷ Hamilton in *The Federalist* No. 78, after discussing the last-in-time rule with respect to laws adopted by the same legislature, says:

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority

The *Federalist* No. 78, *supra* note 49, at 526. From that he deduces judicial review. My point is not that nature and reason require that the commands of a superior trump those of an inferior, but that the phrasing of the Supremacy Clause reflects the assumption that they do. Hamilton was primarily interested in a political justification for judicial review, not in expounding the document. His image of superior and inferior fits judicial review into the scheme of popular sovereignty.

⁵⁸ Article V is central to this argument as to the earlier one, because a repealable affirmative limitation on the legislature would not be hierarchically superior to ordinary legislation. One might think such a limitation pointless because wholly precatory, but it would not be. The additional step of repealing the limitation would signal to the public that the legislature was departing from it, something the public might

against which other federal laws are to be measured and include the implicit assumption that they are superior to such laws. The Supremacy Clause, by associating superiority with nullification of conflicting inferior laws, tells us that the hierarchical relationship is legal and not just political.

This invocation of the Supremacy Clause might provoke the objection that my argument improperly applies conclusions about federalism to the context of separation of powers. According to this objection, we learn nothing about *Marbury* and judicial review from the conclusion that courts faced with conflicting federal and state rules are to follow the federal rule. Federalism and separation of powers are not comparable, the argument would go, because *Marbury* involves two coordinate branches of the national government, whereas the kind of judicial trumping contemplated by the Supremacy Clause pits the federal courts against state legislatures, which are not their constitutional equals.

This is a figure of speech getting out of control. That Congress and the courts are equal to one another but superior to the state legislatures is a way of speaking, not an accurate description of the constitutional arrangement. The Constitution nowhere makes federal courts superior to state legislatures. It gives one federal court appellate jurisdiction over state courts and authorizes the creation of other federal courts with such jurisdiction.⁵⁹ It also makes federal law supreme over state law.⁶⁰ It does not make state courts superior to state legislatures or state constitutions.⁶¹

find worth knowing. The British Parliament is generally thought to be legally omniscient, see 1 William Blackstone, Commentaries *156-57, which means that it could repeal the British Bill of Rights. Parliament is not likely to do that, so the Bill of Rights is an important political barrier to certain possible parliamentary actions.

It is tempting, but I think incorrect, to deduce constitutional superiority to statutes and treaties from the fact that the Constitution provides the procedures by which the latter are to be adopted. See U.S. Const. art. I, § 7. A legally omniscient legislature can change the rules by which it is selected and operates, precisely because it is both legislature and constitutional convention.

⁵⁹ U.S. Const. art. III, § 1.

⁶⁰ U.S. Const. art. VI, para. 2.

⁶¹ Gibson maintained that Article VI expressly empowered state courts to set aside state law in favor of federal law but that the Pennsylvania Constitution did not confer on the courts any similar power to set aside acts of the assembly in favor of the state constitution. *Eakin*, 12 Serg. & Rawle at 356 (Gibson, J., dissenting). He did not explain in detail why an obligation to follow one law rather than another is, as he put it, "a political power." *Id.* (Gibson, J., dissenting).

As for congressional superiority over state legislatures, the Constitution does not establish it, and the Federal Convention rejected a proposal to give Congress a veto on unconstitutional state laws.⁶² Federal law, not the federal government, is supreme.⁶³

The rule I have deduced from Article V and the Supremacy Clause is about what the law is. Although developed in the context of a judge who needs to know the law, it is no more uniquely addressed to courts than is the law against treason. The conflict rule could just as easily be deduced and applied by William Marbury in deciding where to bring his lawsuit as by the Chief Justice in deciding whether to decide that lawsuit.

2. Enumerated Power

Marbury is the easy case. Analysis of the second category of possible statutory/constitutional conflict—that involving enumerated power—is somewhat more complicated, but the result is the same. Suppose that Congress passes a statute making it a crime to feed one's dog between the hours of seven and nine p.m. Assume, as is plausible at least, that there is no warrant for such a statute in any of the powers the Constitution grants to Congress. If the Constitution is the law, does the ban on dog feeding have the status of a law of the United States?

Nothing in the Constitution creates a permission for feeding dogs, so the statute is not logically contradictory to anything in it. It thus has no *Marbury* problem. The status of the dog feeding statute therefore turns on the nature of provisions that take the form of grants of power to Congress. Do such provisions provide criteria for the validity of acts of Congress? In order to be legally effective, must an act of Congress come within one of the grants? If so, then statutes that are not supported by any of the enumerated

⁶²The Virginia Resolves, presented at the outset of the convention, provided that the new national legislature should have power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., rev. ed. 1966).

⁶³"But it is worth reminding ourselves that the supremacy clause does not say that the *federal government* shall be supreme. It doesn't even say that the *federal courts* shall be supreme. It says, fundamentally, that the *Constitution* shall be supreme." Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 633 (1981).

powers are void. If not, then two conclusions follow. For one, the enumerating provisions must be something other than criteria of validity, something other than rules about power, or they are wholly pointless. The most natural alternative is that they impose political duties on Congress.

Next, and less obviously, if the enumerating provisions do not affect the validity of congressional acts, then Article I, Section 7 is a grant of comprehensive legislative authority. While the Supremacy Clause tells us that laws of the United States are the supreme law, only Section 7 provides procedural criteria by which to tell whether a writing is a law of the United States. It thus provides necessary conditions of validity. Section 7, however, contains only procedural and not substantive criteria. If it is the only provision that deals with the ability of Congress to make legally effective laws of the United States—putting aside the affirmative limitations for the moment—then it authorizes Congress to make laws on any subject.

Here the thoroughly obvious and mundane is dispositive. Grants of power in the Constitution are written as grants of power. Article I, Section 8, the preeminent clause in this connection, begins, “Congress shall have Power.” If Section 7 already gave Congress the authority to make all the kinds of laws that Section 8 goes on to list, Section 8 would not read that way. It would include an “only” or otherwise would be framed so as to undo the comprehensive grant contained in Section 7. As written, however, Section 8 assumes that Section 7 was not enough to enable Congress, for example, to establish post roads. Section 8 is drafted as part of the system of rules that determine whether a statute is legally effective.

Moreover, Section 8 and the other grants of power are not phrased as instructions to the legislature, written on the assumption that Congress has authority and laying down rules for the exercise of that authority. Putting the principle of enumerated powers that way would indeed raise the question discussed by Justice Gibson, but the Federal Convention did not draft the provision in that manner. Rather, the Convention placed that principle, its most important substantive limitation on the new legislature, in the empty space left over from the affirmative grants. Evidently the framers assumed that without a grant there was no authority to make valid law.

To be sure, the Federalists soon had to sell the Convention's work to swing voters and convention delegates deeply suspicious of central power. Eventually those skeptics obtained an enumerated-power belt to go with the original Constitution's suspenders. The Tenth Amendment provides that all powers not delegated are reserved. It is not a command to Congress, and indeed does not even mention the legislature. Unless it is a trick, and there are no reserved powers at all, it reiterates the point that Section 7 is not a grant of comprehensive legislative power.

Finally, the first sentence of Article I reinforces the conviction that Congress is a legislature with limited powers, rather than a legislature with unlimited powers subject to certain political duties regarding the exercise of its authority. The provision vests Congress with all legislative powers "herein granted," and hence with no other legislative powers.⁶⁴ If Section 7 grants general legislative authority, then the first sentence of Article I is a bit of misdirection too: All legislative power "herein granted" turns out to be the same as "all legislative power" or simply "legislative power." For the Constitution to speak in terms of limits on the grant of Congress's power would not be consistent with a document that gives total power and provides standards by which voters may impose political penalties for abuse of that authority.

Enumerated power is about power, not just duty, and the Constitution is indeed a charter of enumerated powers.

3. *Bans on Laws*

Some provisions of the Constitution take the form of directives to the legislature not to make certain kinds of laws or not to exercise power in certain ways. Article I, Section 9, the original document's principal collection of affirmative prohibitions on Congress, begins by stating that Congress shall not prohibit the migration or importation of persons into the original states.⁶⁵ Section 9 goes on to say that "No Bill of Attainder or ex post facto

⁶⁴ U.S. Const. art. I, § 1.

⁶⁵ U.S. Const. art. I, § 9, cl. 1. Among the Constitution's various oblique references to slavery, this provision limited Congress's power to prohibit the international slave trade before 1808. See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 4, 19-29 (1996).

Law shall be passed.”⁶⁶ The First Amendment, drafted by the First Congress, is also in the form of a prohibition on the legislature: “Congress shall make no law,” it begins.⁶⁷

Here Justice Gibson’s counter to *Marbury* has real bite, and here Chief Justice Marshall’s argument rests mostly on assumptions about the purpose of the Constitution rather than on a reading of the text. If the people are the principal and Congress the agent, it is certainly conceivable that the enumeration of powers is a grant of authority to act for the principal and that the affirmative prohibitions are directions concerning the exercise of the granted authority that do not (legally) limit it. Instead, the prohibitions may provide a standard of conduct for Congress that the people will enforce at the polls or otherwise. These could be rules only about duty, not also about power.⁶⁸

That is possible, but a close reading suggests that the Constitution is not drawing this distinction. If it were, it would distinguish sharply between those provisions that are only about the legislature’s duties and those that are also, or are only, about its powers. When formulating a duty-only rule, the Constitution would adhere to the clearest form of such a rule, one that tells the legislature what to do. But while many of the affirmative limitations are written that way, some are not. Some refer, not to the passage of legislation considered as an action of the legislature, but to the law’s content. The proviso built into the taxing power, for example, states that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁶⁹

Statements about what the law is to be differ subtly but significantly from statements about what laws are to be passed. The latter fairly clearly address the legislature and hence, whatever else they may do, impose political duties on it. The former address no one in particular, which is to say that they address anyone who wants to know what the law is. They differ from provisions like the

⁶⁶ U.S. Const. art. I, § 9, cl. 3.

⁶⁷ U.S. Const. amend. I.

⁶⁸ At the very least, provisions like the Ex Post Facto Clause pretty clearly do impose duties. A representative who votes for such a law, or a president who signs one, has done something wrong.

⁶⁹ U.S. Const. art. I, § 8, para. 1.

Treason Clause, which actually lays down a particular rule,⁷⁰ in that they constrain the content of the law without specifying it. The uniformity proviso in the taxing power restricts the range of permissible taxes but hardly constitutes an Internal Revenue Code because there are so many possible systems of uniform duties, imposts, and excises. Nevertheless the uniformity proviso is in the form of a rule about the law rather than a rule for the lawmaker.

If the Constitution were employing Justice Gibson's distinction it would not contain difficult passages like that, provisions that require subtle analysis to distinguish duties on the legislature from direct constraints on the law. Nor would it contain dangerously ambiguous provisions like the Ports Preference Clause.⁷¹ On one reading, that clause is an instruction to Congress, telling it not to pass certain laws. But if one regards a "Regulation of Commerce" not as an action of the legislature but as a piece of law, then the clause is another constraint on what the legal rules can be and, in effect, a limitation on the power of Congress, not simply a duty concerning the exercise of that power. Any drafter who thought crucial the distinction between rules for the legislature and rules for the law would not come up with such a chimera.

The most plausible inference from the way the Constitution is written is that prohibitions on a legislature bring with them limitations on its power. If the Constitution were playing Justice Gibson's game, we would know it.

II. BICKEL'S PROBLEM

Forget about all this abstract talk, said Alexander Bickel. The real question is who decides. Should it be the Court or the institution that made the initial decision?⁷² In the situation facing John

⁷⁰ See *supra* notes 38-39 and accompanying text.

⁷¹ "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another." U.S. Const. art. I, § 9, para. 6.

⁷² Bickel observed:

But Marshall knew (and, indeed, it was true in this very case) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who: the courts, the legislature itself, the President, perhaps juries for purposes of criminal trials, or ultimately and finally the people through the electoral process?

Marshall that institution was Congress. Why should the Court not accept Congress's determination that the Judiciary Act rested on a correct interpretation of the Constitution?

The question of who decides, of who has the last word, is indeed a fundamental one in legal systems in general and the Constitution in particular. Under the Constitution the particular question that Bickel poses, and that he finds so difficult, is in fact quite easy. It is even easier, and requires weaker assumptions, than many proponents of judicial review seem to think. This Part first seeks to clarify the issue of finality and then asks who decides in the *Marbury* context.

A. Finality

Finality, letting someone have the last word on a disputed question, is basic to cooperation. The soldiers in an army may all agree on the goal of winning a battle but disagree on the means of achieving that goal and thus on the application of their common principle. If each individual does what that individual thinks necessary to reach that shared goal, the result is likely to be chaos. So armies have commanders. The soldiers do not try to figure out how to win. Instead they follow the rule of doing what the commander says. They are much more likely to agree on what the commander has said than on what it would take to win. The commander, not each individual soldier, has the last word on how to achieve victory.

People trying to cooperate in enforcing a system of substantive legal rules face a problem similar to the soldiers'. In order to cooperate effectively they need to agree as to what the rules require. They cannot keep A from taking the property of B if they do not agree on what is A's and what is B's. In any reasonably sophisticated legal system, however, even experts often will disagree on the application of the law. A standard solution is to overlay the substantive rule with a much clearer rule giving someone the last word as to the substantive rule's application. When A and B disagree as to who owns Blackacre, the court will decide. Everyone will then treat the court's answer as correct, whether it is or not.

Bickel, *supra* note 7, at 3. Bickel did not consider the possibility that the people might ultimately decide through some other process.

The court, as H.L.A. Hart put it, will be final but fallible.⁷³ Its finality will produce certainty and hence enable coordination at the price of its errors.⁷⁴

As with the rule marking the commander, the rule identifying the court and giving it the last word will work only to the extent that it is itself quite clear and the court's output is clear. A rule according to which the five wisest citizens are the court is unlikely to work because people generally will not agree as to who those five are. Once the judges and their decision-rule are clearly specified, their decrees still will not be effective if those decrees are as oracular as the underlying law. The judgment that A shall have what belongs to A is not much use.

Rules that identify final decisionmakers must be very clear because people must agree as to the rules' application without the help of a final decider. Courts can resolve disputes only when people know who the judges are, and the judges cannot themselves answer that question because, until it is answered, no one knows whether they are the judges or not. In other words, even in a system that uses finality rules, people start off on their own. They must interpret at least one finality rule, one rule pointing to someone else's decision, for themselves. With that single rule that people can apply for themselves, cooperation can begin. Courts can be established that resolve disputes on issues great and small, from matters of life and death to lawsuits over a piece of paper. This brings us back to the most famous of such lawsuits.

B. Congressional Finality

The preceding abstract examination of legal finality shows us what the default position is for any legal interpreter: You are on your own until you encounter a finality rule telling you to accept someone else's decision. That is the starting point for everyone, including judges. Hence, the answer to Bickel's who-decides question is that a court decides for itself what the Constitution means unless there is a finality rule telling it to accept Congress's decision.

⁷³ Hart, *supra* note 53, at 141.

⁷⁴ The rule empowering a military commander and the rule constituting a court involve different forms of finality. The commander is given substantive power whereas the court is given the last word in interpreting a norm.

As I noted, constitutions run on finality rules, so there might be one. The only way to find out is to look.

The kind of finality rule that would make *Marbury* come out differently and eliminate judicial review would look like this: If there seems to be an inconsistency between the Constitution and a statute, first attribute to Congress a determination that the meaning of the Constitution is consistent with the natural meaning of the statute, and then take that judgment as dispositive. In other words, if you find an inconsistency between the Constitution and a statute, revise your understanding of the Constitution so that the inconsistency goes away.⁷⁵ No such instruction explicitly appears in the Constitution, but then neither does it in so many words say that it prevails when inconsistent with an act of Congress. Either rule for what to do in case of a conflict must be inferred. I have presented an inference to the *Marbury* rule that seems to me most persuasive. Now we need to ask whether the document contains the “defer to the hypothesized congressional judgment” rule. If it does not, the courts (and other interpreters) remain in their default position, in which they are not required to accept any presumed congressional view as dispositive.

The argument in favor of such a finality rule focuses on Congress’s claim to constitutional primacy. That argument begins by observing that Congress has the legislative power. Decisions on questions of constitutional interpretation that are made in the exercise of that constitutional power are as binding as the laws adopted pursuant to it, much as the courts’ judgments bind parties to lawsuits. Because senators and representatives are bound to support the Constitution, the argument goes, passage of a statute represents a decision that it is consistent with the Constitution. Hence constitutional questions are finally resolved in the legislative process and must be respected at later stages.⁷⁶

⁷⁵ The hypothesis that the Constitution and statutes never conflict would not by itself undo *Marbury*. That hypothesis would be satisfied if the courts adopted the reading of the Constitution they thought most natural and adopted readings of statutes, however forced, that matched the Constitution. Congress’s interpretation of the Constitution is final when that interpretation, however forced it may seem to the courts, is followed so that Congress’s statutes as naturally read accord with it.

⁷⁶ I do not think this is the argument Bickel had in mind because I think he was trying to answer a different kind of question. See *supra* note 15 and accompanying text. My concern is with the constitutional text. Bickel’s main concern was with con-

Two flaws are built into that argument. First, it suffers from a common tendency to collapse all kinds of constitutional problems into the third category discussed above, in which the Constitution prohibits certain action by the legislature.⁷⁷ When legislators have promised to support a Constitution that forbids them from making *ex post facto* laws, part of their job is to ensure that nothing they enact meets that description. They would fail in their duty if they did not consider that question. Under those circumstances it would be reasonable to say that the process of legislation necessarily entails the resolution of a constitutional issue.

While the Constitution forbids *ex post facto* laws it does not generally forbid invalid laws. Common sense and the demands of constituents for common sense might keep legislators from enacting legal nullities, but the Constitution does not tell them not to. Nor are the demands of common sense so clear. A legislator might be in genuine doubt about the constitutionality of a proposal but think it excellent policy. Such a legislator could vote for the proposal with a clear conscience, thinking that the good that will be done if it is effective outweighs the harm done if it turns out not to be. Yet that legislator would not have come to a conclusion as to the constitutional issue. Even one who thought it more likely than not that a desirable proposal was not authorized by the Constitution would not be violating the constitutional oath, and might be acting reasonably, by voting for a bill as long as the constitutional difficulty did not come from an affirmative prohibition.⁷⁸

stitutional design, with whether judicial review was desirable, and, in particular, whether it was consistent with the majoritarian premise he attributed to American politics. Bickel, *supra* note 7. In that sense he was concerned with *Marbury* as a piece of constitutional politics, which it certainly was, rather than as constitutional law. Moreover, Bickel would have thought a narrowly legal argument for judicial review unsatisfying, and the essentially political aspect of the who-decides question so important, in large part because he saw judicial review as an exercise of political judgment more than legal interpretation. He therefore characterizes even the highly technical question in *Marbury* as one of policy. *Id.* at 3. As far as he was concerned, the reason to prefer the legislature was its closer electoral connection to the people. *Id.* at 16-17. That connection is very important if constitutional adjudication involves policy judgment, but largely irrelevant if it involves technical legal analysis.

⁷⁷ See Section I.C.3.

⁷⁸ Constituents might not like that kind of behavior, of course. Some might feel betrayed, on the theory that senators and representatives implicitly commit themselves to vote only for what they think legally valid. But there is nothing to keep a candidate from announcing a different policy and if elected such a candidate would not have betrayed anyone.

The process of legislation thus does not entail the resolution of all types of constitutional doubts about what the legislature is doing. That is true as a logical matter and certainly as a practical one, even if we assume that all legislators conscientiously seek to comply with the actual prohibitions of the Constitution. Hence the hypothesis that Congress has decided the constitutional issues that later come before another actor or government decisionmaker is not required by the Constitution. More to the point, the Constitution is not likely to accord binding force to a decision that it does not require ever be made.⁷⁹

The second flaw in the argument for congressional finality involves the step that attaches finality to legal determinations made during the legislative process. Even if such determinations are made, they are not unique to the legislative power. Indeed, oddly enough it is the legislature that least needs to know whether its acts are valid or not, because it is not called on to carry them out. The courts must know what the law is in order to decide cases and the President must know what the law is in order faithfully to execute it. We thus need a reason to prefer the legislature's presumed judgments to anyone else's. A first in time rule might work, but there is nothing in the Constitution to support one and, besides, it would produce at least one bizarre result. The President is obliged to recommend legislative measures to Congress that he thinks desirable.⁸⁰ It seems very unlikely that the House and Senate are bound to respect the President's conclusion that his proposals are consistent with the Constitution, but that conclusion would be prior in time to any congressional vote.

Making legal judgments may or may not come with legislative power, but there is no reason to think that making final legal judgments does. Moreover, there is reason to think it does not because legal finality is very much part of a power that Congress does not have. Courts finally decide lawsuits between parties, at least as between private parties. Indeed, the strongest case for finality by

⁷⁹ It is unlikely that the Constitution contains a finality rule that operates only with respect to the affirmative prohibitions, for the same reason that it is unlikely that they alone are about duty and not power: If the distinction between prohibitions on the legislature and other provisions were so important, it would be made more clearly. See *supra* notes 68-71 and accompanying text.

⁸⁰ U.S. Const. art. II, § 3.

the House and Senate comes when they are acting in judicial mode in the course of an impeachment. The House's sole power to impeach, and especially the Senate's sole power to try impeachments, strongly imply that those nonlegislative decisions are binding on all the world.⁸¹ Finality is built into the judicial, not the legislative, power.⁸²

An argument to my conclusion may seem to be missing. In rejecting congressional finality it is natural to rely on the separation of powers, the principle that the three branches of the national government are independent of one another. In fact, that principle simply confirms one aspect of my argument. My point is that there is no affirmative indication of congressional finality to be found in Congress's constitutional role and powers. A system without separation of powers might have such an affirmative indication. If Congress were the sovereign, or if the executive and the courts were otherwise hierarchically subordinate to Congress, then there would be reason to believe that congressional interpretations would bind the other institutions of government. Lower courts are generally thought to be subject to a finality rule in favor of their superiors in the appellate hierarchy; a lower court must enter a judgment it thinks wrong if instructed to do so from above.⁸³

While the fact that no branch of the national government is hierarchically superior to another repels one argument for congressional finality, it cannot play the leading role in this drama. Separated and independent powers can nevertheless sometimes interact so that one branch must accept another's determination. For example, the executive can be independent of the judiciary even if it has an obligation to enforce all judgments; such an obligation leaves the executive discretion in deciding what measures involving the use of force are appropriate in enforcing the courts' decrees.

⁸¹ U.S. Const. art. I, § 2 (House has sole power of impeachment); U.S. Const. art. I, § 3 (Senate has sole power to try impeachments).

⁸² I do not mean to suggest that the courts' judgments are always binding on other branches of government, even less that their precedents are. The extent of judicial finality is a difficult question that is independent of the existence of congressional finality. I do mean to suggest that final resolution of legal questions is the essence of what the courts do.

⁸³ See, e.g., *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (describing the Supreme Court's practice of vacating judgment in a moot case and ordering lower courts to dismiss the action).

Hence it is not enough to know that Congress is not simply the boss of the government the way the President is boss of the military. The legislative power nevertheless might be such as to bring with it finality. In fact there is no indication that it does so, but that conclusion comes from examining the relation between legislation and the resolution of legal questions, not from the general separation of powers.

Also missing from the drama as I have cast it is the principle that the courts have a special role in saying what the law is. The argument has relied on the observation that courts exist finally to say what the law is in cases and controversies, but that is hardly the same thing as saying that they have a monopoly on legal interpretation. Lastly, it has not been necessary to appeal to any general principle that everyone, or every branch of government, must always independently interpret the law. Indeed, the existence of finality rules is inconsistent with that principle. Only finality rules themselves must be independently interpreted. The question is not whether any actor may bind another, but who can do so and when.

III. TEXT AND STRUCTURE

This derivation of judicial review may seem like a compass-and-straightedge exercise. It has been concerned with the text while neglecting the historical and constitutional design issues that frequently dominate discussions of judicial review. Questions of design, and in particular the question whether judicial review of acts of Congress is needed in order to ensure congressional compliance with the Constitution, I deliberately avoid.

Nor is this an attempt to add to the substantial work on framing-era expectations concerning judicial review. That scholarship does, however, raise a question concerning my argument that deserves a response. I maintain that a close examination of the text leads pretty clearly to a particular form of judicial review. That may seem too neat when we realize that in the early days there was substantial difference of opinion about the proper derivation and form of judicial review.⁸⁴ It is natural to wonder why one particular

⁸⁴ Some of the varying ways of thinking about the issue are on display in Treanor's important recent historical study. William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491 (1994). Sylvia Snowiss

account of the origin and nature of judicial review is better than any of the others that were in circulation in the framing era.

While I will not attempt to determine which of the various understandings of judicial review was most common when the Constitution was adopted, I will try to reinforce my textual account with structural considerations. The particular features of the Constitution on which my argument focuses are the result of fundamental structural choices by the Federal Convention. The version of judicial review presented here is thus thoroughly in accord with the basic plan of the Constitution.⁸⁵

The Supremacy Clause plays an important role in my derivation of the principle of nullity. On my account, the clause reflects the assumption that superior law can nullify inferior law, providing not simply a rule of political obligation for political actors but a rule of recognition for legal actors.⁸⁶ The clause is quite clear that it deals with the question of what the law is when that question is to be answered by a court.

The presence in the Constitution of nullification by superior law reflects deliberate choices about the legal structure it established. Any compound government with multiple sources of law, whether that law be legislative or constitutional, must answer the question of the legal status of those different sources. One approach is to treat conflicts between the Constitution and statutes the way conflicts between statutes and treaties are treated in American domestic law: Last in time prevails.⁸⁷ Before the Constitution, the status of United States law—the Articles of Confederation—for the various state legal systems was in doubt. There was a very plausible case that the Articles had for each state the status of a treaty and did not prevail over later-enacted state laws. Indeed, there were serious doubts about the authority of the state legislatures to es-

seeks to identify and periodize the different approaches. Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (1990).

⁸⁵ This is not to say that the derivation of judicial review presented here is a post hoc rationalization. Rather, it is a refinement of the choice-of-law approach that was probably the leading element in thinking about the issue around the time of the framing. Future Supreme Court Justice James Iredell, for example, employed many of the elements I use in developing his theory of judicial review in the late 1780s. See William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 *Conn. L. Rev.* 329 (1995).

⁸⁶ See *supra* notes 55-57 and accompanying text.

⁸⁷ See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 600-03 (1889).

establish any other arrangement because doing so would involve one legislature binding a future legislature.⁸⁸ Ratification by state conventions after the Federal Convention would solve this problem, providing that in the future the law of the Union would be the supreme law of each state.⁸⁹

The Supremacy Clause builds into the Constitution's structure the principle that superior law supplies criteria of validity for inferior law. Federal law can make a state enactment a legal nullity, not simply a political wrong like a treaty violation. The Supremacy Clause also makes clear that the Constitution itself is not a purely political, but also a legal, phenomenon. The Constitution can block the legal effectiveness of state law. That too was very much part of the design. Moreover, because the Supremacy Clause is a choice-of-law rule addressed to everyone, it operates automatically. No political act is needed to nullify a state law. The Federal Convention chose this approach when it rejected a congressional veto over state law and instead drafted Article VI. Hence, on my account, judicial review is not the exercise of a legal power conferred on one particular institution. It is simply one instance of the law-finding process.

Article VI contemplates a Constitution that is law capable of displacing other law. It assumes that superior law nullifies inferior law. It leaves somewhat in doubt, however, the relation between the Constitution and other forms of federal law. Article V removes those doubts. Once again, it does so for reasons fundamental to the framers' settlement. Article V is the conceptual keystone of the arch. It tells what the Constitution is.⁹⁰ It was equally fundamental from a very practical standpoint because it expressed the political deal that made the Constitution possible. That deal requires a supermajority of states for amendment. That was security for the states, the state governments, and the people attached to those governments. Without an implicit *expressio unius*, the Constitution would not work: For Congress to have power to change

⁸⁸ See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 100-01 (1996).

⁸⁹ See 2 *The Records of the Federal Convention of 1787*, supra note 62, at 88-93.

⁹⁰ Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 *Mich. L. Rev.* 621, 632 (1987) (noting that, subject to some qualifications, Article V is the supreme criterion of law in the United States).

the Constitution would undo the deal.⁹¹ The Constitution thus must be superior to acts of Congress. Moreover, because the Constitution is not wholly political but also legal, that means that courts and other legal actors must follow it, anything in the acts of Congress to the contrary notwithstanding. Hence *Marbury*.

The Supremacy Clause and Article V together demonstrate that when the Constitution logically conflicts with a statute, the Constitution prevails. That leaves open the question whether the kinds of statutory inconsistency with which we are most familiar constitute logical conflict. If the principle of enumerated powers and affirmative limitations were about political duty rather than power, then statutes that were inconsistent with these principles nevertheless could be valid without actual conflict. This would be precisely because the constitutional rules were not about the validity of statutes but instead about the conduct of legislators.

The system of enumerated powers, however, is on close inspection truly a system of enumerated *powers*. The Constitution was drafted on the assumption that it takes an affirmative grant of authority legally to validate an action of the new government. That approach in turn reflects a basic feature of the Constitution. As Henry Hart said, it is superstructural.⁹² Federal power starts from a zero baseline; it builds from nothing in large part because it builds on a foundation of pre-existing law and the pre-existing political structures of the states. A drafter who thinks that way will assume that affirmative steps must be taken to create federal authority and will use formulations that reflect that assumption. Even if the drafter wants to produce a government that is legally omnicompetent but subject to political restrictions on the use of its power, it still would be necessary to write in a source of the legal omnicompetence.

Because of the zero baseline, the *Marbury* configuration results from the more natural way to draft. A constitution that makes the principle of enumerated powers one of the criteria of legal validity can proceed in a simple fashion. In order to empower the government to do something while not empowering it to do anything else,

⁹¹ See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 133-39 (1996).

⁹² Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 495 (1954).

simply add a power. A Gibsonesque constitution,⁹³ however, would have to proceed in two steps, first with a general grant of power and then with politically-enforced limitations on that power. A drafter would have to go out of the way to do that. One who was somewhat unclear on this issue, but was not consciously seeking Gibson's result, thus would produce a Marshallian document as a matter of course.

Gibson was definitely on his strongest ground in discussing the affirmative limitations on the government, and it is with respect to those provisions that my argument requires the finest slicing. According to my account, provisions like the Ex Post Facto Clause are largely dragged along by the principle of enumerated powers. Once it is clear that enumeration is indeed about power and not just political duty, the failure to mark off the affirmative limitations as fundamentally different is a strong indication that they are not different.⁹⁴ This too reflects an important underlying point about the Constitution: Enumeration is more fundamental than limitation. Thus it is not surprising that the former should take the latter along for the ride.

In similar fashion, the answer I propose to the who-decides question reflects a basic feature of the Constitution. That question asks whether there is any special binding authority to congressional judgments of constitutionality. The answer is no because the power to legislate does not entail the power finally to decide questions of legal interpretation.⁹⁵ In that simple and obvious statement is one of the great innovations of the Constitution. Congress is not the High Court of Parliament. It makes but does not interpret the law. This aspect of American separation of powers is probably the most radical break from the British model.⁹⁶ A chief executive who participated in the legislative process without being an agent of the legislature was not an innovation; the King was that. Courts that

⁹³ See *supra* notes 3-5, 17-36 and accompanying text.

⁹⁴ See Section I.C.3.

⁹⁵ See Section II.B.

⁹⁶ Corwin explained in his classic essay on *Marbury* that "the retention of the doctrine that legislative power extended to the interpretation of the standing law" retarded the development of judicial review in the states in the late 18th century. Edward S. Corwin, *The Doctrine of Judicial Review* 52-53 (Peter Smith 1963) (1914).

participated in the operational work of government but that were not agents of the executive were also a feature of the parent system.⁹⁷

Parliament was the highest court, able not only to make the law but to declare it. Congress can do only the former. As the Court recently noted, separating the legislative and judicial powers was an important point for the Federal Convention.⁹⁸ It is a natural result of that decision that the legislature they designed cannot authoritatively declare the meaning of a Constitution it cannot amend.

The Supremacy Clause, Article V, the principle of enumerated powers, and separation of powers, are the Constitution's load-bearing walls. They go a long way toward explaining why "[t]he sanction of nullity is pervasive in the whole theory of American public law."⁹⁹

IV. EXECUTIVE REVIEW

If I am right, the Constitution provides substantive criteria for the validity of congressional statutes. Even when Congress, in passing a statute, can be said to have made a judgment that the statute is consistent with the Constitution, that judgment has no binding force on anyone else. One consequence of these principles is that courts, in deciding cases, must judge for themselves the validity of federal statutes. That consequence, however, does not follow from any special power or function of the courts. Nor does it require the premise that no individual's or institution's legal judgment can ever bind another individual or institution. Only one form of finality, that of Congress with respect to the constitutionality of its own acts, must be excluded.

All this implies that the federal executive, which I will generally personify as the President, should treat as legal nullities acts of Congress inconsistent with the Constitution.¹⁰⁰ In determining

⁹⁷ See 1 William Blackstone, Commentaries *259-60. The British practice of staffing colonial courts with judges who served at the Crown's pleasure was one of the grievances leading to the American Revolution. "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776).

⁹⁸ *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219-22 (1995).

⁹⁹ Hart & Sacks, *supra* note 29, at 154.

¹⁰⁰ Substituting the President for the executive or, for that matter, substituting the executive for the class of government actors that are not courts or agents thereof, requires some simplifying assumptions. It assumes at the federal level at least that all

whether an act of Congress is unconstitutional, the executive may be influenced, but is not bound, by any congressional decision on that subject.¹⁰¹ I will refer to this arrangement as executive review. This Part deals with two objections: first, that executive review does not really rest on a persuasive reading of the constitutional text and, second, that whatever the document seems to say, executive review is such a bad idea that the Constitution cannot possibly mean it. Neither objection is well founded.

A. *Everyone Review*

Judge Frank Easterbrook, a proponent of executive review, calls the *Marbury*-like logic that leads to it “arid.”¹⁰² My version of that logic is, by design, exceptionally desiccated. It works for everyone—William Marbury, John Marshall, and Thomas Jefferson—because it is about how to tell what the law is. Anyone may want to know that, and officers of government who are not judges need to know that in order to do their jobs. In particular, the chief of the nonjudicial operational branch is enjoined to take care that the laws be faithfully executed.¹⁰³ That would be tricky if one could not identify the law.

The simplest way to reject executive review is to reject judicial review, finding a finality rule in favor of Congress’s determinations that its statutes will be legally effective. Those who would retain judicial review while rejecting executive review, however, must come up with some way of defeating the symmetry on which my argument relies. A finality rule that operates against the

government actors who do anything legally significant exercise one of the three powers and that the President is the chief of those who exercise the executive power. I will not try to provide a new account of what the latter assumption means. Any such account would itself focus on finality rules, according to which inferior executive officers are to act in accord with the President’s decisions, including his decisions on legal issues, whatever the officers’ views may be. Finality rules in favor of the President within the executive, it should be noted, are not inconsistent with the principle that executive officers may be personally liable for their conduct according to legal standards set, not by the President, but by the courts. An inferior officer who finds the risk of later judicial disapproval too high can leave.

¹⁰¹ The executive determination of constitutionality is to be independent of Congress. Whether it should be independent of the courts is another question, as discussed in more detail below. See *infra* notes 130-133 and accompanying text.

¹⁰² Easterbrook, *supra* note 13, at 922.

¹⁰³ U.S. Const. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

President but not the judiciary would fit the bill, and some find such a rule in the very requirement on which I just relied, the Take Care Clause.¹⁰⁴ One version of this argument is textual: “Laws” include acts of Congress whether consistent with the Constitution or not, so the President is required to execute them.

“Laws” can refer either to duly enacted legislation or to duly enacted legislation that is consistent with the Constitution. The latter usage is employed in saying that an unconstitutional statute is not law. But if “laws” includes all acts of Congress, then the Take Care Clause imposes on the President an impossible obligation when a statute is logically inconsistent with the Constitution. A bored Congress might pass a statute instructing the President not to trouble it with any more information on the state of the Union. The Constitution requires even the most taciturn of chief executives, however, to communicate that information.¹⁰⁵ The President cannot faithfully execute both the Constitution and that statute.

Probably more important to the opponents of executive review is the nontextual argument that the Take Care Clause was designed to exclude a presidential power to dispense the operation of laws. Refusing to execute an unconstitutional statute, goes the reasoning, would be an exercise of the dispensing power.¹⁰⁶ The comparison is inapt, however, because executive review is limited to unconstitutional laws as a dispensing power is not. Jefferson ended prosecutions under the Sedition Act.¹⁰⁷ In doing so, he was not acting like James II.¹⁰⁸

¹⁰⁴ *Id.*; e.g., May, *supra* note 13, at 873-74.

¹⁰⁵ “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .” U.S. Const. art. II, § 3.

¹⁰⁶ May, *supra* note 13, at 869-73, 893-95.

¹⁰⁷ See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 268 (1994).

¹⁰⁸ May rests his argument against nonenforcement of laws the President thinks unconstitutional in large part on the absence of a dispensing power. His position and mine do not meet one another head on because he seems to be concerned with the subjective expectations that prevailed at the time of the framing rather than with the meaning of the Constitution:

If we were to examine the Constitution without the light shed by the records of the Federal Convention, without the input of the state ratifying conventions, and without even a glance at the British history from which the Founders drew inspiration—in short, if we were to read the Constitution in a vacuum—the

Whether or not Jefferson behaved like a Stuart monarch, opponents would respond, many presidents vested with executive review would do so. They would trump up constitutional objections to statutes with which they disagreed. By this logic, however, judicial review is also illegitimate because judges can trump up objections to statutes they do not like. Furthermore, legislative finality is excluded because Congress can pass statutes it likes but knows to be unconstitutional. All power can be abused, but someone must have power if there is to be government. Executive review exercised in good faith is different from presidential authority to suspend the laws, just as judicial review exercised in good faith is different from judicial authority to rewrite the Constitution.

Another way of breaking the symmetry is to focus on what is unique to the judiciary. Whatever it is that authorizes judicial review might be limited to the courts, so that the executive equivalent constitutes a usurpation of the judicial power. But there is no inconsistency between executive nonenforcement of statutes and final decision on constitutional questions by the courts. Those questions, in fact, are independent of one another. As I have stressed, courts have no monopoly on needing to know what the law is. The Take Care Clause tells us that, and Article VI's requirement of allegiance to a Constitution that calls itself law reinforces the conclusion. If the judiciary has a unique role, it is not in resolving legal questions but in doing so finally. The courts and they alone, one might think, can provide an answer to a legal question that must be accepted as correct by future actors.

Executive review as presented here is consistent with the principle that in general only courts are final. I do not suggest that the judiciary normally would be bound by an executive determination of validity or invalidity. Indeed, executive review is consistent with the principle that once the courts resolve a dispute, the executive must respect that resolution. If that principle is correct, then the

logic of *Marbury* might suggest that we are to "equate[] the President with the judges in ability and authority to set the Constitution over a statute."

May, *supra* note 13, at 891 (quoting Easterbrook, *supra* note 13, at 922). May explains that the framing-era record is "virtually devoid of evidence suggesting that the President was to enjoy" a power similar to judicial review. *Id.* at 891-92. As he notes, the record is not actually void of such evidence because James Wilson urged a form of executive review, relying on the same logic that leads to judicial review. *Id.* at 892 n.116.

President, confronted with an unconstitutional statute, would not execute it until a court told him to do so. At the heart of executive review is the claim that Congress cannot bind the President with its judgments of constitutionality because it cannot bind anyone. That claim about the legislature leaves open questions concerning the other two branches and the relations between them. It leaves open both the question of the binding effect of the courts' judgments, which finally determine the entitlements and obligations of the parties to a lawsuit, and the more controversial question of the binding effect of their precedents, which under a system of case law have an effect on nonparties similar to that of statutes.

Courts are not unique in reaching legal conclusions. They may be unique, or nearly so, in reaching finally binding legal conclusions, but the latter special role accommodates executive review as I understand it.¹⁰⁹ Perhaps, though, the courts are unique in that they alone must always determine legal questions for themselves. *Marbury* may seem to stand for that proposition. In that case the Court made up its own mind about legal questions associated with actions of both of the other two branches.¹¹⁰ It decided that Congress's statute was invalid because inconsistent with the Constitution and that President Jefferson's conclusion that *Marbury* had never been appointed was erroneous.¹¹¹ That exercise of the judicial power might reflect the principle that courts alone are not bound by prior decisions reached by other government actors.

Or it might not. It is not in fact the practice of American courts always to decide legal issues for themselves. Assume that A sues B on a contract, and B gets judgment on the grounds that the contract does not require the performance A seeks. In later litigation between A and B, that is normally what the contract means, whether the later court thinks it means that or not. Judicial acceptance of legal conclusions reached elsewhere is as common as preclusion. Judicial practice reflects, not the principle that courts

¹⁰⁹ The current Supreme Court does not maintain that only it may resolve legal questions in a way that binds future actors. When the Senate concludes that an impeached officer's conduct constitutes a high crime or misdemeanor, that decision is final. *Nixon v. United States*, 506 U.S. 224, 237-38 (1993).

¹¹⁰ *Marbury*, 5 U.S. (1 Cranch) at 157.

¹¹¹ This point is stressed in Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 7-14 (1983).

cannot be bound, but the principle that they can bind. If as a general matter only they can do that, then, in general, Congress and the executive cannot bind either courts or one another and there will be both judicial and executive review.

The difference between the executive and the judiciary much more plausibly has to do with the finality rules that work in favor of the latter than with any different relation to properly enacted federal statutes. In order to break the symmetry between executive and judicial review we would need a derivation of judicial review wholly different from the one I present, and indeed different from John Marshall's. Both Marshall's argument and mine rely on the principles that identify the applicable law and in particular on the notion that the Constitution gives rules that limit the effectiveness of statutes. A dramatically different approach would not derive judicial review from any such argument and in particular would not hold that the Constitution is the kind of hierarchically superior law contemplated by the Supremacy Clause. Instead it would treat judicial review as a political power to nullify previously valid laws. Such a power would resemble the presidential veto. It would repeal rather than block the adoption of laws, however, and it could not be overridden.¹¹²

The Constitution manifests no such political authority in the courts. It conveys to the federal judiciary only the judicial power, and to the state judiciaries it conveys no power at all. It does impose on the state courts a duty not to enforce some laws, but it does so by invoking the hierarchical superiority of some sources in the law-determination process.¹¹³ Nevertheless, one might think that in practice this is how things work in America, and that it explains why there is no executive review: Under the Supremacy Clause statutes supersede the Constitution except that the judiciary is authorized and apparently required to annul such laws.¹¹⁴

¹¹² Justice Gibson regarded judicial review as such a political power, an addition to the Constitution like the veto rather than a result of its other components, and rejected it because no such power was granted to the Pennsylvania courts with respect to Pennsylvania law. *Eakin*, 12 Serg. & Rawle at 346-47 (Gibson, J., dissenting).

¹¹³ U.S. Const. art. VI, para. 2.

¹¹⁴ On this hypothesis, a valid law supersedes the Constitution the way a later inconsistent law supersedes an earlier one.

This Article is concerned with the Constitution and not much with the practices that have developed under it. In any event, the conduct of American courts is not fully consistent with the principle that they are authorized to unenact statutes they find unconstitutional. When a court decides that a statute conflicts with the Constitution, it gives judgment as if the statute had never been valid. It decides the case, not as if the court just wiped the statute away, but as if the statute had never been enacted, which is just what the system of “everyone review” would have it do. Shawn Eichman looked at the Flag Protection Act,¹¹⁵ decided that it was invalid because of the First Amendment, and acted as if it imposed no obligation on him.¹¹⁶ The Supreme Court decided that Eichman had been right about that conclusion the moment he burned the flag. Eichman walked.¹¹⁷

Executive review is consistent with the Constitution’s text and structure. Indeed, it is implied thereby.

B. Executive Review Compared to What?

Besides text and structure, constitutional interpretation calls for at least a little common sense. If a system of executive review seems completely outlandish, then we should look at the text and structure afresh. In subjecting executive review to the test of common sense, though, the question must be, compared to what? Executive review results from the premise that the Constitution provides criteria for the validity of duly enacted statutes and that the President is not bound by presumed congressional determinations of constitutionality any more than the courts are. The alternative is to say that the President is bound to accept Congress’s determination and therefore to execute all statutes, whatever his

¹¹⁵ Pub. L. No. 101-131, 103 Stat. 777 (1989) (codified at 18 U.S.C. § 700 (1994)).

¹¹⁶ *United States v. Eichman*, 496 U.S. 310 (1990).

¹¹⁷ *Id.* The form of “legislative” power that comes to the courts through their ability to decide cases and set precedents thus differs from the form possessed by a legislature. Courts usually act consistently with the premise that they are resolving disputes about law they did not make:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

view of their constitutionality, at least until a court tells him otherwise. I will call this alternative arrangement the ministerial executive, or ministerialism. Ministerialism has no edge on executive review on the common sense scale.

If there is executive review, then as between the President and Congress the former will for practical purposes have the last word with respect to the constitutionality of enacted statutes.¹¹⁸ If the executive is ministerial then, as between it and the legislature, the legislature determines questions of constitutionality. One factor in choosing between executive review and ministerialism therefore is the relative tendency of these two branches to follow the Constitution. If the President is more likely to ignore constitutional statutes than Congress is to enact unconstitutional ones, then considerations of policy would favor the ministerial system. If the opposite tendency prevails, then executive review would be better.

Congress and the President might differ on this score if one is more competent in deciding constitutional questions or more likely to do so in good faith. This is an empirical question of political science, the answer to which may change systematically over time and vary randomly with personalities: There can be strong and lawless Speakers of the House, dull-witted and gullible presidents. Proponents of the ministerial executive as a policy matter need to show that Congress is generally less likely to err than the President. It is hard to see why that would be.

Congresses and presidents are political and also bound to the Constitution. There is nothing in that situation to make one more likely than the other to decide constitutional questions honestly. That leaves the question of competence: Which is more likely to judge the Constitution correctly? The most prominent difference between the two as decisionmaking institutions is one of numbers. The executive power is vested in a President of the United States, whereas Congress is composed of a large number of people in two houses, two-thirds of each house being necessary to override a presidential veto on constitutional grounds. If we confine ourselves to situations in which a President is called on to enforce a

¹¹⁸ The President will be final in a practical sense, not through the operation of a finality rule. Congress speaks and the executive acts. Of course, in this sense the executive is always final.

statute enacted over his veto, does the difference in numbers make it likely that the two-thirds vote was right and the President wrong?

Maybe appellate courts, the institutions that routinely decide disputed questions of law, point the way here. They are almost invariably collegial bodies although none today is the size of the Senate, let alone the House. It is not hard to see why one would want a body composed of at least several individuals. Any single individual, even one who has passed through the selection process for national political office, might have an idiosyncratic view on an issue. Moreover, collegial courts are supposed to be able to take advantage of the expertise of their different members, producing a chain that is as strong as its strongest link.

The choice, however, is not between an ordinary one-judge court and a tribunal like the Supreme Court of the United States. It is between the President and Congress. The former differs from any American judge in important ways. First, the decisionmaking process on major legal questions within the executive branch has many of the advantages of a collegial court. The President can draw on more than one view and preside over genuine debate.¹¹⁹ Second, presidents have a hard time hiding. Everything they do is subject to close observation and analysis, and they cannot take cover behind other members of a majority. The sole responsibility that comes with presidential unity provides strong incentives to think carefully about important issues or to make sure that subordinates (who will suffer if the President does) have done so. No doubt presidents often fail to do that, and no doubt judges routinely decide issues off the top of their heads.

So much for the one, what of the many? Congress is well adapted to political horse-trading and compromise, to the representation and accommodation of competing interests. Its numbers make impossible the kind of discussion one would hope characterizes an appellate court. Where compromise is impossible it is hard to see

¹¹⁹ President Washington, for example, made his decision to sign legislation creating the Bank of the United States with the benefit of an exchange between Thomas Jefferson and Alexander Hamilton. See Thomas Jefferson, *Opinion on the Constitutionality of a National Bank*, in 1 *Documents of American Constitutional & Legal History* 132 (Melvin I. Urofsky ed., 1989); Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, in 1 *Documents of American Constitutional & Legal History*, supra, at 136. While modern Presidents may not have advisers of that caliber, they do have plenty of good lawyers available.

senators and representatives seeking wisdom from one another. More likely a leader would emerge to whom others would defer.¹²⁰ Moreover, responsibility is diffused in a very large body. The Constitution uses the smaller component of Congress as a court only in extraordinary circumstances, circumstances in which political judgment and accountability bulk large, probably larger than strict legal accuracy.¹²¹

This comparison between Congress and the President is probably a wash. It may seem, though, that it is the wrong comparison. Executive review leads to lawlessness, one might argue, not because presidents are less scrupulous than Congresses, but because they are less scrupulous than courts. The choice is really between executive review and judicial review, and courts are more likely to follow the law.¹²²

In its simplest form this argument is simply false. Executive review can coexist with the principle that the courts are final where they have jurisdiction. Suppose that Congress adopts a program of cash bounties to named individuals and confers on those individuals a cause of action against the government if the bounties are not paid. With executive review, if the President concludes that the spending program is not for the general welfare or otherwise

¹²⁰ Congress's internal structure reflects the difficulties of genuine deliberation in a large body and follows the approach of delegating substantial responsibility to small numbers of people who are expected to provide leadership. The committee system assigns leading roles to select groups of senators and representatives who can develop expertise in their special field. In the first House of Representatives, which did not have committees organized by subject matter, the debates on constitutional questions were apparently dominated by a small number of representatives. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 118 (1997)

¹²¹ *Id.* at 277 (1997) (noting that Senate proceedings on impeachment are by design political).

¹²² Whether that is true is, of course, another story. According to Alfange, "One thing that our experience with Vietnam, Watergate, and Iran-Contra has taught us is that the one branch of government that must not be vested with unreviewable authority to interpret the Constitution is the executive . . ." Alfange, *supra* note 23, at 432. Those with different experiences have different views. In 1932, Court critic Louis Boudin wrote: "After the review of the actual course of adjudication by the United States Supreme Court, it would seem almost absurd to discuss seriously the contention advanced in support of the Judicial Power that it provides for a Government of Laws instead of a Government of Men." 2 Louis B. Boudin, *Government by Judiciary* 531 (1932).

unconstitutional, he will not implement it. The beneficiaries can then sue, and the courts can decide the constitutional question.

At this point some theories of executive review might suggest that the President should not obey a decree in favor of the beneficiaries.¹²³ My theory has no such implication because it rests, not on the general notion that no branch can bind another, but on the more specific claim that Congress does not bind the other two branches with its presumed decisions as to the constitutionality of its statutes. As I have been at pains to point out, judicial finality is much more plausible than congressional finality because courts are in the last-word business on questions of legal interpretation and legislatures are not.¹²⁴

In fact, in the example I have given, it is ministerialism, not executive review, that would defeat judicial involvement. If the executive is ministerial, then the President must pay the bounties whatever he thinks of the legal question. Under current jurisdictional doctrine, however, it is very unlikely that anyone would be able to seek judicial review of the expenditure, except possibly on the grounds that it violates the Establishment Clause of the First Amendment. The Establishment Clause is an exception to the general principle that taxpayers do not have standing to challenge spending that they claim is unconstitutional.¹²⁵

Executive review as I have derived it is consistent with ultimate judicial resolution of particular disputes. It is also consistent with the principle that judicial precedents are somehow binding on the other branches of government. If they are, then in exercising review the President must treat those precedents as correct. Similarly, if the executive is ministerial and precedent is binding then Congress, in deciding whether statutes are constitutional, must act in accordance with the case law and may not adopt a statute inconsistent with the judicial view.¹²⁶

¹²³ See Paulsen, *supra* note 107, at 276-84.

¹²⁴ See Section II.B.

¹²⁵ The general rule is that of *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), which is qualified by the special Establishment Clause principle of *Flast v. Cohen*, 392 U.S. 83, 101-03 (1968), which itself is limited by *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 489-90 (1982).

¹²⁶ It is not clear what ministerialism calls for when Congress adopts a statute that is unconstitutional under applicable precedents. Most advocates of that approach probably would say that the finality rule in favor of the courts trumps the finality rule

This conclusion may surprise those for whom President Jackson's veto of legislation to renew the charter of the Bank of the United States is the classic example of a President exercising constitutional judgment.¹²⁷ The veto was notable because the President at one point rejected the authority of *M'Culloch v. Maryland*.¹²⁸ As executive review is understood here, however, Jackson's veto was not an instance of it at all. I set out to answer the question posed in *Marbury*, which concerns the legal effectiveness of statutes and hence the binding nature of congressional determinations of constitutionality. It is enough to answer that question to show that such determinations have no binding authority.

The argument that they do not rests on the claim that the power to legislate does not entail the power finally to decide constitutional questions that arise while legislating. It is tempting to generalize from that conclusion to the principle that none of the three branches can ever bind another on an interpretive question. That more general principle supports President Jackson's conclusion that he was not bound by the Court's precedent. From there it is possible to generalize still further, invoking the separation of the branches for the proposition that none can ever bind another. Attorney General Bates provided such reasoning in favor of President Lincoln's decision to ignore a writ of habeas corpus issued by Chief Justice Taney.¹²⁹

in favor of Congress so the President should treat the statute as invalid.

¹²⁷ Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents, 1789-1897 at 576 (James D. Richardson ed., United States Congress 1897). President Jackson stated:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.

Id. at 582. Whether the last quoted sentence is correct depends on the Constitution's finality rules.

¹²⁸ Id. at 581-82. *M'Culloch v. Maryland*, in which the Court upheld the constitutionality of the Bank of the United States, appears at 17 U.S. (4 Wheat.) 316 (1819).

¹²⁹ John Merryman had been detained by the federal military. Chief Justice Taney issued a writ of habeas corpus, directing that Merryman be brought before him so that the legality of his imprisonment could be adjudicated. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). In response, Attorney General Bates discussed the constitutional structure at some length, stressing that the branches are independent and that none is sovereign. 10 Op. Att'y Gen. 74, 76 (1861). When he came to

Symmetry can be beautiful. The Constitution is in some ways symmetrical, but in other ways it is not. Congress, the President, and the federal courts are each vested with one of the powers of government, and none is generally subjected to the direction of the others. It is natural to describe that arrangement as separation of powers and to say that the three branches of government are independent of one another. But independence is a way of describing the structure, not a concept referred to in the provisions that actually constitute the structure. Neither the President nor the courts work for Congress the way a military officer works for the Commander in Chief, but the President must faithfully execute valid statutes, and the courts must decide cases in accordance with them. The three powers are such as to interact with one another, and those interactions are often asymmetrical. The particular powers in question, not any general principle of independence, must determine the nature of those interactions.¹³⁰ Hence we must answer the question whether and when the executive is bound to follow what the courts have said by looking at the relations between the judiciary and the executive, not simply by looking at the relations between those two branches and the legislature.

Courts in particular are at the very least in the business of binding private parties, and the executive is in the business of enforcing judicial decrees. Suppose that A sues B on a contract in federal court and B defends on the basis of a state stay law that the court finds to be inconsistent with the Contracts Clause.¹³¹ If A has an otherwise valid claim, the court is to give A judgment. It is highly plausible to say that if A then needs help in enforcing the judg-

the particular question of the President's obligation to comply with a writ of habeas corpus issued by a federal judge, he rested his conclusion that the President need not comply on the principle "that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other." *Id.* at 85. The executive did not comply with the writ. See Paulsen, *supra* note 107, at 278-80.

¹³⁰ Paulsen derives his conclusion that the executive has what he calls the *Merryman* power "to execute or decline to execute judgments rendered by courts," Paulsen, *supra* note 107, at 223, from his premise that the "coordinacy" of the three branches of the federal government is one of the fundamental political axioms of our federal Constitution." *Id.* at 228. Coordinacy is gloss, not text. The danger of confusing those two is one reason I have not formulated the inquiry here in terms of departmentalism, the principle that each branch of the national government is supreme within its sphere. Such principles are of limited use in answering the really interesting questions concerning the spheres' boundaries and what happens when they overlap.

¹³¹ U.S. Const. art. I, § 10.

ment, the federal executive is to give that help whatever the President's views on the constitutional question may be. If the executive does indeed have that obligation, it is because of a finality rule in favor of the courts. The possibly tricky question in *Ex Parte Merryman*¹³² was whether that logic applies when the judicial order is itself directed to the executive. The very tricky question with respect to the Bank veto concerned the binding power, not of the courts' judgments, but of their precedents. While there is much to be said on behalf of President Jackson's position, little of it really has to do with post-legislative review in the *Marbury* sense.¹³³

Despite its associations with challenges to judicial supremacy, executive review can be derived by an argument that is neutral concerning the relations between the judiciary and the other branches and hence compatible with any resolution of that issue. That is not to say that we are done with all challenges to executive review based on a preference for judicial resolution of constitutional questions. There is a more sophisticated form of that argument. As noted above, executive review can coexist with judicial finality and ministerialism can in certain circumstances defeat it.¹³⁴ One nevertheless might think that on balance courts will ultimately resolve more questions if the President must execute all statutes until the judiciary tells him otherwise. There is really no good reason to think that, however. The two regimes do differ in the circumstances under which they lead to a final resolution by the judiciary. That difference arises because executive review and ministerialism differ systematically along one of the axes which, in turn, determine whether the courts will reexamine what the executive has done. That axis is the difference between executive action and inaction, between implementation and non-implementation of statutes.

Under executive review some statutes are not executed that would be carried out were the executive ministerial. One rule produces

¹³² 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). See *supra* note 129.

¹³³ Both of these questions are treated in penetrating detail in Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267 (1996). David Engdahl maintains that John Marshall himself did not think that the courts' precedents finally bound the other branches. David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 *Duke L.J.* 279, 280-82 (1992).

¹³⁴ See *supra* notes 122-125 and accompanying text.

action, the other inaction. Under certain circumstances that difference will spell the difference between judicial and nonjudicial finality.¹³⁵ As a result of the Court's jurisdictional doctrines, sometimes action is reviewable and inaction is not, whereas other times inaction is reviewable and action is not. Criminal statutes generally fall into the first category. If a ministerial executive prosecutes despite constitutional reservations, the courts will decide the constitutional issue. If the constitutionally scrupulous executive exercises review and does not prosecute, typically no one will be able to challenge that decision in court.¹³⁶ Contrariwise, as noted above, spending programs are often such that beneficiaries can challenge inaction in court whereas taxpayers cannot challenge action.¹³⁷ Constitutionally dubious spending programs administered by a ministerial executive often will not come before a court.

To be sure, there are situations in which the availability of judicial review does not depend on whether the statute has been carried out. Under current doctrine, for instance, Congress can impose on a regulatory agency a nondiscretionary duty to issue regulations, a duty that can be judicially enforced by regulatory beneficiaries. Regulations can, of course, also be challenged by those to whom they apply. Therefore, when a judicially enforceable duty to regulate is in place, the executive will litigate if it does and litigate if it does not, and both executive review and ministerialism will lead to an ultimate judicial decision.¹³⁸ There probably remain some circumstances in which neither action nor

¹³⁵ The difference is not between judicial and executive finality. Even though it is the executive and not the legislative branch that acts, under ministerialism the executive acts on the basis of a legislative decision that it treats as final. In that circumstance, the legislature is final even though the executive is acting, just as the judiciary is final when its judgments are actually carried out by executive officers.

¹³⁶ See, e.g., *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973).

¹³⁷ See *supra* note 125 and accompanying text.

¹³⁸ Section 304 of the Clean Air Act, 42 U.S.C. § 7604 (1994), for example, provides that the Administrator of the EPA may be sued in federal district court to compel the performance of a nondiscretionary duty such as the issuance of regulations the promulgation of which is mandatory. Judicial review of other actions of the Administrator, including review of the substance of regulations, is exclusively in the Court of Appeals for the District of Columbia Circuit. *Id.* § 7607 (1994). The courts have developed tests to determine whether an action is one to compel the performance of a duty, such as making a decision, or to review the content of an action that has already been taken. See *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899-900 (2d Cir.), cert. denied, 493 U.S. 991 (1989).

inaction will come to court. Statutes regulating the conduct of diplomatic negotiations most likely fall into this category.¹³⁹ When such circumstances arise, executive review will make the President's decision on the constitutional question final and ministerialism will make Congress's view final, assuming one attributes to Congress the view that its statutes are consistent with the Constitution.¹⁴⁰ (As noted above, I am less certain than many scholars that statutes necessarily embody conclusions as to constitutionality.¹⁴¹) The two operational branches, however, must make a judgment of validity before treating a statute as law.¹⁴²

¹³⁹ See *Can v. United States*, 14 F.3d 160, 162-63 (2d Cir. 1994) (discussing judicial reluctance to become involved in questions of foreign relations, including negotiations with foreign governments).

¹⁴⁰ Under executive review, the executive's judgment that a statute is unconstitutional is followed until a court says otherwise, if ever. With the ministerial executive, the statute is followed until a court says otherwise, if ever.

¹⁴¹ See *supra* notes 77-82 and accompanying text.

¹⁴² So with executive review:

1. Where both action and inaction are judicially reviewable, an executive determination of invalidity will be implemented at the outset, and the position finally adopted will be the judiciary's.
2. Where action but not inaction is judicially reviewable, an executive determination of unconstitutionality will be final.
3. Where inaction but not action is judicially reviewable, an executive determination of invalidity will be implemented at the outset, and the final position will be the judiciary's.
4. Where neither action nor inaction is judicially reviewable, an executive determination of unconstitutionality will be final.

While with the ministerial executive:

1. Where both action and inaction are judicially reviewable, the legislature's determination of validity will be implemented at the outset, and the position finally adopted will be the judiciary's.
2. Where action but not inaction is judicially reviewable, the legislature's determination of constitutionality will be implemented at the outset, but the judiciary's position will be final.
3. Where inaction but not action is judicially reviewable, the legislature's determination of validity will be final.
4. Where neither action nor inaction is judicially reviewable, the legislature's determination of validity will be final.

These distinctions between ministerialism and executive review can thus be schematized in the following way:

If the situations in which executive action but not inaction will go to court outnumber those in which inaction but not action will lead to judicial decision, then the ministerial executive will produce more judicial finality than executive review. In deciding what is most likely, however, it is essential to remember that were presidents to embrace executive review, Congress would have substantial authority to ensure that the constitutionality of its statutes could come before the courts in spite of executive inaction. Congress often can create causes of action in favor of private beneficiaries against the government.¹⁴³ When actions against the government were not available or were otherwise undesirable, Congress often would be able to include in its statutes rights of action among private people that would bring the constitutional question before the courts. If the executive is ministerial, of course, Congress will have an incentive to minimize the possibility that its programs will undergo judicial scrutiny. It could seek to shape behavior through spending rather than direct regulation, for example.

All this is not to say that executive review would be desirable for a country that was writing a new Constitution. Nor is it to say that executive review is, as a policy matter, the most desirable adaptation to the way American government actually operates today. Perhaps some intermediate rule, such as one under which the executive enforces statutes unless they are definitely unconstitutional,

| Availability of Judicial Review | Executive Review | Ministerialism |
|--|------------------|-------------------|
| Executive Action and Inaction Reviewable | Judiciary final | Judiciary final |
| Executive Action Reviewable, Executive Inaction Unreviewable | Executive final | Judiciary final |
| Executive Action Unreviewable, Executive Inaction Reviewable | Judiciary final | Legislature final |
| Executive Action and Inaction Unreviewable | Executive final | Legislature final |

¹⁴³ See supra note 138 and accompanying text.

would be most desirable.¹⁴⁴ Presidents also could be disciplined by a rule requiring enforcement of any statute that a particular President had signed rather than vetoed; the demand to veto or shut up could limit presidential manipulation and sand-bagging. Proponents of judicial primacy likely would endorse a system under which the executive did what was necessary to bring about judicial review, enforcing or not as the jurisdictional doctrines require.¹⁴⁵

This is an argument I will not enter into, other than to urge that executive review be its starting point, as the Constitution's text generally is the starting point in debate over the operation of American government.

V. CONCLUSION: THE SANCTION OF NULLITY AND THE LAST WORD

Having rejected congressional finality, I have been agnostic as to the extent of judicial finality. This concluding observation draws on the categories employed in reassessing *Marbury* to generate a perspective on the latter issue.

This article deals separately with the issues raised by Gibson and Bickel. The answers to the questions they pose for John Marshall have, however, implications for one another. It would be very strange to draft a Constitution that purported to make some acts of Congress legal nullities while making Congress final as to whether those acts were nullities. Moreover, the configuration under which Congress has the power to supersede the Constitution but a duty not to do so is very similar to that under which Congress finally decides on the consistency of its acts with the Constitution. In both cases a statute must be treated as legally effective but the legislature that made it can be subject to extra-legal censure. Practical-minded people like John Marshall, John Gibson, and Alexander Bickel—the last an academic, to be sure, but one who was concerned with great questions of constitutional design and political legitimacy, not hair-splitting distinctions—easily could treat them as the same issue.

¹⁴⁴ Thayer proposed that the courts adopt such an approach. Thayer, *supra* note 23, at 135-38.

¹⁴⁵ May suggests combining Thayer's clear mistake rule with an imperative for judicial resolution: "It would therefore not be incompatible with the original scheme for a President to ignore a clearly unconstitutional law if there is no other way for judicial review to occur." May, *supra* note 13, at 987.

Nevertheless, they are separate questions for interpretive purposes because their answers are to be found in different constitutional subsystems. The provisions of the Constitution that deal with the legal status of statutes are largely separate from those that allocate final decisional authority. Whether one thinks of judicial review as essentially a question of hierarchical sources of law or as one of the allocation of decisionmaking authority among the branches and levels of government depends on the set of provisions to which one looks. Article V and the Supremacy Clause frame the question in terms of contending sources of law, whereas the contrast between legislative and judicial power frames it as a question of who decides.

It is natural for someone familiar with the American debate over judicial review to think that those components of the Constitution should be closely integrated. There should be a rule allocating final decisionmaking authority on the question whether a statute is valid. Someone should have the last word on that question, not just in the context of a specific dispute like a lawsuit, but across the board. That someone might be Congress, the thinking would go, but if not it should be the judiciary. Yet it is entirely likely that the Constitution's finality rules do not mesh neatly with the problem of legal hierarchy. If the finality rules are about the resolution of concrete disputes and the rules of legal hierarchy are about the validity of statutes in all situations, there will be no one who can decide that a statute is generically valid or invalid, as opposed to deciding that question in a specific context. Even in a system with strong judicial finality as to cases and controversies, therefore, there may be no one who determines, as a general matter, whether an act of Congress is legally effective.

Uniformity of judicial decision over time is to an important extent a function of rules of precedent, continuity of personnel, and appellate hierarchies.¹⁴⁶ Those elements are the infrastructure of judicial lawmaking. If the authority of precedent is weak, personnel unstable, and the judicial hierarchy significantly decentralized, courts will decide concrete disputes more than they decide abstract questions of law. Depending on one's views of institutional design,

¹⁴⁶ Those three factors need not be independent of one another. It is entirely possible that the rules of precedent actually followed by courts are a result of continuity of personnel and appellate hierarchies.

this may be all to the good. If finality is mainly needed on very specific questions like who owns Blackacre and whether A goes to jail, and if the power associated with the final decision of abstract questions is dangerously great, then it might be desirable to have finality only as to particular and not general questions, and therefore to have little judicial lawmaking.

Hence it is important not to be misled by taking the problem of congressional finality as the model for finality in general. Congress makes law as a legislature makes it, which is to say by announcing abstract rules. If in the process it were resolving an interpretive question finally, it would be an abstract question. Judicial review rests on the conclusion that Congress does not do so, in part because finality is to be found elsewhere. Whether that finality, the finality of the courts, is abstract or concrete is another question.

