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AMBITION'S PLAYGROUND

Paul E. McGreal

"Ambition must be made to counteract ambition."
- The Federalist No. 51 (James Madison)

AMBITION was an essential ingredient in James Madison's prescription for good government. The sentence above describes the system of constitutional government Americans have inherited from Madison's generation. Day in and day out, four combatants—the three branches of the federal government and the People—duke it out in the prescribed arena known as the American system of checks and balances. Each combatant's ambition—their desire for public or private power and for satisfaction of personal wants or needs—puts them on guard against actions of the others. If any combatant tries to grab power at the expense of another, the others are constitutionally armed to defend themselves. It is in the fire of this furnace, not in the ether of academic theory, that the Constitution's meaning is forged.

Yet, constitutional scholars from such varied positions as Laurence Tribe and Robert Bork have, at one time or another, joined the hunt for a grand theory of constitutional law. Like the elusive Grand Unifying Theory sought by physicists, a grand theory of constitutional law would ideally organize and discipline constitutional adjudication, and would explain and justify all constitutional results that like-minded members of the community of constitutional lawyers deem

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1. See Laurence H. Tribe, American Constitutional Law vii (2d ed. 1988) (preface begins with: "This treatise ventures a unified analysis of constitutional law.").
Many grand theorists argue that their own theories have strong claim to legitimacy because they are either most consistent with or required by the Constitution. Admittedly, this is a tall order for any such theory, and no author has yet made a persuasive claim to have created a grand theory that does so.

This Article takes a contrary view: The Constitution does not require or prefer any particular theory of constitutional interpretation. Indeed, a rejection of grand constitutional theory can be inferred from aspects of the Constitution's structure and history.

4. See Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 Cardozo L. Rev. 201, 206 (1993) (describing "unified theory" of constitutional law as "any theory of constitutional law that attempts to unite, in some fashion, the two great domains of constitutional law, the system of rights and the system of structure"); see also Richard A. Posner, Overcoming Law 171-97 (1995). Judge Posner refers to such a theory as "top-down" legal reasoning, which he describes as follows:

   In reasoning from the top down, the judge or other legal analyst invents or adopts a theory about an area of law—perhaps about all law—and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the cases accepted as authoritative within the theory.

   *Id.* at 172. For other views on constitutional theory, see generally Michael C. Dorf, Create Your Own Constitutional Theory, 87 Cal. L. Rev. 593 (1999) (setting forth his idea that constitutional theories emerge from contextual judgments about particular cases), and Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Cal. L. Rev. 535 (1999) (arguing that, in addition to being based on the text of the Constitution and its surrounding practice, theory should maintain the rule of law, preserve fair opportunity for political democracy and protect an acceptable set of rights).

5. For example, Robert Bork has argued that we must search for the "correct" way to interpret the Constitution, or at least a method that yields "outcomes that can be called correct" in the large run of cases. Robert H. Bork, The Tempting of America: The Political Seduction of the Law 140-41 (1990).

6. See Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 8 (1998) ("No method of constitutional interpretation will yield easy or certain answers; it is proper for us to be wary of any theory that purports to suggest otherwise."); Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1766 (1994) ("What theory could possibly provide a persuasive and coherent rationale for the entire body of American constitutional law as well as provide persuasive guidance for all future cases?"); see also Posner, *supra* note 4, at 186-87 ("A comprehensive theory of constitutional law will infringe a multitude of deeply held commitments without being supportable by decisive arguments.").

7. As some have commented, the view set forth above could be called a form of grand theory. My response is that the approach offered in this Article is not a grand theory of constitutional law in the sense used above. See *supra* note 4 and accompanying text. The phrase "grand theory of constitutional law" has two important parts. First, as described above, a grand theory of constitutional law seeks a method or approach that directs the decision of particular cases. Ideally, the theory could be used to reach specific outcomes in specific cases, and the theory's proponents would criticize judges who deviate from the chosen method or approach. Second, also as described above, a grand theory of constitutional law seeks to show how the author's particular theory is either required by or most consistent with the Constitution and its history, text, structure, etc.
To be clear, my argument is not that the framers, ratifiers, or other founding decision-makers specifically rejected grand constitutional theory; they likely never considered the point. Rather, working from the government structure the framers established, their expressed understanding of certain institutions (for example, the qualifications and role of federal judges), and an understanding of law and legal reasoning, we can infer that the Constitution neither requires nor supports the quest for a grand theory of constitutional law.

Without a grand theory to guide them, how are judges to decide constitutional cases? The answer lies in a careful review of the Constitution's delicate system of interlocking powers: the system of checks and balances. This system, properly understood, merely anticipates that federal judges will fight for survival. Federal judges are in the position of the youngest son in a parable related by philosophy Professor Max Black. Of three siblings, the youngest son is neither faster nor stronger than his two brothers. If the youngest son is to defeat his two brothers in any contest, then he must rely on his analytical and psychological skills to outsmart them. He must always be at the ready to anticipate their moves and outfox them.

In our system of checks and balances, the judiciary plays the role of Professor Black's youngest son. Having neither the power of the purse nor the power of the sword, the federal courts must enlist the respect and aid of Congress and the President, as well as the acceptance (or tolerance) of the People, if their judgments are to have any effect. Judges must explain their decisions, including constitutional decisions, in a way that engenders support by, and not a retaliatory check from, the other branches of government or the People. This need for support pressures courts to settle on an

8. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 948 (1985). Indeed, this Article proceeds aware of Professor Martin Flaherty's warning about amateur historians misusing historical materials. See Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 563 (1995). Professor Rebecca Brown, however, has offered a concise statement of the role of history in constructing a current understanding of American constitutional government:


10. See The Federalist No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961); infra notes 190-193 and accompanying text.

11. As others have done, I use "the People" as a proper noun referring collectively to those people in the United States to whom the various bodies of
acceptable interpretive method, or at least acceptable solutions to individual cases. It is this pressure, not some specific method or grand theory, that the Constitution envisioned. The search for some overarching, legitimating theory or method of interpretation is a chimera.

This Article develops its thesis in three parts. Part I begins by analyzing constitutional structure and history in light of one of a federal judge's most contentious tasks—judicial review of constitutional questions. Many myths surround the debate about judicial review, such as the beliefs that judicial review means judicial supremacy or that judicial review is out-of-place in our primarily majoritarian government. These myths serve as a springboard for the discussion of checks and balances.

The most persistent myth surrounding judicial review, and thus the myth that occupies most of Part I, is the "counter-majoritarian difficulty." This myth has two parts: judicial review is "counter-majoritarian" because judges are not accountable to electoral majorities, and this presents a "difficulty" because American government prefers democratic, majority-based decision-making.

American government are accountable. See 1 Bruce Ackerman, We the People: Foundations 6 (1991); Joseph Goldstein, The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand 5 (1992). The phrase invokes the Preamble to the Constitution, which notes that ultimate sovereignty in the United States is lodged in the People. U.S. Const. preamble ("WE THE PEOPLE of the United States ... do ordain and establish this CONSTITUTION for the United States of America."). Of course, who is included in "the People" has expanded over time. See Richard B. Morris, The Forging of the Union: 1781-1789, at 173 (1987) ("The original Constitution we now recognize to have been basically a document of governance for free white propertied adult males.").

12. Professor Cass Sunstein's work on what he calls incompletely theorized agreements shows how judges who disagree on either constitutional method or theory can nonetheless agree on holdings and rationales in particular cases. See Cass R. Sunstein, Legal Reasoning and Political Conflict 37 (1996) ("When people diverge on some (relatively) high-level proposition, they might be able to agree when they lower the level of abstraction.").

13. Others have argued that constitutional scholars ought to abandon the search for a grand theory of constitutional law. See Posner, supra note 4, at 171-72; Lawrence Lessig, The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be, 85 Geo. L.J. 1837, 1837-39 (1997). Most notably, Professor Philip Bobbitt's influential works have urged that we abandon the quest for a normative justification respecting one interpretive methodology or another. See generally Philip Bobbitt, Constitutional Interpretation (1991) [hereinafter Bobbitt, Interpretation]; Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982) [hereinafter Bobbitt, Constitutional Fate]. Instead, when it comes to constitutional law, to paraphrase a popular commercial slogan, we ought to "just do it." Professor Akhil Reed Amar has expressed a similar attitude toward constitutional interpretation. See Akhil Reed Amar, A Few Thoughts on Constitutionalism, Textualism, and Populism, 65 Fordham L. Rev. 1657, 1662 (1997).

14. See infra notes 68-234 and accompanying text. This myth, partly because of its pedigree and entrenchedness in current constitutional thought, is the most difficult to dispel.
Proponents of the counter-majoritarian difficulty suggest that judges defer to the accountable branches of government on constitutional questions. The counter-majoritarian difficulty assumes that the Constitution prefers ordinary law-making by accountable legislatures over prevention of ordinary law-making by judges exercising judicial review. Part I explains the Constitution's structure and history, concluding that the framers had experienced democracy run amok in their state legislatures and were suspicious of ordinary democratic lawmaking. Under the Constitution's system of checks and balances, law-making was to be difficult and, consequently, rare. Within this system, federal courts were to be co-equal partners with Congress and the President in interpreting the Constitution, providing an essential check on federal governmental power. Further, judicial deference to the accountable branches is unnecessary: just as the judiciary may check the other branches, the other branches may check the judiciary. In order to avoid a check on its authority, the judiciary may defer to Congress and the President in certain cases, but it should do so only to preserve its authority, and not as a general principle of constitutional interpretation.

Part II explains that the checks and balances theory of judicial review, with its corollary of robust judicial review, reflects the best understanding of constitutional law's hoariest chestnut—Marbury v. Madison. The discussion also explains how the checks-and-balances approach to robust judicial review sheds new light on Marbury, the fount of judicial review.

Part III explains the implications of the checks-and-balances approach for theories and methods of constitutional interpretation. Judges will tend toward methods of argument that will maintain (or enhance) their power within the system of checks and balances and will avoid a retaliatory check by the other branches. Thus, while the system of checks and balances anticipates a need for reasoned interpretation, it does not require or prefer any specific theory or method of doing so. Historical sources show that many framers believed federal judges would have the skill and training of lawyers, and, thus, that those judges would "do law" while on the bench.

15. See 1 Ackerman, supra note 11, at 6-7 (explaining dualist conception of democracy that distinguishes between ordinary and higher law-making). Ordinary law-making is to be distinguished from fundamental law-making. Fundamental law is that law which creates and organizes a society's legal system, like a constitution. Conversely, ordinary law is that law which is made pursuant to the fundamental law, like statutes. See infra note 89 and accompanying text.

16. See infra notes 218-29 and accompanying text.

17. 5 U.S. (1 Cranch) 137 (1803).

18. As will be discussed later, the phrase "do law" refers to the idea that legal method is best described as the set of practices that lawyers, judges, academics, and other legal actors use in their professional work. See Victoria F. Nourse, Making Constitutional Doctrine in a Realist Age, 145 U. Pa. L. Rev. 1401, 1405 (1997) (stating
While the Constitution does not envision any particular method or theory of interpretation, it does anticipate that judges will do law as that practice is defined at any given time; grand constitutional theory is inconsistent with the Constitution’s design.

Constitutional scholars can play an important role within this system of checks and balances. Scholars can critique the courts’ work as attempts at doing law and try to better understand how judges do, in practice, decide cases and make law. We can also marshal empirical data that might be necessary to assess the efficacy of court decisions. Also, as legal scholars have done throughout history, we can critique the various methods of law and suggest changes to our prevailing practices. What we do not need, and what the Constitution does not require, is some overarching theory that ties together all cases in all areas of constitutional law. Such a theory is not only impossible (both descriptively and normatively), but it is irrelevant to our Constitution.

I. THE CHECKS AND BALANCES DEFENSE OF JUDICIAL REVIEW

Defenses of judicial review have proceeded along many lines. Some point to portions of the Constitution’s text—such as the Supremacy Clause—in support of judicial review. Others point to statements made during the drafting convention or the ratification period, including the Federalist Papers, as evidence that the drafters or ratifiers intended federal courts to exercise judicial review. Still
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others point out that state courts practiced judicial review before and after ratification of the Constitution.\textsuperscript{23}

This Article follows another approach. Articulation of the checks and balances approach will necessarily entail a defense of robust judicial review. This part articulates judicial review's integral role in the system of checks and balances. The first section begins with a critical review of the myth that judicial review will result in judicial supremacy, making the judiciary the only branch of government that can force its interpretation of the Constitution on other branches.\textsuperscript{24} By exposing the myth that robust judicial review leads to judicial supremacy, this section presents an initial view of how the system of checks and balances works in practice.

The second section addresses the objection that the Constitution nowhere grants federal courts the power of judicial review. While true, this objection ignores the equally accurate fact that the Constitution grants no branch such a power. Yet, the very point of a written Constitution is that it shall limit all exercises of government power. To do so, the members of each branch of government must necessarily form some opinion about what the Constitution requires of them. Thus, each branch, in executing its limited functions, must of necessity both interpret and apply the Constitution.

The third section tackles the objection that federal courts must defer to the judgment of politically accountable branches on close constitutional questions.\textsuperscript{25} The main line of argument here is that judicial decisions on the meaning of the Constitution are somehow out of place—due less weight or legitimacy—than decisions by politically accountable decision-makers. The third section argues that there is no warrant in the structure of the Constitution for such a view of judicial review. Rather, constitutional structure indicates that robust judicial review, where the courts decide constitutional questions for themselves without any required deference to other branches,\textsuperscript{26} is the

ascertain the meaning of any legislative act). For a collection of cites to the records of the federal drafting convention, see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 70 n.42 (1985).


24. See Sanford Levinson, Constitutional Faith 37-46 (1988) (describing different commentators who argue that the judiciary should be the supreme interpreter of the Constitution).

25. This objection to robust judicial review that has framed much of constitutional theory for the last three decades and is most closely associated with Professor Alexander Bickel. See Bickel, supra note 22, at 19; Brown, supra note 8, at 532-33.

26. As discussed later, the Constitution does anticipate that each branch of government may find it expedient—even necessary to its continued existence—to
proper course. Under this view, the politically accountable branches of government have no preferred claim—are not better constitutionally situated or constituted to decide what the Constitution means.

A. The Myth of Judicial Supremacy

The argument against judicial supremacy takes a single, simple fact as its basis: Judicial review somehow makes the judiciary “supreme” over the other branches of the federal government on issues of constitutional interpretation. By “supreme,” commentators typically mean that the judiciary has the last word on constitutional questions, and, thus, its decisions effectively trump the constitutional judgments of the other two branches. This argument, however, begs an important question: Does judicial review, in practice, give judges the final word on the Constitution’s meaning (thus making the judiciary supreme)? This section turns to that central question.

In practice, the Supreme Court is hardly the “supreme” interpreter of the Constitution. To see this, consider several different hypothetical scenarios loosely drawn from historical incidents:

1. The House or the Senate decides not to pass a bill because their members believe that the bill would not be constitutional.

2. The House and the Senate pass a bill, believing it is constitutional. The President vetoes the bill believing it to be unconstitutional, and neither chamber of Congress can override the veto.

defer to other branches of government on the meaning of the Constitution. See infra notes 328-66 and accompanying text. Part of the checks and balances in our system of government is that each branch has the power and the motive to check—effectively, to mount a political attack against—the other branches. To forestall such a check (or attack), a branch may find it prudent to defer to another branch’s judgment. Such deference, however, is as a matter of practical survival, a built-in component of the Constitution’s political structure, and not a comment on the proper role of any branch. Thus, such deference is different from saying that judges must always defer to accountable branches because judges are second-class constitutional decision-makers.

27. See Neal Devins & Louis Fisher, Judicial Exclusivity and Political Instability, 84 Va. L. Rev. 83, 96 (1998) (“The Supreme Court may be the ultimate interpreter in a particular case, but not in the larger social issues of which that case is a reflection.”). There is now burgeoning literature discussing whether Congress and the President should treat Supreme Court decisions as supreme on constitutional issues. See id. at 83-85; see also John Norton Pomeroy, An Introduction to the Constitutional Law of the United States § 141, at 94 (10th ed. 1888) (“There must...be some judge, some single umpire, to whose arbitrament the government as well as the citizen are subject.”); Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1363 (1997).

28. As with a judge, a representative’s constitutional opinion could be based on any of the accepted sources of constitutional meaning. Unlike a judge, however, we do not expect representatives to explain their constitutional judgments in lawyer-like terms. See infra notes 299-27 and accompanying text.
(3) The House and the Senate pass a bill, believing it is constitutional. The President vetoes the bill believing it to be unconstitutional, two-thirds of the Senate votes to override the veto, but the House cannot muster enough votes to override the veto.

(4) The same scenario as in (3), except it is the Senate that cannot muster enough votes to override the President's veto.

(5) The House and the Senate pass a bill, believing it is constitutional. The President vetoes the bill and two-thirds of both the House and the Senate vote to override the veto. The President then announces that the statute will not be enforced. 29

(6) The House and the Senate pass a bill, and the President signs the bill into law. After the next congressional election but before any judicial proceedings have begun under the statute, the new Congress repeals the statute believing that it is unconstitutional.

(7) The House and the Senate pass a bill, and the President signs the bill into law. After the next presidential election but before any judicial proceedings have begun under the statute, the new President announces that the statute will not be enforced because the new President believes that it is unconstitutional. 30

(8) The House and the Senate pass a bill, presumably believing it is constitutional, and the President signs the bill into law. The Supreme Court holds that the law is unconstitutional. The President, believing the Supreme Court is wrong, refuses to enforce the Court's judgment. 31

(9) The House and the Senate pass a bill, presumably believing it is constitutional, and the President signs the bill into law. Before the President can enforce the law, Congress drastically reduces the budget.


30. See May, supra note 29, at 969-77. This example also illustrates how the People play a role in the system of checks and balances. The People, through the Electoral College process set forth in Article II, Section 1, have elected a President who offered a changed reading of the Constitution. Of course, this is not to suggest that the People vote solely, or even primarily, on constitutional issues. Yet, a constitutional world view is likely to be part of a candidate's platform or ideology. Thomas Jefferson's state-centered constitutional view included opposition to the constitutionality of the Alien and Sedition Acts. When elected in 1800, Jefferson set to implementing his decentralist ideology, which included pardons of all those convicted under the Alien and Sedition Acts. See Devins & Fisher, supra note 27, at 88. Thus, while voters in 1800 might not have had the Alien and Sedition Acts on their minds, they voted for a candidate whose web of constitutional beliefs included that specific issue.

31. For a discussion of similar historical incidents, see infra notes 338-53 and accompanying text (discussing President Andrew Jackson's role in the cases challenging Georgia's treatment of the Cherokee Indian tribe) and infra notes 341-58 and accompanying text (discussing President Abraham Lincoln's opposition to the Supreme Court's decision in Scott v. Sandford, 60 U.S. 393 (1856)).
of the agency charged with enforcing the law. Enforcement is effectively prevented.

In each of these cases, the judiciary does not—and cannot—have the final say on the constitutionality of a law. Rather, the President or one chamber of Congress, based on their interpretation of the Constitution, takes action that finally decides a constitutional issue. For example, if the Senate cannot pass a bill because a majority of its members believe the bill to be unconstitutional, the House, the President, and the Supreme Court are all powerless to enact the bill into law if any or all of them disagree with the Senate's interpretation of the Constitution. The Senate's constitutional judgment is final,
effectively binding the other branches.

History is replete with examples of one chamber of Congress or the President getting the final word on a constitutional question. Consider the following examples:

President George Washington believed that a 1792 bill apportioning the House of Representatives was unconstitutional and, based on that understanding, vetoed the bill. Presidents since that time have exercised the veto power on that basis.

In 1816, Congress passed a bill (signed by President James Madison) that created a second Bank of the United States. When a case arose challenging the constitutionality of the bank, the Supreme Court held that Congress had power to create a national bank. In 1832, Congress passed a bill extending the charter of the second national bank. President Andrew Jackson, however, believed that Congress did not have the power to charter a national bank and, despite the Supreme Court's decision to the contrary, vetoed the second bank bill on that basis. According to Jackson, Supreme Court precedents should receive only "such influence as the force of their reasoning may deserve."

President Thomas Jefferson believed that the Alien and Sedition Acts of 1798, which made it a crime to criticize the government, were

that judiciary cannot decide a constitutional question unless a case comes before it that raises that specific issue).

36. Two commentators suggest that using the case-method of teaching Constitutional Law may blind lawyers to the role of the other branches:

Few Supreme Court Justices have had as much theoretical and practical influence on our constitutional order as Abraham Lincoln. Yet because most contemporary casebooks and courses are so unrelentingly U.S. Supreme Court-centered, they offer a highly distorted understanding of the American constitutional system to the hapless students exposed to them. These students will almost inevitably end up believing that constitutional interpretation is the exclusive province of the judiciary—and particularly the Supreme Court—both as a theoretical and an empirical proposition. As a theoretical proposition, this is pernicious. As an empirical proposition, it is preposterous.


37. See George Washington, Veto Message (Apr. 5, 1792), reprinted in 1 A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 124 (James D. Richardson ed., 1896); 2 Annals of Congress 119 (1792) (reporting that President Washington's veto message is received by the House, and the House failed to override the veto by the necessary two-thirds vote); Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 907 (1990).


39. See Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 A Compilation of the Messages and Papers of the Presidents, supra note 37, at 576-91.

40. See id. For a discussion of this episode, see 3 Robert V. Remini, Andrew Jackson and The Course of American Democracy, 1833–1845, at 161-78 (1984) (detailing Andrew Jackson's actions and beliefs regarding a national bank).

41. Andrew Jackson, Veto Message, supra note 43, at 582.
unconstitutional. Based on this belief, Jefferson pardoned "every person under punishment or prosecution under the sedition law."

Congress passed and President William Clinton signed the Communications Decency Act of 1996. One section of the Act prohibits Internet distribution of information about abortion, even though the Supreme Court had struck down a similar prohibition for the mails. In signing the Act, President Clinton recognized the constitutional problems with this provision of the Act and assured the public that the Justice Department would "decline to enforce that provision of the current law."

Congress passed and President Clinton signed the National Defense Authorization Act of 1996. One section of that law required the armed services to discharge any member diagnosed as HIV-positive. The requirement applied regardless of the serviceperson's ability to perform her duties. President Clinton signed the defense bill that contained the discharge requirement, but immediately indicated that he would seek repeal of the requirement because he considered it to be unconstitutional. Congress repealed the discharge requirement before any serviceperson was discharged under the provision.

In each instance, a constitutional issue was decided, and a statute was prevented from going into effect, without any opportunity for the judiciary to offer its opinion. In none of these cases were the federal courts supreme in any sense of the word.

42. See Devins & Fisher, supra note 27, at 88.
48. See id.
51. For example, by pardoning all those convicted or prosecuted under the Alien and Sedition Acts, Jefferson had voided the Acts "as much as if the Supreme Court had held them unconstitutional." Easterbrook, supra note 37, at 907.
52. For a discussion of other situations where the Court has not had a say in resolving constitutional questions, see Louis Fisher, Separation of Powers: Interpretation Outside the Courts, 18 Pepp. L. Rev. 57, 58 (1990); Paul E. McGreal, Can Congress Require House Districts? (unpublished manuscript, on file with
The above hypotheticals and examples establish an important point: In practice, no law binds the People of the United States unless all three branches of government concur in its constitutionality. The disagreement of any branch is enough to prevent a law from taking effect. This, in a nutshell, is the core of the system of checks and balances. Each branch of the federal government can interpret the Constitution within its sphere of authority, and, in doing so, each branch can check law-making power by the others. Thus, at different times, each branch has a form of supremacy on constitutional questions. History demonstrates that strict judicial supremacy is a myth.

B. No Textual Grant of Authority

It is commonplace in discussing judicial review to observe that the Constitution nowhere specifically grants the federal judiciary such a power. This observation, however, is at best trivial and at worst incorrect. The Constitution does not specifically grant any branch—executive, legislative, or judicial—power to interpret the Constitution. Yet, it is self-evident that Congress is to consider the constitutional limits of its power in passing bills, and the executive is to consider the same issues in deciding whether to approve bills presented by Congress. If textual silence does not deny Congress and the President power to interpret the Constitution, it should not deny the judiciary the power to do so.

One early example of such legislative and executive reflection on

53. See Marci A. Hamilton, The People: The Least Accountable Branch, 4 U. Chi. L. Sch. Roundtable 1, 4 (1997) ("To state the principle at its most basic level, Congress' law making capacity is meaningless, or at least severely restricted, without the President to enforce the law or the courts to interpret it.").

54. See Freund, supra note 34, at 93 ("It is part of our political theory that each department of the government has responsibility in the first instance for interpreting and applying the Constitution as a limitation of its own action.").

55. See, e.g., Bickel, supra note 22, at 1 ("The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself."); Learned Hand, The Bill of Rights 10 (1958) ("There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress.").

constitutional issues was the legislation creating the first Bank of the United States. In the House, James Madison led the discussion of the bill's constitutionality. Madison argued that the bill was beyond Congress's enumerated powers, while supporters of the bill responded that a national bank was "necessary and proper" to Congress' enumerated power to tax. When the bill passed the House, a similar debate ensued in the Senate. After passing both chambers of Congress, discussion of the bill's constitutionality continued in the executive branch. There, President Washington asked three of his cabinet members—Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton—to advise him on the bill's constitutionality. Significantly, President Washington undertook his own review of the bill's constitutionality even though the House and the Senate had thoroughly done so. After receiving Randolph, Jefferson, and Hamilton's advice, Washington then signed the bill into law. Thus, soon after ratification of the Constitution, the House, the Senate, and the President each engaged in constitutional interpretation even though that document nowhere specifically granted them the authority to do so. Such authority is implied in the limited nature of the Constitution.


59. See id. 1952-59 (Joseph Gates ed., 1834) (providing speech of Representative Ames in support of the bank bill); Elkins & McKitrick, supra note 32, at 229-32.

60. See Moulton, supra note 57, at 13.


The national bank episode shows little dispute about Congress's or the President's authority to determine the meaning of the Constitution in performing their assigned tasks under the Constitution.\(^{63}\) If either branch had believed that a national bank was unconstitutional, that determination effectively would have bound the other branches of government. If Congress had refused to pass the bank bill, the President or the Courts could not force Congress to do so. If the President had refused to sign the bank bill, neither the courts nor a bare majority of Congress could force the President to do so. If Congress overrode the President's veto, the President could refuse to administer the bank. In either case, Congress or the President would have the last word on what the Constitution means.

It is unproblematic for Congress or the President to have the final word on the Constitution's meaning in some contexts. But, the Constitution's text nowhere explicitly grants these branches the power to do so. In that case, how can the President and Congress get away with doing so?\(^{64}\) The answer here is the same as the answer should be for the judiciary—such power is inherent in the system of checks and balances. As is discussed below, the system of checks and balances requires that each branch act to keep the other branches from abusing their power. For this system to work, each branch must be able to resort to the Constitution and determine for itself whether the other

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63. As one commentator has noted, Congress takes past congressional constitutional decisions seriously, treating them as a form of precedent. See Geyh, supra note 56, at 260 ("Members of Congress have likewise used their constitutional interpretations as a form of precedent to influence, if not control, subsequent interpretations."). This practice recently gained new prominence when, for only the second time in United States history, the House impeached and the senate tried a President for high crimes and misdemeanors. For example, the issue arose whether articles of impeachment approved by one Congress could carry over to the next Congress. In support of allowing such articles to carry over, lawyers working in the Congressional Research Service of the Library of Congress appealed to the precedent of past impeachment proceedings where articles approved by a House in one Congress were tried by a Senate in the next Congress. See Memorandum from Elizabeth B. Bazan, Legislative Attorney at American Law Division of Congressional Research Service, to House Committee on the Judiciary (Oct. 7, 1998) <http:lwww.house.gov/judiciary/ crs.html> ("[P]ast precedents suggest that either an impeachment proceeding or an impeachment inquiry may be continued from one Congress to the next."). Members of Congress also acknowledged that what they did and said in this impeachment and trial could serve as precedent in future proceedings. See, e.g., The Impeachment and Trial of President Clinton: The Official Transcripts, from the House Judiciary Committee Hearings to The Senate Trial of President Clinton 419 (Feb. 6, 1999) (Rep. Ed Bryant said that the House Managers are "here to help the Senate in this constitutional process do the constitutional thing not only for the precedent of this Senate, but for the precedent of the future generations in terms of how the courts now and later will view obstruction of justice and perjury.").

64. Cf. Erwin Chemerinsky, The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 75 (1989) ("If judicial review is always slightly suspect because it is not expressly mentioned in the Constitution's text, majority rule should be even more so because the Constitution seems so heavily oriented against it.").
branches have gone too far. The text's silence turns out to be irrelevant.

C. The Judiciary as Equal Partner

One of the most common arguments for judicial restraint—and for the federal courts as less-than-equal partners in constitutional interpretation—is that there is something wrong in a democracy with an unelected, unaccountable judiciary preventing democratic representatives from making law. Simply put, judges should not get in the way of democracy. Supreme Court justices and commentators warn of the danger judicial review poses to democracy.65 The notion is that there is something inherently suspect about a court holding that a duly enacted statute violates the Constitution.66

There are two main problems with the argument that robust judicial review—the idea that courts should interpret the Constitution with no necessary deference to other constitutional decision-makers—is out of place in American democracy. First, this argument assumes that, under our Constitution, it is a graver error for judges to incorrectly find a law unconstitutional than to incorrectly find a law constitutional. This assumption rests upon the further assumption that there is little or no difference between making ordinary law and failing to make ordinary law under the Constitution.67 Subsection 1 below identifies the assumptions, and Subsection 2 offers a historical critique.

Second, the argument both assumes that federal judges are unchecked in the federal system and undervalues the role of the judiciary as a check on other branches. Subsection 3 explains why both of assumptions points are false.

1. The Counter-Majoritarian Difficulty

Professor Alexander Bickel has bequeathed us the counter-majoritarian difficulty.68 Like a mathematical conjecture or puzzle,


67. On the distinction between “ordinary law” and the Constitution, see infra note 89 and accompanying text.

68. See Bickel, supra note 22, at 16-23; Brown, supra note 8, at 531-32. Learned
the counter-majoritarian difficulty simultaneously tantalizes constitutional theorists and casts a shadow over the legitimacy of judicial review. Bickel stated the problem as follows:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

Others have restated the point in different language. For example, Robert Bork refers to the "Madisonian dilemma" that an unaccountable judiciary must be reconciled with a predominantly democratic government. In either case, the main objection is that unaccountable decision-making, and especially judicial review of constitutional questions, is inherently suspect or illegitimate.
The implication of Bickel-like concern with judicial review is that the judicial branch of government is given a lesser role than the other branches in deciding constitutional questions. Recall the discussion above of judicial supremacy, where we saw that all three branches of the federal government have the power to perform constitutional review, and, in different cases, each branch has the final word on the issue. Yet, under the Bickel view, Congress and the President get to decide these issues for themselves, while the courts must defer to the other branches unless they find a clear constitutional error. In the familiar terms of appellate standards of review, the President and Congress decide constitutional questions de novo, but the courts are limited to a clearly erroneous standard. In the typical case, by passing a bill and signing it into law, Congress and the President make their constitutional judgments that the bill is constitutional. The question is whether federal courts owe any deference to those judgments, or whether the federal courts also are allowed to address constitutional questions de novo. Because Bickel's adoption of the former view has dominated much of constitutional discourse, let us examine that view.

Continuing the analogy to appellate standards of review will help isolate the crux of Bickel's argument. Consider that for purposes of appellate standards of review, courts generally distinguish between questions of fact and questions of law. An appellate court will generally decide questions of law for itself, exercising de novo review. Questions of fact, however, are different, with an appellate court playing a limited role, usually giving great deference to the trial court. In the latter cases, the appellate court defers to the trial court

legal enactments that were approved by a whole series of majorities—namely the majorities of those representative bodies that proposed and ratified the original Constitution and its subsequent amendments.” Id. at 1046. Ordinary law-making, however, has only the “soft” support of the people. See 1 Ackerman, supra note 11, at 240-43. Because citizens are busy people who cannot do extensive research before voting, elections do not represent the “considered judgment” of the People, but rather only a soft vote of confidence for those elected. See id. at 243. Courts, then, should have no problem preferring the People's considered judgments, reflected in the Constitution, over the People's not-so-considered judgments, reflected in the ordinary laws made by their representatives. See id. at 262-63 (“Given the ‘softness’ of normal public opinion, it is simply impossible to say how the people of today would decide an issue if they mobilized their political energies and successfully hammered out a new constitutional solution.”). Professor Ackerman thus argues that judicial review is not counter-majoritarian. Conversely, this Article simply argues that judicial review, even if counter-majoritarian, is not a difficulty.

74. See Fleming James, Jr., et al., Civil Procedure § 12.9, at 668-69 (4th ed. 1992). Of course, any generalization is subject to qualifications. For present purposes, however, such qualifications are not relevant.

75. See id. at 668 (“[A]ppellate court reviews questions of law.”).

76. See id. at 668-69 (“[A]ppellate court . . . may not substitute its own view of the facts or make new fact findings.”). By “questions of fact,” I am referring to a trial court's findings of fact after a trial on the merits of the issue. Thus, I am not referring to other types of fact determinations, such as summary judgment or other summary dispositions, where the appellate court engages in more aggressive review of the trial
unless the trial court was "clearly erroneous" or abused its discretion.77

The different standards of review for questions of law and fact are justified by institutional differences and similarities between trial and appellate courts. Regarding questions of law, trial and appellate courts are similarly situated because we have no reason to believe that either is more skilled than the other in legal research, analysis, and writing.78 Thus, we deem both types of courts competent to read the law and say what the law is—each gets to decide for itself.

Conversely, trial and appellate courts are differently situated regarding questions of fact; trial courts are thought to be better situated to decide such questions. For example, being present at the trial, the trial judge can observe factors such as a witness's demeanor and tone of voice, that help in assessing the credibility of testimony.79 Because such factors are not captured on the bare page of the appellate record, the appellate court has a distinct disadvantage in evaluating such evidence.80 As the old adage goes, practice makes perfect: The trial court's "major role is the determination of fact, and with experience in fulfilling that role comes expertise."81 For these reasons, the trial court is believed to be in a better position than the appellate court to weigh evidence and find facts. Consequently, appellate courts generally defer to a trial court's determinations of court's judgment.

77. See Fed. R. Civ. P. 52(a) ("Findings of fact... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

78. For a period of time, there was an exception to this rule when federal courts interpreted state law. In such cases, federal courts of appeal would defer to the district court's interpretation of state law. The courts of appeal did so out of a belief that the district courts, which sat in the state whose law they were applying, had more experience with and more exposure to that state's law. See Dan T. Coenen, To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn. L. Rev. 899, 910-12 (1989). This difference in experience was thought to justify giving some deference to the district court's judgment. The Supreme Court, however, has since rejected this position, reasoning that there is no relevant difference between courts of appeal and district courts when it comes to interpreting state law. See Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).


80. See James et al., supra note 74, § 12.9, at 669 ("[T]he trial judge has[s] the opportunity, not available to the appellate court, to see and hear the witnesses"). Of course, this argument rests on an empirical assumption—that people are better at detecting lies in person than from transcripts—that might be challenged. See Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1075-76 (1991) (disputing the empirical basis for deference to trial court fact finding). Regardless of the accuracy of this assumption, the central point for current purposes is that standard of review depends in part on the relative institutional competencies of the reviewing body (appellate court) and the reviewed body (trial court).

81. See Anderson, 470 U.S. at 574.
questions of fact.\textsuperscript{82}

Our detour into appellate standards of review draws out an important point: The role a decision maker plays in performing a given task will be determined, in part, by the relative competence of the decision-maker to that task. For present purposes, the relevant task is constitutional interpretation, and the relevant decision-maker is the federal judiciary relative to the other branches of the federal government. Our question now becomes whether the federal judiciary, relative to Congress and the President, is less competent to the task of constitutional interpretation? To answer this question, we need to ask whether the federal judiciary is differently situated from the legislative or executive branches—in a respect relevant under the Constitution\textsuperscript{83}—when it comes to deciding constitutional questions. The most common answer is that the judiciary is differently situated because it is unaccountable. This argument follows several steps, and we now examine each step separately to properly evaluate its logic.

First, the argument starts from the reality that most constitutional questions do not have clear answers.\textsuperscript{84} If such questions have clear answers, judicial review poses no problem: The Constitution is supreme, and the clear commands of the Constitution bind each branch.\textsuperscript{85} This much Bickel would concede.\textsuperscript{86}

The lack of clear answers to most constitutional questions leads us to the second step in the logic: decision-makers will sometimes err in

\textsuperscript{82} See James et al., supra note 74, § 12.9, at 668-70.

\textsuperscript{83} Several authors have noted non-constitutional reasons for leaving constitutional interpretation to the legislature or the executive. See, e.g., Brown, supra note 8, at 541-46 (collecting and reviewing authors who advocated such reasons).

\textsuperscript{84} See Bickel, supra note 22, at 3 ("[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."); Stephen L. Carter, Constitutional Adjudication and Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821, 821 (1985). At one time, Justice Roberts suggested that judicial review was a largely discretionless act that merely required a straightforward comparison of the challenged law to the Constitution. See United States v. Butler, 297 U.S. 1, 62-63 (1936).

\textsuperscript{85} Marshall makes this point in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171-78 (1803), when he gives examples of statutes that would clearly violate the Constitution. See infra notes 256-71 and accompanying text.

\textsuperscript{86} See Bickel, supra note 22, at 45. In part, Bickel agrees with James Bradley Thayer, who argued that judicial review should be limited to clear cases of unconstitutionality, as where the government acts in a patently irrational manner. See id.; Thayer, supra note 66, at 150. But, Bickel believed that Thayer's theory of judicial review was incomplete. In addition to clear cases of unconstitutionality, Bickel believed that Courts were to strike down laws that violated clearly defined principles. See Bickel, supra note 22, at 41-43. According to Bickel, judges could act on principle because they were the only government actors well-suited to do so: "[T]he root idea is that the process [of judicial review] is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable." Id. at 58.
determining what the Constitution requires, or there will be no answer to constitutional questions, or different constitutional decision-makers will reasonably disagree. Various sources of constitutional meaning—such as text, structure, history, precedent—may point to different answers or no answer at all. The question is whether, given this uncertainty, we ought to credit (or give greater weight to) the constitutional interpretations of one branch over the others. Here, we come to the third step of the argument: Given uncertainty as to constitutional meaning, unaccountable federal judges ought to defer to the accountable branches of government.

The third step rests to a great extent on the assumed priority of accountable decision-making under the Constitution. An additional, related assumption underlies this view: Given the choice between accountable ordinary law-making and no ordinary law-making, the framers preferred accountable ordinary law-making. If the federal courts defer to Congress and the President (by upholding the constitutionality of a statute), we have accountable ordinary law-making; if the federal courts strike down a statute based on their view of the Constitution, there is no ordinary law-making. The question is whether the Constitution prefers ordinary law-making over no ordinary law-making, or vice versa. Put differently, is there anything special about accountability that requires us to prefer ordinary law-making over no ordinary law-making? I believe the answer is not only “no,” but that the Constitution is better read to prefer no ordinary law-making over ordinary law-making. The next section develops this point.

2. Law-Making Versus No Law-Making Under the Constitution

Before moving forward, it is important to distinguish between, on the one hand, preferring accountable law-making to unaccountable law-making, and, on the other hand, preferring no law-making to law-making. A judicial finding that a statute is unconstitutional is more properly categorized as no law-making, not unaccountable law-making. This reflects the long-held distinction between fundamental or organic laws—the laws that create, organize, and limit the government and its powers, such as a constitution—and ordinary laws.

87. See Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56, 57-58 (1997) (“As the Court attempts to implement the Constitution, its task is much complicated by the phenomenon of reasonable disagreement in constitutional law.”).

88. Professor Rebecca Brown has recently criticized this assumption with great insight. See Brown, supra note 8, at 565-71. She argues that the Constitution uses accountability as a means to check tyrannical law-making, not as a means to assess and implement the law making preferences of the majority. See id. at 546 (“[P]olitical accountability was not viewed as a disembodied value to be elevated over others simply for its own sake, for fidelity to some deified concept of democracy.”).
created pursuant to the fundamental or organic law, such as the statutes found in the United States Code.\textsuperscript{89} When the Supreme Court strikes down a federal statute as unconstitutional, it has prevented ordinary law-making.

Conversely, the federal judiciary cannot create ordinary law.\textsuperscript{90} While the Constitution grants Congress the power to “make law”\textsuperscript{91} and the President the power to “make treaties,”\textsuperscript{92} both of which are species of ordinary law, the Constitution does not grant the judiciary ordinary law-making power. Of course, to say that judges do not “make law” in some sense when they apply the Constitution is incorrect. Judges make a form of constitutional law by setting forth rules and doctrines they will follow in future cases.\textsuperscript{93}

The above point is that Madison and the framers were worried about a certain type of law-making by the federal government—ordinary law-making. The following two premises were important to the framers: (1) they were suspicious of ordinary law-making power, especially democratic law-making power,\textsuperscript{94} and (2) when in doubt, they preferred no ordinary law-making to ordinary law-making.\textsuperscript{95} Specifically, the framers worried that factions would be most able to assert their selfish interests in the ordinary law-making process.

The following sections develop the framers’ thinking on ordinary law-making. Section (a) explains the origin and nature of the framers’ deep suspicion of ordinary law-making. Section (b) explains how the

\textsuperscript{89} See 1 Ackerman, \textit{supra} note 11, at 6-7 (distinguishing between ordinary and “higher” law-making); H.L.A. Hart, \textit{The Concept of Law} 78-81 (1961) (distinguishing between primary (ordinary) and secondary (organic) rules); Hans Kelsen, \textit{Pure Theory of Law} 193-95 (Max Knight trans., 1967) (distinguishing the ‘basic’ presupposed norm from other, lower norms).

\textsuperscript{90} Federal courts were at one time allowed to make federal common law in deciding diversity cases. This power, however, has since been repudiated. See \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64, 65 (1938). Also, it would be naive to say that federal judges do not in some sense make ordinary law when they interpret statutes. See \textit{The Federalist No. 22}, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Laws are a dead letter without courts to expand and define their true meaning and operation.”). But, the important point is that some act of Congress and the President (for example, enactment of a statute) is necessary before the judiciary can play its \textit{anticipated role} of applying the statute to a concrete set of facts. Thus, application of a duly enacted statute is a form of judicial law-making anticipated by the Constitution; wholesale judicial writing of legal codes (like statutes), however, is not part of the Constitution’s design.

\textsuperscript{91} See, e.g., U.S. Const. art. I, § 8 (“The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...”).

\textsuperscript{92} See id. art. II, § 2 (“The President shall ... have Power, by and with the Advice and Consent of the Senate, to make Treaties ...”).

\textsuperscript{93} See \textit{Nourse, supra} note 18, at 1403-04.

\textsuperscript{94} See \textit{Brown, supra} note 8, at 569-71.

\textsuperscript{95} See James MacGregor Burns, \textit{The Deadlock of Democracy: Four-Party Politics in America} 22 (1963) (“Government, in short, was a necessary evil that must be curbed, not an instrument for the realization of men’s higher ideals or a nation’s broader interests.”).
structure of the federal government—specifically, the systems of federalism and separation of powers—was crafted to address the concerns raised by democratic ordinary law-making. Section (c) explains how robust judicial review fits within the system of checks and balances by placing another, essential check on democratic ordinary law-making. It is this account of judicial review that part II uses to re-interpret Marbury v. Madison, and that part III uses to critique the role of grand theory in constitutional law.

a. The Framers' Suspicion of Ordinary Law-Making

The founders came to constitution-making in 1787 with a deep suspicion of democratic assemblies. This suspicion arose from the destructive actions many states had taken toward their citizens, toward one another, and toward the new federal government. The framers did not want to reproduce the powerful destructive forces they saw at work on the state level. To understand their Constitution, then, we must first understand these forces. Each type of state action is described briefly in turn.

First, state legislatures were passing laws that disturbed existing commercial arrangements. Most notably, several states passed debtor-relief legislation, making certain debts unenforceable in state courts or prohibiting remedies like foreclosure for non-payment of debts. Also, several states were coining or printing their own money, further eroding the value of debts owed. For Madison, who served in the Virginia state legislature during this period, such laws showed

96. 5 U.S. (1 Cranch) 137 (1803).
98. See Charles A. Beard, An Economic Interpretation of the Constitution of the United States 52-53 (Transaction Publishers 1998) (1913); Elkins & McKitrick, supra note 32, at 11 ("The state legislatures, as Madison and many another viewed them, had become a babel of narrow-minded parochial concerns, their members men of selfish interests and untutored understanding, oblivious of minority rights, passing unjust laws (such as legal tender acts whereby debts people owed each other could be paid in worthless currency), and all unchecked by any overriding vision of the public good or what it might consist of."); Janet A. Riesman, Money, Credit, and Federalist Political Economy, in Beyond Confederation: Origins of the Constitution and American National Identity 128, 150-56 (Richard Beeman et al. eds., 1987).
99. See id.; Riesman, supra note 98, at 150-56.
the darkly irresponsible side of democracy.101 As Madison saw it, such laws were enacted by legislators who served nothing other than their constituents' narrow, selfish interests.102 In the states, neither the rulers nor the ruled would see the bigger picture:

Is it to be imagined that an ordinary citizen or even an assemblyman of R. Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Massts or Connect. [sic]? It was a sufficient temptation to both that it was for their interest . . . .103

In asking this rhetorical question, Madison set the pessimistic tone about local democracy that helped shape the resulting Constitution.104 Madison’s unfavorable experiences with state politics later coalesced into an important aspect of his theory of government, articulated in his famous Federalist No. 10. Madison warned of the dangers of “faction:” “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”105 Madison explained that differences in wealth, occupation, religion and general loyalties will be among the important cause of faction.106


The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

*Madison Letter, supra,* at 500. See Ralph Ketcham, *James Madison: A Biography* 86-87 (1990) (“The root evil . . . was the overwhelming tendency of the existing governments, obsessed with their selfish interests, to lose sight of the general welfare and the need for disciplined respect for the law.”); Madison, *Vices, supra* note 97, at 166-169; Rakove, *supra* note 97, at 28-30; Wood, *Disinterestedness, supra* note 97, at 74 (Madison’s time in the Virginia legislature was “perhaps the most frustrating and disillusioning years of his life, but also the most important years of his life, for his experience as a Virginia legislator in the 1780’s was fundamental in shaping his thinking as a constitutional reformer.”).

102. See Wood, *Disinterestedness, supra* note 97, at 74-76. Wood notes that Madison’s sentiment was shared by many of the members of the Philadelphia drafting convention. See *id.* at 76.


106. *Id.* at 47; Madison, *Vices, supra* note 97, at 169.
In these interests lies the "spirit of faction;" the danger for society is that government will be used as a tool to promote the interests of one faction at the expense of another.\textsuperscript{107} For example, the framers saw laws promoting manufacturing or granting debtor relief as the product of faction.\textsuperscript{108} In each case, selfish interests—those of manufacturers and debtors respectively—stood to benefit from the government's action. One of the great aims of governing is to reign in the self-interests that derive from faction and instead to pursue the "public good."\textsuperscript{109} Madison, not so naive as to think that faction could be avoided, argued for a lawmaking process he believed would minimize the opportunity for factions to make law.\textsuperscript{110}

Second, the framers were discouraged by the states' treatment of each other.\textsuperscript{111} Under the Articles of Confederation, Congress did not

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\item[107.] Id.
\item[108.] See Gillman, supra note 101, at 20 ("Those who supported the Philadelphia Constitution used [the idea of faction] in the hope of delegitimizing certain kinds of laws passed by democratic state legislatures in the 1780's, laws such as debtor-relief legislation and wage and price controls.").
\item[109.] Madison, Vices, supra note 97, at 168. Madison drew a line between faction and the public good. The main question is what differentiates mere faction from the public good. For Madison and others, the difference was tied to a free market: Laws that restrained commercial competition were the product of faction and thus did not serve the public good. See Gillman, supra note 101, at 114 ("Market freedom, or 'liberty of contract,' was linked inextricably with the commitment to faction-free legislation."). This faith in the free market was based on the assumption that unrestrained commercial activity would inure to the benefit of society as a whole. One commentator has explained the logic as follows:

[M]any at the time of the founding considered the exercise of public power illegitimate precisely to the extent that it was designed merely to advance the special interests of particular classes or to interfere with the common-law (natural and just) obligations imposed on competing participants in the market economy on behalf of favored classes. This sensibility was predicated on the assumption that the social relations constructed by the common-law regime of contract and property were essentially fair and liberty loving—or at least would be in the United States, with its expansive frontier—and that the enforcement of common-law obligations would not result in certain classes having to suffer under conditions of dependency or servitude vis-a-vis competing classes that might make reasonable requests for special government favors.

\textit{Id.} at 27.

\item[110.] See The Federalist No. 10, at 50-51 (James Madison) (Clinton Rossiter ed., 1961). An important part of this scheme was a national government that encompassed a large geographical area. See \textit{id}. A large nation would likely consist of many different regions with many different interests. The different regions with their different interests would be factions, but each faction would likely be small. Madison argued that a large nation with a large number of small factions would minimize the opportunity for any single faction to make law to promote its factious interests. See \textit{id}. Thus, Madison believed that a large nation was an important safeguard against faction.

\item[111.] See Andrew McLaughlin, A Constitutional History of the United States 137-147 (1936); Rakove, supra note 97, at 46-47 (discussing James Madison's critique of the Articles of Confederation); Richard B. Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43, 53 (1988) ("Interstate rivalry was the
have power to regulate interstate commerce.\footnote{112} Without any central regulation, states waged economic warfare that threatened the stability of the new nation.\footnote{113} The framers particularly focused on conflicts between states that produced and exported goods and some coastal states whose main commerce was the trade that flowed through their ports.\footnote{114} A state with few resources other than its location as a trade center could exact a great toll to allow passage of goods to other states or foreign markets.\footnote{115} Many states did so, either closing their ports to or imposing prohibitive taxes on goods from other states.\footnote{116} In doing so, the taxing states pursued their own

Convention’s greatest concern.”); Wood, \textit{Disinterestedness, supra} note 97, at 69, 72. As Gordon Wood reasons, while the inadequacies of the Articles of Confederation may explain why the Philadelphia Convention convened to amend that document, those problems do not fully explain the push for an entirely new document. \textit{See} Wood, \textit{Creation, supra} note 97; Wood, \textit{Disinterestedness, supra} note 97, at 72; Elkins \& McKitrick \textit{supra} note 32, at 10.

\footnote{112} \textit{See} Articles of Confederation art. IX (setting forth the powers of “The United States, in Congress assembled”).

\footnote{113} As the Supreme Court has noted, the economic opportunism practiced by the states after the revolution threatened the continuing survival of the newly created United States. \textit{See} \textit{H.P. Hood \& Sons, Inc. v. Du Mond, 336 U.S. 525}, \textit{533} (1949) (“When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began.”). A federal power over interstate commerce was thought necessary to keep the peace.

The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was “to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony” and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states.

\textit{Id.}

\footnote{114} \textit{See} \textit{Beard, supra} note 98, at 29 n.1 (noting how New York took advantage of its status as port of entry to New Jersey and Connecticut); Max Farrand, \textit{The Fathers of the Constitution 29-30} (1921) [hereinafter Farrand, Fathers]; 3 Farrand, \textit{supra} note 22, at 519, 542; Albert S. Abel, \textit{The Commerce Clause in the Constitutional Convention and in Contemporary Comment,} 25 Minn. L. Rev. 432, 448-49 (1941).

[T]he states were using their imposts as weapons against each other, either offensively, as where the importing states imposed tariffs the ultimate incidence of which was calculated to fall on others not blessed by geography with as good and accessible harbors, or defensively, as by strengthening their tariff walls against each other to compensate for revenue deficiencies resulting from diversion of foreign shipments to the states with the least onerous imposts.

\textit{Id.;} Collins, \textit{supra} note 111, at 53.

\footnote{115} \textit{See, e.g.,} The Federalist No. 7, at 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors.”); \textit{see also} The Federalist No. 42 (James Madison) (discussing conflicts between states relating to trade).

\footnote{116} \textit{See} \textit{IV Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 254} (1888); \textit{V Elliott, supra,} at 119; David Hutchison, \textit{The Foundations of the Constitution 103} (1975).
economic advantage at the expense of their neighbors. The exploitative state taxes posed several negative consequences for the new nation. First, if goods could be taxed as they passed through each state border, trade would effectively cease; each tax would increase the price of the good to the point that it would no longer be purchased.\(^{117}\) Also, the border taxes might cause producing states to choose alternate, less efficient trade routes to avoid exploitation.\(^{118}\) Finally, trade wars could escalate into violence.\(^{119}\) Thus democratic law-making threatened the existence of the nascent nation.

Third, in going about ordinary law-making, states neglected their obligations to the United States. Many states ignored their share of the debt incurred to wage the Revolutionary War.\(^{120}\) Similarly, when the new nation tried to conclude treaties with other nations, many states would not abide by those documents unless a particular treaty happened to coincide with their economic interests.\(^{121}\) When other nations took coordinated action against the United States, the several states could not be relied upon to put aside their individual interests in favor of a common response.\(^{122}\) Coordinated national action was ineffective because states consistently placed their own narrow, factious interests above the interests of the nation as a whole.

In short, the state lawmaking processes were captured by self-interest—by Madison’s feared factions.\(^{123}\) The problem was that democracy, even representative democracy, was a mirror of human

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117. See, e.g., Case of The State Freight Tax, 82 U.S. (15 Wall.) 232, 280 (1872) (noting that this is the benefit of having of having Congress as the sole regulating body).

118. See The Federalist No. 42, at 236 (James Madison) (Clinton Rossiter ed., 1961) (explaining that state taxes could cause exporting states “to resort to less convenient channels for their foreign trade”).

119. See id. (noting that retaliatory trade measures “would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility”), No. 7 (Alexander Hamilton); Joseph Story, Commentaries on the Constitution of the United States 259-60 (abr. ed. 1833) (detailing retaliatory trade measures that would “threaten at once the peace and safety of the Union”).


122. Shortly after the Revolutionary War, Britain closed its ports to American ships. To regain access, the United States wanted to implement a national response, closing its ports to British ships until such time as Britain re-opened its ports. Because the federal government did not have power over the subject, the coastal states acted in their best interests by keeping their ports open, and the United States could not coordinate a successful response. See Rakove, supra note 97, at 26-27.

123. See Wood, Disinterestedness, supra note 97, at 76 (describing “the democratic politics of state legislatures” as “scrambling of different interest groups, the narrow self-promoting nature of much of the lawmaking, the incessant catering to popular demands”).
nature, transmitting the wants and desires of the People into law. Experience had shown, however, that human nature was hopelessly flawed — people are inherently selfish and will pursue their personal interests given the chance. But, the People could not be cut out of the law-making process. A Revolutionary War had been fought in part over the right of people to actually consent to the laws that controlled them. A central challenge of the Philadelphia drafting convention was to construct a government based on consent of the governed that safeguarded against human nature’s tendency toward faction. The next section explains how the framers tried to solve this problem with a system of checks and balances that made ordinary law-making difficult. The last section then explains how robust judicial review — without deference — fits within this system.

b. The Role of Checks and Balances

Part of the framers’ solution to the challenges of faction was to make ordinary law-making difficult — very difficult. They did so by dividing government power both vertically and horizontally. Both divisions of power make federal law-making less likely.

First, the framers divided power vertically between the state and federal governments. This is the structure of federalism created by our Constitution. The People are the ultimate sovereign in the United States, and, as the sovereign, they have delegated some power to the national government and left themselves free to exercise (or not) the remaining of power in their respective states, within limits set forth in

124. See The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (“But what is government itself but the greatest of all reflections on human nature?”). Bernard Bailyn describes how the pre-Revolutionary colonists adopted a view of representation that made representatives the mirrors of their constituents’ desires. See Bernard Bailyn, The Ideological Origins of the American Revolution 173 (enlarged ed. 1992) (discussing the view that representatives be “an accurate mirror of the people, sensitively reflecting their desires and feelings”).


126. See Bailyn, supra note 124, at 161-75; Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 163-94 (1993) (describing colonists’ struggle to gain greater representation and control over local interests of the colonies); Wood, Creation, supra note 97, at 36-45; Wood, Disinterestedness, supra note 97, at 77.

127. See Adair, supra note 125, at 142-43 (noting that Madison looked extensively to the work of Scottish philosopher David Hume, who tried to construct “a government to be based on the consent of the ‘people’ and at the same time obviate the danger of factions.”); cf. The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (“[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.”).
Federalism is an important limitation on both national and local power. For national power, federalism means that the national government may exercise only those powers the People delegated to that level of government. This was originally a relatively small set of powers. For state power, federalism means that the Constitution is supreme whenever it addresses the states. Thus, states must obey the Constitution's prohibitions on laws impairing the obligations of contracts or ex post facto laws. Also, the national government may pre-empt state law when acting within its limited sphere of authority.

128. The Tenth Amendment briefly states this principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people." U.S. Const. amend. X.
130. See II Elliotts Debates, supra note 116, at 468 (at the Pennsylvania ratifying convention, James Wilson responded to the charge that Congress's powers are "unlimited and undefined" by arguing that Article I Section 8 sets forth powers that are "accurately and minutely defined"); see also The Federalist No. 45, at 269 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."). Since the founding, however, rapid changes in transportation and communication technology have meant that more activities now come within the scope of various federal powers, such as Congress's power to regulate interstate commerce. See Lopez., 514 U.S. at 556-57; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 583-84 (1985) (O'Connor, J., dissenting).
131. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").
132. See U.S. Const. art. I, § 10, cl. 1 ("No State shall... pass any... Law impairing the Obligation of Contracts.").
133. See id. ("No State shall... pass any... ex post facto Law").
134. This is done by the Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Congress need not expressly state that it is pre-empting state law; courts may infer that Congress has pre-empted state law when state law conflicts with or impedes the functioning of federal law. See Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985) (stating that courts will find that federal law pre-empts an entire subject when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (maintaining that state law is pre-empted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); Henry H. Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace, 62 Fordham L. Rev. 469, 532 (1993); Paul E. McGreal, Some Rice with Your Chevron? Presumption and Deference in Regulatory Preemption, 45 Case W. Res. L. Rev. 823, 830-841 (1995).
The second, horizontal division of power occurs within the national level of government, where the framers further divided power among three branches—the legislature, the executive, and the judiciary. In Federalist No. 51, Madison articulated this great American notion of separation of powers that was intended to protect the liberty of the people by keeping factions from making ordinary law. To do so, the framers had to take precautions against the possibility that a faction might momentarily take control of any single branch of the national government. If that happened, the other branches must have the interest and ability to defeat the faction-controlled branch.

135. Bernard Bailyn explains that the British constitution had a similar notion of separation of powers, under which the three estates—the crown, the House of Lords, and the Commons—shared power to make law. See Bailyn, supra note 132, at 70-77. According to Bailyn:

So long as each component remained within its proper sphere and vigilantly checked all efforts of the others to transcend their proper boundaries there would be a stable equilibrium of poised forces each of which, in protecting its own rights against the encroachments of the others, contributed to the preservation of the rights of all.

Id. at 70.


137. See Madison, Vices, supra note 97, at 169 (“Whenever ... an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?”). Madison argues that a concentration of all government power in one person or body means the end of liberty:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.


138. This is the parallel notion to when a faction posed a threat. Madison’s Federalist No. 10 was not concerned with the existence of faction simpliciter. Rather, he feared the ability of a faction to put its will into law. See The Federalist No. 10, at 48 (James Madison) (Clinton Rossiter ed., 1961) (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”). A faction would pose such a threat only when the “impulse and the opportunity” to faction “coincide” in a majority of the public. Id. at 49. In other words, factions could make law only when a majority of people subscribed to the factious belief or interest and those people could act in concert to put their belief or interest into law. Id. At the time, Madison argued that a large nation would minimize the likelihood that either the impulse or the opportunity to faction would ever coincide. As to impulse, a large nation with many different regions would likely yield many different, minority factions, preventing the impulse to faction from existing in a majority of the voting population. Id. As to opportunity, given the relatively primitive state of communication and travel at the time, a large
Separation of powers, then, is a series of securities against faction built into the Constitution.

The first such security against abuse of power was to make each branch independent of the other as much as practicable. One aspect of such independence was that members of each branch would play as little a role as possible in selecting members of the other branches. Another aspect of independence is that each branch “should be as little dependent as possible on those of the others” for their compensation. By maintaining independence between the branches, each branch remains free to check the power of the other if necessary. In doing so, the framers hoped to avoid a domino effect whereby a faction capturing one branch of government would inevitably lead to the fall of the other two branches.

The second security against faction was to construct the branches so that they would have the ability and the interest to check the other branches. Madison expressed this crucial point as follows:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The nation would make it practically impossible for a faction to organize and act on a national scale. Id.

Madison further argues that separation of powers will work only if all branches of government are given the impulse and opportunity to defend themselves. See id. No. 51, at 289-90 (James Madison). Madison in fact uses the words “means” and “motive.” Id. This point is discussed further in the text that follows above.

139. See U.S. Const. art. I § 2 cl. 1 (election of the house); id. § 3 cl. 1 (senators selected by state legislators); id. art. II § 1 cl.s 2-3 (President selected by electoral college); see also The Federalist No. 51, at 289 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he members of each [branch] should have as little agency as possible in the appointment of the members of the others.”). As Madison concedes, the Constitution does not strictly follow this principle. Id. (“Some deviations, therefore, from the principle must be admitted.”). For example, the President and the Senate both have a role in selecting the members of the judiciary. See U.S. Const. art II, § 2, cl. 2 (stating that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”). Madison explained why this exception to the independence principle was acceptable:

In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.


140. Id.; see U.S. Const. art. II § 1 cl. 7 (President’s compensation cannot be changed during a term in office and President may not receive “any other Emollient” from the state or national governments while in office); id. art. III § 1 (federal judges’ compensation cannot be decreased).
provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.\textsuperscript{141}

According to Madison, self-interest, which was the source of faction, was to be channeled in ways that served the public interest.\textsuperscript{142} This was done by giving each branch the "constitutional means and personal motives" to check encroachments by each other branch. The constitutional means would be certain of the powers granted to each branch under the Constitution. For example, the House of Representatives has power to check the President by not passing a bill (and thereby depriving the President of an opportunity to exercise the power to enforce the laws) or, in extreme cases, by impeaching the President.\textsuperscript{143} The House of Representatives has power to check the federal judiciary by impeaching members of the judiciary,\textsuperscript{144} as well as

\textsuperscript{141} Id. at 289-90.

\textsuperscript{142} See id. at 290 ("[T]he private interest of every individual may be a sentinel over the public rights.").

\textsuperscript{143} See U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); cf. 2 Ackerman, supra note 11, at 209-12 (discussing Congress's use of the impeachment power to resolve its dispute with President Andrew Johnson over Reconstruction); Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 139 (1973) ("To a large extent . . . impeachment [of President Andrew Johnson] had succeeded in its primary goal: to safeguard Reconstruction from presidential obstruction."). The House's impeachment power is checked by involving the Senate and the judiciary in the process: The Senate tries the impeachment with the Chief Justice of the United States presiding. See U.S. Const. art I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . When the President of the United States is tried, the Chief Justice shall preside . . . "). Hamilton argued that the Senate would play an important role in checking any politically motivated impeachments emerging from the House. According to Hamilton, only the Senate "would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives." The Federalist No. 65, at 366 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{144} In Federalist No. 81, Hamilton set forth his belief that the House's power of impeachment was the most effective check against judicial abuses of power:

\textsuperscript{[T]he important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon
sharing power with the Senate to create the lower courts, establish the number of Supreme Court justices, and establish the jurisdiction of the federal courts. The President has the power to veto them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.


Shortly after Marbury v. Madison was decided, the Democrat-Republican House of Representatives impeached the Federalist Supreme Court Justice Samuel Chase. See 1 Charles Warren, The Supreme Court in United States History 276-82 (1926). The impeachment was supposedly driven by Chases's partisan political activities and statements. See id. at 273-82. The Senate, however, was not able to muster the two-thirds vote needed to convict. See id. at 291.

In modern times, the House and the Senate have removed federal judges largely for illegal behavior while in office. See Nixon v. United States, 506 U.S. 224, 234-38 (1993) (holding that impeached federal judge’s challenge to Senate’s trial process was nonjusticiable political question). Some politicians have recently threatened renewed use of impeachment as a check against so-called activist judges. See Geyh, supra note 56, at 246 n.16 (quoting Ralph Z. Hallow, Republicans Out to Impeach “Activist” Jurists, Wash. Times, Mar. 12, 1997, at A1 (quoting representative as vowing, “[a]s part of our conservative efforts against judicial activism, we are going after judges”). See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).


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145. See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

146. See id.

147. See Ex Parte McCord, 74 U.S. (7 Wall.) 506, 513-15 (1868); Freund, supra note 34, at 94 (“Congress . . . enjoys considerable authority over the jurisdiction of the federal courts, which it can exercise to cut off the appellate jurisdiction of the Supreme Court, as it did in the Reconstruction era, or to place limits on the jurisdiction of the lower federal courts.” (footnote omitted)); Geyh, supra note 56, at 246 (discussing jurisdiction-stripping legislation under active consideration). For a variety of views on the scope of Congress’s power to regulate court jurisdiction, see generally Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205 (1985); Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030 (1982); Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

Congress has also attempted to check judicial power by canceling terms of the Supreme Court. An example is the aftermath of the election of 1800. Prior to the election, the Federalist Congress passed the Circuit Court Act of 1801 which created new lower federal courts. Predictably, the Federalist President John Adams and the Federalist-controlled Congress filled these new judgeships with Federalists. See II George L. Haskins & Herbert A. Johnson, History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15, at 129 (1981). Another part of the Act eliminated the need for Supreme Court justices to “ride circuit”—to have to travel the country to hear trial court cases. See id. at 114. The practice of riding circuit had been an onerous burden on the justices. See id. (“The almost unbearable hardships of circuit riding, which were caused in part by the scarce and primitive transportation facilities in undeveloped portions of the country, continued to result in accidents, delays, and fatigue.”). When Thomas Jefferson’s Democratic-Republicans took over the executive and legislative branches in 1801, they faced a
legislation, which protects against abuse of the legislative power.\textsuperscript{148}

Once each branch has the necessary constitutional means to check other branches, the members of each branch must also be motivated to do so.\textsuperscript{149} The unexercised power to check is useless.\textsuperscript{150} So, how did the framers hope to motivate each branch to exercise its checking function? A simple phrase from Federalist No. 51 provides the answer: “Ambition must be made to counteract ambition.”\textsuperscript{151} The primary ambitions of the members of each branch will be to remain in office and to expand the power of members of that branch.\textsuperscript{152}
Hamilton argued that one of the “inducements to good behavior” under the Constitution was a desire to remain in office because “the desire of reward is one of the strongest incentives of human conduct.” The recent literature on public choice theory and positive political theory has emphasized this point. The second ambition is a restatement of the well-worn political maxim that power corrupts. The colonists recognized this point: “Most commonly the discussion of power centered on its essential characteristic of aggressiveness: its endlessly propulsive tendency to expand itself beyond legitimate boundaries.” Pursuit of these two ambitions would be shaped by each branch’s constituency as well as the anticipated response from the other branches. Consider each in turn.

Each branch of the federal government, as well as each chamber of Congress, answers to a different constituency. First, consider
Congress. The House answers directly to the people, with its members elected by direct popular vote unmediated by state institutions. Conversely, the Senate originally answered to the states, with its members elected by the respective state legislatures. Consequently, "[n]o law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States." Senators, however, were not conceived as mere pawns of the state legislatures. Indeed, senators were given longer terms—six years, as opposed to two-year terms in the House—to give them some distance from their electors and time to persuade their electors of the wisdom of their policy choices. Yet, in the end, the decision whether to return a senator still lay with the state legislatures.

Second, the President answers to the nation as a whole. With such a
large constituency, the President would be least affected by factious interests. A nation as large as the United States would have many small factions, and a majority of the population was unlikely to form around a factious interest or belief. The President, then, would not likely be captured by faction. Instead, the President would need to appeal to a large cross-section of the country, seeking compromise or common ground. This need for compromise would push candidates for the Presidency to view the world and every problem from the perspective of the welfare of all of the nation, making the executive a moderating influence on Congress.

Third, the judiciary does not directly answer to any constituency. Instead, given the presumed learning and background of judges, they are to act on judicial "judgment," which Hamilton directly opposed to the political "will" motivating the President and Congress. The ability to exercise "judgment" comes from the judges' training in the substance and method of the law. Thus, while judges are not directly accountable to any constituency, they are constrained not merely by the Constitution's prescribed role, but also and importantly by their legal training.

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162. See The Federalist No. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961). Even if a majority faction existed, Madison argued that it could not recognize itself and adequately organize to make law. At the time, this was an accurate picture, given the state of national communication and transportation. Today, of course, those obstacles have been substantially lessened.

163. It is probably for this reason that President Richard Nixon remarked that to win the Presidency a Republican candidate must run to the right in the primary and to the center in the general election. See Richard Stengel, Bob & Bill's Beltway Bake-Off: How Do You Cook Up Laws and Roast Each Other at the Same Time? Dole and Clinton Are About to Show What Happens When the Campaign Comes to Washington, Time, Mar. 25, 1996, at 53 ("It was Nixon's commonplace advice to run to the right in the primaries, then back to the left in the general election."). According to Nixon, this switch is required because the Republican primaries are dominated by conservative voters while the general electorate is more mainstream. This problem, of course, is not new. Thomas Jefferson assumed this point when he ran for President:

Jefferson's system [of governing] assumed that in a nation like the United States, where sectional, economic, and other group lines cut across parties in a maze of overlapping memberships, and hence where neither major party could abuse any major interest without alienating people in its own ranks—that a governing majority in such a nation could not afford politically to be immoderate, because it could not afford to alienate moderate voters holding the balance of power.

Burns, supra note 95, at 40. This problem is inherent in the Presidency in a party system, which may require a candidate to appease a particular faction to get nominated, but will require approval of the moderate general electorate to gain office. Cf. The Federalist No. 68 (Alexander Hamilton) (discussing mode of electing the president).

164. See Burns, supra note 95, at 40.


166. See infra notes 299-31 and accompanying text.

167. See Bobbitt, Interpretation, supra note 13, at 163-70, 179.
The judiciary also has the advantage of insulation from the political process that caters to petty, selfish interests. Federal judges, have life tenure and thus do not depend directly on the People to keep their jobs. For this reason, we trust the courts to decide "cases" and "controversies"—which naturally will have selfish interests or factions represented on each side—according to the law. Judges will look to something beyond what the majority of people want in a given case; presumably, what they believe the law provides. In doing so, judges will remain faithful to their professional training, which includes instruction in both the substance and the method of the law. The judiciary, then, is itself a check on faction.

Each branch, then, has a different motivation derived from the need to please a different constituency or, in the case of the judiciary, the relative freedom from a constituency coupled with its legal training. Ambition being what it is, the framers believed that members of each branch would not be shy about exercising their delegated powers in pursuit of their ambitions. If the ambitions of different branches come into conflict, those branches will check one another, and no ordinary law will be made.

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This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions in the minor party in the community.

169. Of course, the laws applied by the courts will in many cases be the product of bodies that indirectly reflect majority will. Also, as discussed below, the other branches and the People can register their disagreement with judges' decisions or methods and, in doing so, can exert an attenuated check on the judiciary.

170. See Gordon S. Wood, The Radicalism of the American Revolution 325 (1991): Many, including Madison in his later years, concluded that the judiciary was the only governmental institution that came close to resembling an umpire, standing above the marketplace of competing interests and rendering impartial and disinterested decisions. It seemed the only public place left in democratic America where a trace of classical aristocracy and virtue could be found. Some even thought that the very "existence" of America's elective governments depended on the judiciary—the institution most removed from the people and most immune to the pressures of private interests.

171. In addition, the different tenures in office set for each branch—two years for the House, four years for the President, six years for the Senate, and life for federal judges—ensured "that a complete renewal of the government at one stroke is impossible." Beard, supra note 98, at 162.

172. Some commentators have suggested a helpful caveat to this principle. While each branch has the power to check the other, that does not preclude less antagonistic inter-branch interchange. See Geyh, supra note 56, at 246-48; see generally Robert A. Katzmann, Courts and Congress (1997). These commentators rightly note that the branches might foster a spirit of comity, as well as a spirit of restraint before resorting
The Court's recent Commerce Clause case, United States v. Lopez,172 is an example of these checks and balances at work.174 In Lopez, the Supreme Court reviewed the constitutionality of the Gun Free School Zones Act of 1990. The Act, which prohibited possession of a firearm within a thousand feet of a school, was like baseball and apple pie—what red-blooded American could possibly object?175 It is hard to imagine a politician leading the opposition, sounding the battle cry, "Put guns back in our schools!" To paraphrase a favorite slogan of movie reviewers, the Gun Free School Zones Act was the "feel good" law of the year.176 This plays directly into Madison's argument about ambition. Following their ambition to stay in office, Congress had passed a bill that had great public appeal, cost the taxpayers little if any money, and that largely duplicated state laws on the topic. Additionally, Congress made no attempt, either in the statute's text or its legislative history, to tie the statute to any constitutional grant of law-making power, such as the Commerce Clause.177

In the Supreme Court, ambition checked ambition. The Court was sensitive to the criticism that it no longer seriously reviewed federal statutes passed under the Commerce Clause. Commentators, as well as members of the Court, had complained that the Court would allow Congress to pass virtually any law in the name of regulating interstate

to the arsenal of checks and balances. See Geyh, supra note 56, at 255-57. Such a spirit, if successfully cultivated and maintained, might forestall abuses of power and thus abate the need to check such abuses. The wise decision-maker will recognize this facet of the system of checks and balances.

174. For discussion of other examples, see Devins & Fisher, supra note 27.
175. A task force of the ABA's Criminal Justice section appointed to examine the criminalization of federal law has found:

The Task Force was told explicitly by more than one source that many of these new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular. Put another way, it is not considered politically wise to vote against crime legislation, even if it is misguided, unnecessary, and even harmful.


176. Given that almost every state had a similar law on the books, it is difficult to imagine what practical impact the law would have. See Lopez, 514 U.S. at 581 (Kennedy, J., concurring). Instead, the law provided a good opportunity for lawmakers to put on a good show, while costing the taxpayers little, if any, extra money. The implementation apparatus was already in place, though would be somewhat more burdened by this new criminal law.
177. See Lopez, 514 U.S. at 561-63.
commerce, effectively removing all limits on Congress’s power. As the Gun Free School Zones Act exemplifies, Congress had become emboldened by that prospect.

In Lopez, however, the Court served notice that the Commerce Clause did indeed have judicially enforceable limits. After reviewing several factors, the Court concluded that the Act did not have the requisite connection with interstate commerce. Lopez could signal the Court’s renewed willingness to aggressively interpret the Commerce Clause. Or, Lopez might simply be a warning shot across Congress’s bow that the Commerce Clause has some limits. Either way, the case shows Congress’s ambition (pass a popular law to get re-elected) checked by the Court’s ambition (to assert some role in defining the scope of federal power). When these ambitions conflicted, the federal government made no law.

To the three branches of government, we must also add the overarching check envisioned by the framers: the People. It is no accident that the Constitution’s Preamble says that “We the People of the United States... do ordain and establish this Constitution for the United States of America.” As discussed later, one of the framers’ great innovations was to place ultimate sovereignty in “the People” of

178. See Tribe, supra note 1, §§ 5-7, at 313 (“The doctrinal rules courts currently employ to determine whether federal legislation is affirmatively authorized under the Commerce Clause do not themselves effectively limit the power of Congress.”); Martin Diamond, The Federalist on Federalism: “Neither a National Nor a Federal Constitution, But a Composition of Both,” 86 Yale L.J. 1273, 1283 (1977) (“For decades the limiting doctrine of delegated and enumerated powers has been eroded, and the scope of national government has been vastly expanded.”); see also Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 307-08 (1981) (Rehnquist, J., concurring) (“Although it is clear that the people, through the States, delegated authority to Congress to ‘regulate Commerce... among the several States,’... one could easily get the sense from this Court’s opinions that the federal system exists only at the sufferance of Congress.” (citations omitted)). Prior to Lopez, Chief Justice Rehnquist, author of the Court’s opinion in that case, had consistently warned against such a result in prior cases. See Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting): Hodel, 452 U.S. at 307-08 (Rehnquist, J., concurring); Jeff Powell, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 Yale L.J. 1317, 1346-51 (1982) (discussing Rehnquist’s many separate opinions warning against undue expansion of federal power).

179. See Lopez, 514 U.S. at 559-68.


182. See Bailyn, supra note 124, at 65 (describing the colonists’ belief that “the preservation of liberty rested on the ability of the people to maintain effective checks on the wielders of power, and hence in the last analysis rested on the vigilance and moral stamina of the people”); Hamilton, supra note 21, at 6 (describing the people as “the invisible fourth branch, a branch that is just as important as any of the other three federal branches....”).

183. U.S. Const. preamble.
the nation and not, as Britain had done, in a branch of government. As the sovereign, the People had created a Constitution that delegated some power to the new federal government, restricted state power in some ways, and left themselves free to exercise all remaining power in their respective states. In their states, the People also pursued limited government by enacting constitutions that delegated and limited power. Thus, in delegating only limited power to their rulers, the People placed the first check on government power.

Once the delegation was made, the People retained three main checks over the exercise of that power. The first check was the accountability of all government officials. In different ways, the President, the House, and the Senate are all accountable to the People. If any branch of government attempts to abuse its power, the People stand ready to exert their influence at periodic elections.

As Professor Rebecca Brown has shown, this was to be the main function of accountability—protecting against abuse of power. Human ambition reinforced this check. As mentioned before, a part of human ambition would be the desire to remain in office, to maintain one’s power. To do so, a politician must not incur the ire of her constituents. Thus, politicians have a natural incentive to consider the wishes of their constituents to different degrees.

Even the judiciary is indirectly accountable to the People. The People’s representatives appoint the judiciary, and those representatives hold the ultimate power of impeachment and removal from office. Also, the many political checks discussed above—refusal to increase salary, manipulation of docket or jurisdiction—can be enacted at the insistence of the People. Ultimately, the courts depend on the cooperation of the coordinate branches, which are accountable to the People, for enforcement of their judgments.

184. See infra notes 286-89 and accompanying text.
185. See Rakove, supra note 97, at 30-31; Wood, Creation, supra note 97, at 150-54.
186. See supra notes 157-61 and accompanying text.
187. See Brown, supra note 8, at 565 ("Elections provide the people with an opportunity to punish those who have violated their duty by invading the liberties of the people. The problem with unaccountable government is that there is no one to blame if oppression ensues.").
188. See generally Brown, supra note 8.
189. As the framers intended, some members of the federal government will be tied to their constituents more closely than others. See supra notes 156-71 and accompanying text.
191. See supra notes 144-47 and accompanying text.
192. See Devins & Fisher, supra note 27, at 94 ("Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance.").
short, the judiciary cannot ignore the People or their representatives.¹⁹³

In addition to periodic elections, Article V gives the People a second check over government abuse of power: The power to amend the Constitution acting through their states.¹⁹⁴ If Congress proposes an amendment to the Constitution,¹⁹⁵ three-fourths of the states must ratify the amendment.¹⁹⁶ Or, upon the request of two-thirds of the states, a “Convention” shall be called to propose amendments for ratification by the states.¹⁹⁷ In both instances, the People, acting through their state and federal representatives, retain power to change the Constitution itself.¹⁹⁸ Ultimately, “Our revolutions are to be peaceful.”¹⁹⁹

If Article V provides a peaceful means of revolution, the Second Amendment, the People’s third check on the federal government,²⁰⁰ acknowledges that violent means might someday be required. Framers who had just concluded a violent revolution to break from a government they opposed could not ignore this contingency. Thus, while many checks were built in the system, violent revolution was a failsafe. For this reason, the Second Amendment guarantees “the right of the people to keep and bear Arms” in order that “[a] well regulated Militia” could safeguard “the security of a free State.”²⁰¹ The “militia” mentioned by the amendment referred to members of

¹⁹³. Cf. Finley Peter Dunne, Mr. Dooley’s Opinions 26 (1901) (“[T]h’ supreme court follows th’ iliction returns.”). Also, the Supreme Court should be able to rely on the People’s respect for the law as an aid to keeping other branches in check. As one commentator has explained: “America is a legalistic country. As soon as reformers attempt an end run around established principles and procedures, they will hand their opponents a potent political weapon.” See 2 Ackerman, supra note 11, at 12-13.

¹⁹⁴. See U.S. Const. art. V. The People’s recourse to the amendment process was not intended to be a common occurrence. See The Federalist No. 49, at 282 (James Madison) (Clinton Rossiter ed., 1961) (“[A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”).

¹⁹⁵. See U.S. Const. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .”).

¹⁹⁶. See id. (proposed amendment “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .”).

¹⁹⁷. See id. (“Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . .”).

¹⁹⁸. One commentator has also noted the importance of the First Amendment rights of petition and assembly to this aspect of self-government. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1146-57 (1991).

¹⁹⁹. Goldstein, supra note 11, at 6.

²⁰⁰. See Amar, supra note 198, at 1163 (“History . . . connected the right to keep and bear arms with the idea of popular sovereignty.”).

²⁰¹. U.S. Const. amend. II.
the community who would stand ready to defend their locality against oppression by a distant and detached national government. Neighbor would fight along side neighbor to defend their homes and their liberty. Citizens must possess near constant vigilance in case all other checks fail. And if all other checks fail, Americans might have to go to war again to fight for their freedom. To ensure that this check retained its bite, the Second Amendment does not allow the federal government to defang the People.

In their role as the ultimate check, the People also play a role when the branches disagree about the proper meaning of the Constitution. In that event, the system of checks and balances could become deadlocked, or could descend into chaos, if different branches disagree with one another and none is prepared to back down. The potential for gridlock is the source of an important criticism of the check and balances approach. Professor John Pomeroy gives a concise statement of this criticism:

> What ruinous, destructive consequences would immediately result, if it should be practically admitted that the several departments might independently judge and decide as to the extent and character of the powers conferred by the Constitution! The collisions would as readily and as often arise between the Executive and the legislature as between either and the Judiciary. To illustrate: Congress passes a statute, which the President, deeming unconstitutional, vetoes. It is passed again, notwithstanding his objections, and thus becomes a law. The duty devolves upon the President to execute this law; but he, still regarding it as contrary to the provisions of the Constitution, and judging thereof independently, refuses to carry it into operation, although perhaps the courts may have pronounced it valid, and have adjudicated upon rights created by it; the law is thus made a dead letter. How often must such circumstances arise to render the government an object of contempt, rather than of veneration and

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202. See Amar, supra note 198, at 1166 (“In 1789, when used without any qualifying adjective, ‘the militia’ referred to all Citizens capable of bearing arms.”).

203. See id. at 1163.

An aristocratic central government, lacking sympathy with and confidence from ordinary constituents, might dare to resist [the will of the People] especially if that government were propped up by a standing army of lackeys and hirelings (mercenaries, vagrants, convicts, aliens, and the like). Only an armed populace could deter such an awful spectacle. Hence the need to bar Congress from disarming freemen.

Id.

Another commentator has leveled a similar charge against the checks and balances view, labeling it "arbitrary review." According to this commentator, "[a]rbitrary in this theory denotes that chance must inevitably determine the outcome of any contest over who has the power to give a final authoritative interpretation of the Constitution." In short, these critics complain that the checks and balances view does not offer meta-rules that—like in the game rock-scissors-paper—decide which branch's interpretation trumps that of the other branches.

As their writings show, Madison and Jefferson did not foresee a need for a meta-rule of interpretation. Rather, they accepted the possibility that the different branches would disagree about the meaning of the Constitution. Madison wrote:

> It may happen... that different independent departments... may, in the exercise of their functions, interpret the constitution differently, and thence lay claim to the same power. This difference of opinion is an inconvenience not entirely to be avoided. It results from what may be called... a concurrent right to expound the constitution.

Elsewhere, Madison argued that each branch of the federal government "must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it..." If the different branches disagreed, "the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other..." Jefferson put his faith in "the prudence of the public functionaries, and authority of public opinion [to] produce accommodation" in the event the branches disagreed. In these controversies, the People would

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205. Pomeroy, supra note 27, § 138, at 93.
206. Clinton, supra note 204, at 25.
207. Id.
208. See Alexander & Schauer, supra note 27, at 1361-62.
209. See Snowiss, supra note 66, at 98 ("The absence of any mechanism for authoritative exposition of the Constitution meant that differences among the branches would have to be resolved by some form of concurrent review... Madison and Jefferson accepted this solution, even though it entailed practical difficulties.").
211. Unaddressed letter from James Madison (1834), in 4 Letters and Other Writings of James Madison 349 (J.B. Lippincott ed., 1865) [hereinafter Unaddressed Madison Letter]. In a debate over whether Congress could limit the President's removal power, Madison asked on what basis one could argue that "any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments." 1 Annals of Cong. 500 (1789).
212. Unaddressed Madison Letter, supra note 211, at 349.
break the deadlock when it became clear which side of the debate had
gained their confidence. If the People are hopelessly divided, however, then deadlock will continue. Given the framers' pre-
disposition against ordinary law-making, reviewed above, deadlock is not necessarily a bad thing. If government and the People are
divided, then perhaps it is best that no ordinary law is made, rather than permitting the possibility that a faction might make ordinary law.

The above criticism misses the point. The Constitution does not
dictate one branch as interpreter of the Constitution, nor does it establish rules of priority for one branch's interpretation over that of another. Instead, the Constitution sets forth a carefully crafted set of
procedures for the system of checks and balances, and the play of that system will yield constitutional decisions.

While the outcomes of the checks and balances process might not
be predictable beforehand, they are in no sense arbitrary, as one commentator has charged. In this way, the system of checks and balances could be analogized to a sporting event, such as a baseball game. Before the game, one cannot know with certainty who will win, but that does not mean that the final score will be arbitrary. Rather, the players will follow pre-set rules that tell them what moves are permissible. Within that framework, certain strategies will make sense and others will not, and certain abilities will be valued over others. Within the rules, the team with the better strategy, ability, and execution will win the game. The outcome will not be arbitrary;

214. Bruce Ackerman has discussed how deadlock among the different branches will cause each branch to decide whether to switch its position or continue fighting for what it believes. See 1 Ackerman, supra note 11, at 125. Specifically, he describes how the People decided constitutional disputes between the branches during the Reconstruction and New Deal eras. See id. at 44-57. During Reconstruction, President Andrew Johnson believed that the Republican efforts at Reconstruction were beyond Congress's power; Congress, obviously, disagreed. This constitutional disagreement came to a head in the impeachment of President Johnson. Professor Ackerman argues that the People ultimately decided this constitutional impasse during the election of 1868, putting their electoral weight behind the Republicans and Reconstruction. See id. at 48; 2 Ackerman, supra note 11, at 209-12. Similarly, President Franklin Roosevelt and the Supreme Court disagreed over the proper scope of federal power to regulate the national economy: Roosevelt backed broad federal power in his New Deal legislation, and the Court favored narrow federal power in its rulings striking down pieces of that legislation. Once again, the constitutional impasse led to an inter-branch confrontation as Roosevelt proposed a plan to pack the Supreme Court with sympathetic justices. See 1 Ackerman, supra note 11, at 47-49. As Professor Ackerman tells the story, in the 1938 elections, the People backed Roosevelt's expansive view of federal power and the Supreme Court backed down in its famous “switch in time.” Id. at 49. Professor Ackerman examines each of these episodes in much greater detail in the second volume of his work We the People. See 2 Ackerman, supra note 11.

215. See supra notes 123-35 and accompanying text.
216. See Clinton, supra note 204, at 25.
217. See generally Tim McCarver, Tim McCarver's Baseball for Brain Surgeons and Other Fans (1998).
after the game, we will be able to determine why one team won and the other did not and draw lessons from the outcome. Similarly, the system of checks and balances anticipates that the three branches of government will play by the rules in the Constitution and pursue advantageous strategies to the best of their ability. By playing this game, one branch’s constitutional interpretation ultimately will prevail over the others. While we could not predict which branch would win, their win was not arbitrary, but rather was the result of a finely wrought process.

This section has shown how the framers’ suspicion of democratic law-making led them to create a system of checked and balanced power. Each branch of the federal government has both the means and motive to check abuses by the other branches, and the People stand as an overall check on the system. For this system to work, each branch must stand ready to fulfill its constitutional function. Only when a law-makes its way through this minefield can it bind the People. Not surprisingly, the framers intended law-making to be rare. The next section begins by explaining this point, and then explains why a rule of judicial deference would upset the system of checks and balances.

c. Making Ordinary Law-Making Difficult: The Role of Judicial Review

As the above discussion shows, both in theory and in practice, the Constitution establishes an elaborate set of interlocking powers that allow each branch of the federal government to check the other and the People to check all three. This system was born of the framers’ suspicion of popular law-making—the fear of faction. To thwart faction, the framers built a status quo bias, through the system of checks and balances, into the Constitution. Political scientist James MacGregor Burns summarizes these points well:

The key to Madison’s thinking is his central aim to stop people from turning easily to government for help. Today, when many people want protection by or through government, and not just protection from government, the power of a minority to stop the majority from

218. See supra notes 97-35 and accompanying text; see also Stephen Macedo, The New Right v. The Constitution 28 (1987) (“Direct democracy and majoritarianism were decisively rejected by the Framers, and the system of government established by the Constitution embodies this rejection.”); Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1522 (1990) (“If the Constitution’s Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection.”).

219. See Macedo, supra note 218, at 28 (“Staggered elections, long terms for senators and the president, the system of separated powers, and the embrace by one national government of a large or ‘extended’ republic were all designed by the Framers to make it difficult for a national majority to gain effective control of the government.”).
acting through government may be as arbitrary as majority rule seemed to Madison. The fact is that Madison believed in a government of sharply limited powers. His efforts at Philadelphia to shift powers from the states to the new national government were intended more to thwart popular majorities in the states from passing laws for their own ends than to empower national majorities to pass laws for their ends. For the new national government was supposed to tame and temper popular majorities—which some states had been unable to do. This meant weaker government—but it was Madison, after all, who said that the necessity of any government was a misfortune and a reflection on human nature. Government, in short, was a necessary evil that must be curbed, not an instrument for the realization of men’s higher ideals or a nation’s broader interests.\footnote{220}

Ordinary law-making was a “necessary evil,” to be used in the service of greater liberty. With the specter of faction always lurking nearby, that power was to be used sparingly. Ultimately, faction was checked by piling roadblock upon roadblock in the way of ordinary law-making. As shall be explained later, robust judicial review is an essential roadblock on the path of ordinary law-making.

We can now return to the question that began this section.\footnote{221} Recall that we were analyzing the logic behind judicial deference to Congress and the President on close constitutional questions. When Congress and the President join to enact a statute, we have an instance of accountable ordinary law-making. If the federal courts believe the statute is unconstitutional, they can prevent ordinary law-making by striking down the statute.\footnote{222} Thus, when Congress and the President, on the one hand, and the courts, on the other hand, disagree about the meaning of the Constitution, the question is whether there is anything special about the accountability of Congress or the President that requires us to prefer accountable ordinary law-making over no ordinary law-making? The preceding discussion should show that the answer is “no” for several reasons.

\footnote{220. Burns, supra note 95, at 21-22 (emphasis added); see Richard Hofstadter, The American Political Tradition and the Men Who Made It 8-9 (1948) (“A properly designed state, the Fathers believed, would check interest with interest, class with class, faction with faction, and one branch of government with another in a harmonious system of mutual frustration.”); Brown, supra note 8, at 553 (“At every turn, they buffered majority will, insulated representatives from direct influence of majority factions, and provided checks on majority decision making. The framers of the Constitution were afraid of government, even if made up of officials elected by the people.”); Jonathon Zasloff, The Tyranny of Madison, 44 UCLA L. Rev. 795, 803 (1997) (“The Framers created a government perfectly suited to do virtually nothing. Every avenue to power is checked and balanced; every possibility to create a cohesive political movement is weakened or criminalized. The Founders realized this.”).}

\footnote{221. See supra note 83 and accompanying text.}

\footnote{222. Justice Scalia notes, though with disapproval, that the tendency of greater judicial review is to prevent ordinary law-making. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 41-44 (1997).}
First, within each branch, ambition is to counteract ambition, suggesting that no branch owes necessary deference to the judgments of any other branch. If deference is given, it must be out of a pragmatic or political judgment that such action is necessary to forestall retaliation by another branch. A general rule of judicial deference, however, is not part of the Constitution’s design.

Second, the framers deliberately set out to place obstacles in the path of federal ordinary law-making. The bias in the system is against ordinary law-making. In close cases, then, the default position in the system should be to prefer no ordinary law-making to ordinary law-making, or at least to prefer greater checks to lesser checks. For this reason, the federal courts should act on their own understanding of the Constitution in deciding cases (as with robust judicial review).

Bickel’s objection to judicial review ignores these important points. Recall that the framers’ overriding fear was that faction would take hold of government to make ordinary law. Only in doing so could a faction oppress the liberty of the People. The only way that the power of judicial review could pose such a threat would be to uphold abusive laws passed by factions. Indeed, outside of perhaps statutory

223. See Eskridge & Frickey, supra note 175. Professors Eskridge and Frickey argue that such “institutional rationality and interdependence” is common: [L]aw is an equilibrium, a state of balance among competing forces or institutions. Congress, the executive, and the courts engage in purposive behavior. Each branch seeks to promote its vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond. Id. at 28-29. This point is further elaborated in Part III.D, in the discussion of the role of constitutional theory. See infra notes 353-395 and accompanying text. Also, Professor Philip Bobbitt has explained that the Supreme Court will often justify judicial inaction with regard to concern about its own legitimacy or place in the federal government. See Bobbitt, Constitutional Fate, supra note 13, at 59-73; see also Bickel, supra note 22, at 111-98 (discussing the “passive virtues,” whereby the Court takes itself out of a case out of concern for its political legitimacy).


It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that constancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

Id.

225. See 1 Ackerman, supra note 11, at 192 (noting that the “danger” of judicial review is that, “despite their life tenure, [judges] will be unduly timid when a master
interpretation, the federal judiciary does not have any power to make factious ordinary law. Instead, it stands as a bulwark against such ordinary law-making:

[The judiciary] can never attack with success either of the other two branches; and that all possible care is requisite to enable it to defend itself against their attacks. [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. [A]s, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches.

The main threat of the judiciary to the People occurs when, and only when, the judiciary joins with the other two branches to make ordinary law in response to faction. The judiciary does not threaten liberty by performing the constitutional check of robust judicial review, which merely prevents ordinary law-making.

Third, rejecting judicial deference does not mean courts will be free to write their own factious interests into the Constitution. Rather, the

politician somehow induces our so-called representatives to betray the People’s constitutional commands); The Federalist No. 78 (Alexander Hamilton). Bickel recognizes a related point, when he argues that courts should take seriously their power to not decide cases:

The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black’s better word, “legitimate” legislation as consistent with principle. Or it may do neither. It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.

Bickel, supra note 22, at 69. According to Bickel, a judicial holding that a law is constitutional adds special legitimacy to that government action. See id. at 29-30, 70. Bickel, however, does not use this point to argue for giving judges a freer hand in judicial review. Rather, Bickel makes the point in discussing situations where the Constitution clearly prohibits the challenged government action, yet the Court believes that upholding the action would seriously undermine its power or legitimacy. See id. at 70-71. In such cases, Bickel urges judges to not decide the case (by either declining review or dismissing the case on any number of justiciability grounds). See id. at 111-98 (discussing the legal doctrines, which Bickel refers to as the “passive virtues,” that allow the Court to avoid deciding the merits of a case). Better that than uphold the government action and give it the judiciary’s seal of approval. See id. at 70-72. 206 (“The passive devices are thus justified as lesser rational alternatives to an otherwise unavoidable principled judgment, which would, in turn, be unwise in the given circumstances.”).

226. See The Federalist No. 47, at 270-71 (James Madison) (Clinton Rossiter ed., 1961) (describing the danger of the judiciary combining its powers with those of another branch as a significant threat to liberty); Brown, supra note 8, at 571 (asserting that the federal judiciary “is not enabled to go out and take life, liberty, or property from people, and, given its political insulation, would have very little reason to do so”).

play of checks and balances will also constrain the judiciary in interpreting the Constitution. As mentioned above, each branch should have its say about the meaning of the Constitution within its carefully circumscribed sphere of power. Thomas Jefferson described this point in response to a correspondent who assumed that the Supreme Court was to decide all constitutional issues:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch.\(^{228}\)

For courts, this means that a constitutional question must be presented in a "case" or "controversy." Unless and until that happens, the courts must remain out of the fray.\(^{229}\) When within that sphere, federal courts should speak their mind; outside that sphere, they should remain silent.\(^{230}\)

Of course, if the justices decide to go beyond their sphere of power by deciding constitutional issues not presented in a case or controversy, there is nothing to stop them from doing so in their decision of an individual case. Consistent with Madison's vision of ambition countering ambition and Hamilton's view of the judiciary's weak position, however, Congress and the President are more than armed to defend themselves.\(^{231}\) Congress can limit the courts'...

\(^{228}\) Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 The Writings of Thomas Jefferson 310 (M. Ford ed., 1897). In this letter, Jefferson specifically addressed his power to pardon those convicted under the Alien and Sedition Acts. This episode is discussed supra at notes 42-47 and accompanying text.

\(^{229}\) See Elkins & McKitrick, supra note 32, at 352 (describing episode where the Supreme Court refused to answer questions posed by President Washington regarding the legality of certain rules of neutrality being prepared by the President's cabinet).

\(^{230}\) This limitation suggests that instead of dwelling on issues of judicial deference and constitutional method, we ought to pay more attention to the proper scope of judicial power. In doctrinal parlance, we ought to take issues of justiciability much more seriously than we currently do. These doctrines ensure that courts have their say only when acting within their constitutionally created sphere of power.

\(^{231}\) See Brown, supra note 8, at 575-76 (describing ways in which Congress and the President might attempt to check the federal courts).
jurisdiction or, in an extreme case, impeach the offending judges. The President can refuse to enforce the Court’s judgments or pardon those convicted under a prior administration. Or, acting in concert, Congress and the President could try to pack the Court with new judges who will respect the proper limits of judicial power, as President Franklin Roosevelt tried to do earlier this century.

Underlying the whole system, the People stand ready to review the actions of all participants in the system of checks and balances. The federal courts would ignore these threats at their peril; to do so could mean that their opinions would not be worth the paper on which they are printed.

d. Coda

Part I has defended robust judicial review as an essential part of the system of checks and balances. The framers were suspicious of ordinary law-making and thus crafted government processes under which such law-making would be difficult and rare. They did so, in part, by creating a system of checks and balances in which each branch of government had the means and the motive to both defend itself from encroachments and check abuses of power by the other branches. Robust judicial review—judicial review without necessary deference—is the means by which the judiciary works within this system.

The next part uses the framework developed in part I to help us better understand, and defend, John Marshall’s opinion in *Marbury v. Madison*. Part III then concludes by explaining what the checks and balances approach has to say about the proper role of constitutional law scholarship: Constitutional law commentators should not be concerned with discovering or deriving the “correct” theory or method of interpreting the Constitution. Rather, we should direct our energies at analyzing and synthesizing specific doctrinal areas, clauses, and cases or lines of cases, providing the type of critique that the members of each branch and the People can use in the constant play of checks and balances.

232. On Jefferson’s use of the pardon power, see supra notes 42-43 and accompanying text. On other presidential attempts to check the judiciary, see infra notes 330-62 and accompanying text.

233. See infra notes 346-62 and accompanying text.

234. See Brown, supra note 8, at 574 (“If the executive refused to enforce the orders of the court, or if the legislature tried to impeach the members of the court without warrant, the people would still stand outside of those actions and could pass judgment on them through their retained political powers by holding elected officials accountable for any such breach of trust.”).
II. MARBURY REVISITED

The preceding part developed two important propositions. First, nothing about the accountability of Congress or the President requires federal courts to defer to those branches in deciding what the Constitution means. Second, federal courts should speak on the meaning of the Constitution only when deciding cases and controversies. This part explains how *Marbury v. Madison*, one of the hoariest chestnuts of constitutional law, is best understood in light of these two propositions. Indeed, most of the conventional criticisms of Chief Justice Marshall’s reasoning dissolve in their light.

A. The Standard Criticism of Marbury

In the shortest part of his *Marbury* opinion, Chief Justice Marshall framed the following question: "[W]hether an act, repugnant to the constitution, can become the law of the land?" Part and parcel of that question is the further question whether federal courts should decide cases based on their own interpretation of the Constitution. Marshall made five arguments in support of the Court's authority to do so.

According to the standard criticism, each of Marshall’s arguments in support of judicial review begs the central question: Why should the judiciary have the final word on the Constitution’s meaning? This

235. 5 U.S. (1 Cranch) 137 (1803).
236. Id. at 176. Marshall spends over twenty-two pages of his opinion on the questions whether William Marbury had a right to his commission, whether he had a remedy for a violation of that right, and whether existing federal statutes and the Constitution gave the Supreme Court the power to hear a *mandamus* filed originally in that Court. After deciding that Congress had authorized an original *mandamus* but that Article III did not, Marshall posed the above question, which he disposed of in less than four pages.

In his critique of *Marbury*, Professor Bickel notes that in this question Marshall "had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." Bickel, *supra* note 22, at 3.

237. *See Marbury*, 5 U.S. (1 Cranch) at 177. Marshall also later asks: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"


239. *See O’Fallon*, *supra* note 147, at 256 n.129 (“The weaknesses in Marshall’s argument are notorious . . .”).

criticism assumes that Marshall was arguing for judicial supremacy, in which the Court would be the supreme interpreter of the Constitution. This view misunderstands Marshall, who simply argued that the judiciary should interpret the Constitution in addition to, not instead of, the other branches of government. Thus, far from advocating judicial supremacy, Marshall argued that the judiciary should not be excluded from the project of constitutional interpretation, which must, under the theory of checks and balances, include all three branches of government.

Marshall’s argument becomes clearer when his *Marbury* opinion is viewed through the lens of history. The United States Constitution was an innovation in government and for the first time placed enforecable limits on government power. This scheme stood in stark relief against the British system, which placed unquestioned, final legal authority in Parliament and thus made Parliament supreme. Conversely, under the new American view, all three branches of government could invoke the Constitution against one another, with each branch having a say on constitutional matters within its narrow sphere of power.

The next five sections review each of Marshall’s arguments in support of judicial review. Each section addresses three main points. First, each section gives a brief summary of Marshall’s argument and why Marshall believed that argument supported judicial review. Second, each section briefly describes the standard response made to Marshall’s argument. As stated above, the standard criticism invariably concludes that Marshall has begged the question. Third, each section shows how the standard criticism misunderstands Marshall’s main point. While the standard response assumes that Marshall was defending judicial supremacy, his claim was much more modest. Again, *Marbury* is best read as saying that judges are entitled to interpret the Constitution in addition to the other branches, not instead of them.

1. The Nature of a Written Constitution

Marshall begins his discussion of judicial review with the observation that the Constitution created a limited government, and thus, any governmental act exceeding those limits is void.

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*Marbury*’s “reasoning is not impeccable and its conclusion, however wise, not inevitable”).

241. See Bailyn, *supra* note 124, at 67-69, 175-98; Beer, *supra* note 126, at 145-47; Wood, *Creation, supra* note 97, at 346-49; see also The Federalist No. 53, at 299 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution, as the ordinary objects of legislative provision.”).

242. See *infra* notes 286-89 and accompanying text.

243. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (“Certainly all
According to Marshall, the Constitution is a meta-rule above and beyond ordinary rules made by legislatures and courts. The very fact that the Constitution was written down, leaving a fixed document whose terms could not be "mistaken[] or forgotten" and could be referred to and invoked against the government, was further proof of this important point.\(^\text{244}\) If, however, a law contrary to the Constitution was not void, the Constitution did not limit government and was itself effectively void.\(^\text{245}\)

The standard criticism to Marshall's first argument is, "So what?" Commentators willingly concede that a limited, written constitution must bind the government or else it is effectively a non-entity.\(^\text{246}\) The fact that a limited constitution restricts government action does not tell us who decides what those restrictions mean.\(^\text{247}\) Nothing in Marshall's first argument supports placing that authority in the judiciary instead of Congress or the President.

The standard criticism logically rests on a crucial assumption—that Marshall was defending judicial supremacy with the judiciary as the sole, final interpreter of the Constitution.\(^\text{248}\) By the time Marbury filed his case, both Congress and the President had already spoken on the constitutional issue before the Court: Congress by enacting the challenged statute and the President by signing the statute. So, by

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\(^\text{244}\) Id. at 176; see also Sylvia Snowiss, Judicial Review and the Law of the Constitution 24-26 (1990) (noting that written constitutions are "superior" to ordinary law).

\(^\text{245}\) See Marbury, 5 U.S. (1 Cranch) at 176-77 ("The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.").

\(^\text{246}\) See Bickel, supra note 22, at 3 ("[O]ne may grant to Marshall . . . that the Constitution is a paramount law, and that ordinary legislative acts must conform to it.").

\(^\text{247}\) See Bickel, supra note 22, at 3-4; O'Fallon, supra note 147, at 256 n.129 ("[I]t does not follow from the fact that an act repugnant to the Constitution cannot be law that the judiciary's view of repugnancy should control"); Van Alstyne, supra note 238, at 17.

\(^\text{248}\) Professor Bickel states the point as follows:

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?

Bickel, supra note 22, at 3. Under the checks and balances approach, the response is, "Why not all of the above?" There is no justification for any single actor receiving the final say on questions of constitutional interpretation. Rather, all three branches of government and the People must play their role in the system of checks and balances, acting on their own, deliberate interpretation of the Constitution.
merely reviewing the constitutional issue presented in *Marbury*, the Court was doing no more than what Congress and the President had already done. Critics attack the Court as having no support in the Constitution while leaving the actions of Congress and the President unchallenged. Thus, for this criticism to make any sense, the commentators must view Marshall as doing something different from Congress and the President. These commentators must view Marshall not as merely registering the Court’s opinion on the constitutional issue in deciding a specific case, but rather as trying to somehow generally pre-empt the views of the other branches on that constitutional question. Simply put, they view Marshall as claiming judicial supremacy on constitutional issues.

In light of the checks and balances view articulated earlier, Marshall is better read as arguing that the judiciary can interpret the Constitution in addition to Congress and the President, not instead of those branches. The judiciary can do so only when acting within its limited sphere of authority—deciding cases or controversies. Under this view, the proper response to Marshall’s critics is to ask why the judiciary should be the sole branch disqualified from interpreting the Constitution.

2. Judges Decide Cases

Marshall turns next to the nature of the judicial function. In one of his more famous passages, Marshall explains: “It is emphatically the province and duty of the judicial department to say what the law is.”

Judges do so because of their unique role among the three branches of government. The legislature “makes” law, the executive enforces the law, and the courts apply the law to concrete facts in deciding cases. As Marshall argues, judges interpret the Constitution not out of some special grant of power unique to this Constitution, but because that is what courts must do: “Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” Thus, the power of judicial review is a byproduct of the judicial function (deciding cases), not some separate power given to federal judges above and beyond their normal duties.

249. *Marbury*, 5 U.S. (1 Cranch) at 177.

250. See, e.g., U.S. Const. art. I, § 8, cl. 14 (“Congress shall have power to . . . make Rules for the Government and Regulation of the land and naval Forces.”); id. at cl. 18 (“Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .” (emphasis added)).

251. See U.S. Const. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

252. As noted above, this statement is oversimplified because each branch is given some hand in the selection of the other. See supra note 139. Additionally, the President is given some law-making power by the grant of authority “to make Treaties” with the “Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2.

The standard criticism to Marshall again asks, “so what?” Commentators concede Marshall’s central point—judges must say what the law is in deciding cases. Once again, Marshall begs the central question—why is “the law” that judges apply not simply the legislature’s interpretation of the Constitution? If the legislature is the appropriate interpreter of the Constitution, then “the law is” whatever the legislature decides, and the judiciary should “say” that the legislature’s interpretation is “the law.” Marshall has not explained why judges should apply their interpretation of the Constitution. We could just as easily assign the legislature or the executive that function, and judges would still retain the power to “say what the law is.”

The standard criticism again assumes that Marshall is arguing for judicial supremacy over the other branches, and reads Marshall’s statements that judges must “say what the law is” to mean that judges do so to the exclusion of legislators. In reality, however, each branch must interpret the Constitution in performing its job and, in doing so, gets to “say what the law is.” This point is elaborated further in section B.

3. Easy Cases

Marshall’s next argument may be his most compelling. He identifies three relatively clear clauses of the Constitution—the prohibition of ex post facto laws, the prohibition of taxes on state exports, and the requirement of two witnesses for a conviction for treason—and asks what would happen if Congress and the President enacted laws directly contrary to one of those clauses. If the courts could not strike down such laws, the Constitution effectively would not limit federal power. Like Marshall’s first argument, this argument posits that constitutional limits that can be violated with impunity are no limits at all.

254. See Currie, supra note 238, at 72 n.55 (noting that Marshall’s argument “did not, of course, answer the critical question whether the judges were to accept Congress’s interpretation of the Constitution rather than adopting their own”).

255. See supra notes 27-54 and accompanying text.

256. See supra note 50 at 179. Of course, there will be difficult cases under each of the above-listed clauses. But, for purposes of his argument, Marshall selected three clauses for which one could easily imagine a federal law that violated the provision. See U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause); id. at cl. 5 (no tax on “Articles exported from any State”); id. at art. III, § 3 (Treason Clause).

257. Bickel suggests that this argument only supports judicial power to interpret constitutional provisions defining the scope of judicial authority. Stated more generally, each branch should have the power to interpret provisions that define and limit that branch’s sphere of authority. See Bickel, supra note 22, at 7. For example, Marshall argues that the Court should have power to void a law that allowed conviction for treason without the testimony of two witnesses. See Marbury, 5 U.S. (1 Cranch) at 179. According to Bickel, the treason provision is a rule of evidence directed to the courts. Bickel, supra note 22, at 7 (arguing that the Treason Clause is
There are two standard responses to this argument. First, as above, the existence of clear cases of unconstitutionality does not, standing alone, determine which branch of government has the power to declare such violations. Bickel puts the argument as follows:

The case can be constructed where the conflict between a statute and the Constitution is self-evident in accordance with Marshall's general assumption. Even so, Marshall offers no real reason that the Court should have the power to nullify the statute. The function in such a case could as well be confided to the President, or ultimately to the electorate.

Second, one could concede that courts should strike-down clearly unconstitutional statutes without extending that power beyond clear cases of constitutional violations. Closer questions should be left to accountable decision-makers. This argument was identified in part I as Bickel's argument from the counter-majoritarian difficulty. As the discussion in Part I showed, this argument has no place in the system of checks and balances.

4. Oath of Office

Marshall next cites the Oath Clause as evidence that the framers intended courts to interpret the Constitution. That clause states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any

one instance "when the Constitution addresses itself with fair specificity to the judiciary branch itself"). Marshall's argument is not so narrow. He also refers to the Constitution's prohibition on federal taxes on state exports. See Marbury, 5 U.S. (1 Cranch) at 179. This rule would be directed at Congress and, under Bickel's argument, would seem to be within Congress's power to interpret. Yet Marshall cites that provision as one that the courts should interpret. This example shows that Marshall argued for a general power of judicial review, not a narrow power to review constitutional provisions concerning judicial power.

258. See Nowak & Rotunda, supra note 240, at 8 (discussing Marshall's easy cases argument).

259. Professor Van Alstyne has noted that other nations with written constitutions do not have judicial review. See Van Alstyne, supra note 238, at 18-19. Based on this observation, he argues that it is not as self-evident as Marshall would have us believe that a written constitution without judicial review effectively serves no purpose. See id. While this argument is correct as far as it goes, this Article argues that the framers' self-conscious departure from the British notion of a constitution, coupled with the view of checks and balances articulated above, indicates that Marshall was correct: This Constitution would be effectively void, for the purposes the framers had envisioned for it, if we did not have robust judicial review.


261. But see Van Alstyne, supra note 238, at 18-19 (noting that several countries with written constitutions do not give judges the power to strike down laws that directly contradict their constitution).
Office or public Trust under the United States.\textsuperscript{262}

Judges would violate their oath if they were not permitted to strike down statutes that violated their understanding of the Constitution.\textsuperscript{263} According to Marshall:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.\textsuperscript{264}

The Oath Clause, then, supports judicial review.

Critics correctly note that federal judges are not the only branch of the federal government required to take an oath to uphold the Constitution.\textsuperscript{265} Rather, as the Oath Clause states, officials of each branch of government are required to take a similar oath. So, the standard response asks, why are judges special—why do they get the power to interpret the Constitution?\textsuperscript{266} Even if judges must obey the Constitution, what if the legislature is supposed to be the ultimate interpreter of that document?\textsuperscript{267} If that is so, federal judges, to fulfill their oath, would have to abide by the legislature's interpretation of the Constitution, not their own.

The standard criticism again assumes that Marshall is claiming the

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\textsuperscript{262} U.S. Const. art. VI, cl. 3 (emphasis added).
\textsuperscript{263} At the time \textit{Marbury} was decided, Congress had prescribed the following oath for federal judges:

\begin{quote}
I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as \_\_, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.
\end{quote}

\textit{Marbury}, 5 U.S. (1 Cranch) at 180.

\textsuperscript{264} Id.

\textsuperscript{265} See Eakin v. Raub, 12 Serg. & Rawle 330, 352 (Pa. 1825) (Gibson, J., dissenting) ("The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government.").

\textsuperscript{266} See Bickel, supra note 22, at 8-9; Nowak & Rotunda, supra note 240, at 8 ("[W]hile this oath might give judges some support in choosing not to apply a specific act of Congress in a decision, it furnishes no claim to \textit{superior} powers regarding constitutional interpretation because the legislators and executive take similar oaths."); Thomas Reed Powell, \textit{Vagaries and Varieties in Constitutional Interpretation} 16 (1956) ("The fact that the Constitution requires the judges to take an oath to support it cannot go further than to warrant them to interpret it as a guide to their own action, because many other officers, state as well as national, are required to take a corresponding oath.").

\textsuperscript{267} See Bickel, supra note 22, at 8 (characterizing Marshall as arguing that "everyone's oath to support the Constitution is qualified by the judiciary's oath to do the same, and that every official of government is sworn to support the Constitution as the judges, in pursuance of the same oath, have construed it, rather than as his own conscience may dictate.").
sole power to interpret the Constitution. Importantly, the words of Chief Justice Marshall contradict that assumption: "[T]he framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." In this passage, Marshall expressly argued that courts should interpret the Constitution in addition to, not in place of, the other branches of the federal government. Thus, Marshall argued that because judges also take an oath to abide by the Constitution, as do members of the other two branches, judges should be allowed to interpret the Constitution, as do members of the other two branches.

5. Supremacy Clause

Marshall's final argument examines the Supremacy Clause, about which he observes: "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank." The Supremacy Clause expressly provides that the Constitution takes precedence over ordinary laws, and thus ordinary laws contrary to the Constitution are void.

The standard criticism should be predictable. All concede that the Constitution is supreme, but this begs the all-important question of whose interpretation of that document is supreme. The Supremacy

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268. Marbury, 5 U.S. (1 Cranch) at 179-80; Powell, supra note 266, at 7 (noting that the above passage from Marbury "is open to the possible inference that each body is to interpret for itself").

269. U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

270. Marbury, 5 U.S. (1 Cranch) at 180.

271. See id. ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void . . . .").

272. See II William Winslow Crosskey, Politics and the Constitution in the History of the United States 990-1007 (1953); Nowak & Rotunda, supra note 240, at 8 ("Marshall's argument, that only laws made in pursuance of the Constitution are the supreme law of the land, assumes the point in dispute: who determines which statutes are not in pursuance of the Constitution?"); Powell, supra note 266, at 16 ("The judicial power over national legislation cannot adudge support from the supremacy clause."); Van Alstyne, supra note 238, at 22 ("Assuming that an act repugnant to the Constitution is not a law 'in pursuance thereof' and thus must not be given effect as the supreme law of the land, who, according to the Constitution, is to make the determination as to whether any given law is in fact repugnant to the Constitution itself? . . . Marshall never confronts this question."); id. at 21 ("Under this view, acts of Congress, like acts of Parliament, are the supreme law and not to be second-guessed by any court, state or federal, so long as they postdate ratification of the Constitution.").
Clause does not answer that question.

This Article's response also should be familiar. The standard criticism again assumes that Marshall is claiming judicial supremacy. Marshall's ambitions, however, are much humbler. His argument is only that the Constitution is supreme, "and that courts, as well as other departments, are bound by that instrument.""273 In his own words, then, Marshall is merely claiming parity for the judiciary, not supremacy.

B. A Revised Account of Marbury

As recounted in the preceding sections, the standard criticism of Marbury is that Marshall's opinion ultimately begs the question he set out to answer—why should the judiciary be the supreme interpreters of the Constitution?"274 This criticism mischaracterizes Marshall as making a "we're the one" argument, under which the courts claim the exclusive power to finally determine the Constitution's meaning.275 This reading is a mistake. Instead, Marshall makes a "me too" argument, under which the federal judiciary merely joins the other branches in playing a role, within its sphere of power, in constitutional interpretation.

The "me too" reading of Marbury makes sense for two reasons. First, this reading accurately describes how government works under our Constitution. As discussed above, all three branches will have final say on the meaning of the Constitution in some cases.276 Granting federal courts the power of judicial review does not change that fact. Thus, in practice, the argument over judicial review was not, and cannot, be about which branch will necessarily have the final word on the Constitution's meaning.

Second, the "me too" approach acknowledges the relevant history. The founding generation radically reconceived the notion of a

273. Marbury, 5 U.S. (1 Cranch) at 180 (emphasis added).
274. See Bickel, supra note 22, at 3-4 (asking why the federal courts, as opposed to Congress, should "set the limits" on government power imposed by the Constitution); id. at 7 (discussing whether each branch of government "may be the final arbiter of the meaning of the constitutional commands addressed to it." (emphasis added)). Indeed, to some commentators the best that can be said about Marshall's opinion is that while each of his arguments alone is unpersuasive, they may in combination have enough force to carry the day. See Nowak & Rotunda, supra note 240, at 8 ("Although Marshall's decision can be divided and attacked, it still stands as an impressive argument when taken as a whole."); Geoffrey Stone et al., Constitutional Law 33 (2d ed. 1991).
275. One commentator states that he reviews Marbury "partly to see whether it provides anything of a convincing character that the determination of whether an act of Congress is repugnant to the Constitution shall be made by the courts." Van Alstyne, supra note 238, at 23.
276. See supra Part I.A. For example, if the House does not pass a proposed bill because it believes the bill to be unconstitutional, the House has the final say on the constitutionality of the proposed bill. See supra note 35 and accompanying text.
"constitution," rejecting the traditional British view of a constitution, under which Parliament was supreme, in favor of a new idea, under which the constitution was higher law that limited the power of all branches of government, including the legislature. Only by understanding the prior, British notion of a constitution and the innovation of the founding generation can we appreciate the full meaning of Marshall's opinion and see the full wisdom of his reasoning.

The following two sections develop two points. Subsection 1 briefly discusses the British and American notions of a Constitution. The discussion is far from exhaustive and merely outlines the main ideas necessary for this Article's discussion of Marbury. Subsection 2 explains how reading Marbury against the background of the framers' understanding of a "constitution" allows us to see Marshall's arguments in a new light. This new vision of Marbury fits well with the checks and balances view of robust judicial review.

1. The Nature of a "Constitution"

Today, when Americans hear the word "constitution," the image that inevitably comes to mind is the United States Constitution ratified in 1788, and amended twenty-seven times thereafter. As we are taught in civics lessons, the Constitution both creates the three branches of government and limits their authority. The American Constitution, then, stands above government, both authorizing and controlling its power. It is a charter the People may invoke against the government, and each branch of government may invoke against the other.

The British notion of a constitution was quite different. The British "constitution" was merely a description of the existing framework of
government as then constituted by the supreme Parliament. As Bernard Bailyn describes, the British understood by

the word 'constitution' not, as we would have it, a written document or even an unwritten but deliberately contrived design of government and a specification of rights beyond the power of ordinary legislation to alter; they thought of it, rather as the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them.

No law or set of rules thus constrained Parliament's law-making power; Parliament was the supreme sovereign—the ultimate legal authority. Thus, British citizens had no meta-rules to invoke against Parliament, or for the crown or the courts to invoke against that body. Rather, their "constitution" was purely descriptive, merely describing the then-existing operations of Parliament. Under this view of a constitution, judicial review could not exist.

In one of its great innovations, the founding generation reconceived a "constitution" as a form of law that set enforceable limits on government power. This innovation derived from a prior

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280. See Bailyn, supra note 124, at 175 (the British notion of "constitution" referred to "the existing arrangement of governmental institutions, laws, and customs together with the animating principles, the stamina vitae, that gave them purpose . . ."); Andrew C. McLaughlin, The Foundations of American Constitutionalism 13-14 (1932); Corrine C. Weston, English Constitutional Theory and the House of Lords, 1556-1832, at 1-8 (London 1965); Charles Inglis, The True Interest of America: Strictures on a Pamphlet Entitled Common Sense 18 (Philadelphia 1776) (referring to constitution as "that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community.")(cited in Bailyn, supra note 132, at 175). See id. § 143, at 95 ("[T]he courts of Great Britain do not possess this high attribute [of judicial review of constitutional questions], but only because there is no written British constitution superior to Parliament.").

282. See id. § 143, at 95 ("[T]he courts of Great Britain do not possess this high attribute of judicial review of constitutional questions, but only because there is no written British constitution superior to Parliament.").

283. See Wood, Creation, supra note 97, at 292 ("[F]or all English Whigs, Trenchard and Gordon as well as Burgh, the fundamental law they believed in was one enforceable only by the people's right of revolution, a final sanction that dissolved the contract of government, leaving the people free to do as they would in the future.").

284. See Pomeroy, supra note 27, § 143, at 95 ("The powers of that legislature are not limited; the constitution is, in effect, what Parliament may at any time pronounce it to be.").

285. Bernard Bailyn describes the importance of the concept of a "constitution" to American revolutionary thought:

The word "constitution" and the concept behind it was of central importance to the colonists' political thought; their entire understanding of the crisis in Anglo-American relations rested upon it. So strategically located was this idea in the minds of both English and Americans, and so great was the pressure placed upon it in the course of a decade of pounding debate that in
innovation—lodging ultimate sovereignty in the People of the nation generally, and not in some branch of government (as the British had done with Parliament). Consequently, the People were the highest authority in the new United States, and acts of the People as a whole—the Constitution—bound all law-makers in the nation. Madison explained this point at length:

The distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable as well with regard to the Constitution as the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed, by legislative acts, some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act, continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the cornerstone; and has led them to seek for some security to liberty, against the danger to which it is exposed.287

Hamilton similarly remarked on the importance of a limited constitution.288 So, when Marshall wrote in Marbury that the Constitution is “law,” he was explaining the American innovation in

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Hamilton similarly remarked on the importance of a limited constitution.288 So, when Marshall wrote in Marbury that the Constitution is “law,” he was explaining the American innovation in the end it was forced apart, along the seam of a basic ambiguity, to form the two contrasting concepts of constitutionalism that have remained characteristic of England and America ever since.

Bailyn, supra note 124, at 67.


The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id.
constitution-making, not stating the obvious.

Under the new, American conception of a constitution, judicial review became possible. Judicial review only makes sense if government power is constrained by some set of legal rules. Without such rules, the courts have no standard against which to measure the validity of legislative or executive action. By reconceiving of a constitution as such a set of rules, the framers provided the judiciary—as well as Congress, the President, and the People—a standard against which to measure one another's conduct.289

2. The American Conception of a Constitution in *Marbury v. Madison*

The standard criticisms of *Marbury* fall away when considered in the context of the differing British and American views of a constitution. Marshall wrote against the background of the British experience, where Parliament shaped the British constitution as an ongoing project, and the courts played very little role in that process.290 At that time, then, it was accepted that a legislature would consider the constitution in deciding whether to make law. The open question remained whether the legislature's constitutional judgments were final, as in Britain, making the Constitution nothing more than a description of what Congress (and the President) chose to do, or whether the new, American conception of a constitution meant that the judiciary would now play some role in defining the Constitution?

Marshall's argument from the oath of office now makes eminent sense. Recall that he argued that the judiciary should interpret the Constitution because its members take an oath to uphold the Constitution.291 The standard response has been that officers of the legislative and executive branches take the same oath, thus the oath requirement does not support judicial review.292 The standard criticism misreads Marshall. If Marshall were arguing for judicial supremacy in constitutional interpretation, then, indeed, the fact that judges also took an oath does not explain why judges should be the Constitution's sole interpreters. But that was not Marshall's argument. Instead, he argued that the American Constitution, unlike the British Constitution, anticipated an interpretive role for judges in

289. See Wood, Creation, supra note 103, at 291-92; Powell, supra note 8, at 887 n.11 ("The use of constitutions as written fundamental laws subject to judicial interpretation and enforcement ... was an essentially new creation of the American Revolutionary period.").
290. British courts could pronounce their opinion that an act of Parliament violated a tenet of natural law. See Bailyn, supra note 124, at 177-80. But, the courts would go no further, leaving it to Parliament to repeal the law if Parliament agreed with the court's judgment. Id.; Beer, supra note 126, at 148-53.
291. See supra notes 262-78 and accompanying text.
292. See Bickel, supra note 22, at 8.
addition to the legislature. The Oath Clause now becomes relevant because it is evidence that judges, in addition to the legislature, are bound by the Constitution.

Similarly, Marshall’s “easy cases” argument takes on new meaning when considered in light of the British conception of a constitution. Recall that Marshall asked what would become of the Constitution if Congress could pass laws that were directly contrary to that document? If the courts did not step in, the Constitution would become whatever Congress made of it, transplanting Parliamentary sovereignty to America. For the American Constitution to be different, Congress could not be the sole arbiter of its meaning. Instead, the other branches must play a role in that process. The system of checks and balances articulated in Part I establishes that each branch should do so within its sphere of authority.

Marshall’s invocation of the Supremacy Clause also makes sense in light of the historical background. In Britain, Parliament was supreme, and the British constitution was merely descriptive. In the United States, however, the Constitution is prescriptive, setting forth rules that bind the government. Thus, the Supremacy Clause restates the framers’ crucial departure from Britain—the Constitution is supreme over government, and not vice versa.

We can now see how several of the threads in this Article join in Marshall’s arguments. Recall that Marshall argued that courts will necessarily interpret the Constitution as a byproduct of deciding cases—courts necessarily “say what the law is.” This argument blends the checks and balances approach with the American reconception of a constitution. The checks and balances approach encourages each branch of the federal government to interpret the Constitution when acting within its sphere of power. The judiciary’s sphere of power is to decide cases, which requires courts to determine the applicable law. The American Constitution is “law” that binds all government actors, including judges. Thus, in carrying out their assigned function in the system of checks and balances, federal judges interpret the Constitution. Federal judges are not unique in this respect; the members of each branch should interpret the Constitution in performing their constitutionally assigned roles.

C. Conclusion

Part II has argued that the checks and balances approach to judicial review, along with an understanding of the British and American views of a constitution, shed new light on Marbury. Reconsidered in that light, Marbury is a vivid statement of first principles and innovations embodied in the American Constitution. Robust judicial

293. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803); see supra notes 256-71 and accompanying text.
review is an important part of that system. The next part discusses how constitutional commentators can best serve that system.

III. THE ROLE OF CONSTITUTIONAL THEORY

As a matter of fact and theory, this Article has maintained that the federal courts owe no necessary deference to the other branches on constitutional issues. As a matter of fact, history illustrates this reality, with each branch of government at times refusing to acquiesce in the constitutional decisions of the other branches.\(^{294}\) As a matter of theory, judicial deference would upset the system of checks and balances. Thus, this Article has defended a constitutional principle of robust judicial review—judicial review without necessary deference.

Yet, the principle of robust judicial review does not mean that deference on constitutional issues is not a part of the Constitution's design. While no branch owes a constitutional duty of deference, each branch might, at some point, find deference (or, perhaps acquiescence or accommodation) a desirable strategy when operating within the system of checks and balances.\(^{295}\) As discussed earlier, the framers constructed each branch of government with the power and motive to check the others.\(^{296}\) Electoral accountability operates as an ultimate check on the entire system.\(^{297}\) To avoid a check from a coordinate branch or from the electorate, one branch may find it desirable or advisable to defer to or acquiesce in the constitutional judgment of another branch. This interplay of actions and anticipated responses is built-in to the checks and balances system. Thus, while deference is not constitutionally required as a general rule or in any particular case, political circumstances may dictate deference as an act of political survival.\(^{298}\)

\(^{294}\). See supra notes 27-54 and accompanying text.

\(^{295}\). This raises an important point, discussed later, regarding the role of deference. Professor Philip Bobbitt has criticized some authors who urge deference for elevating that method of interpretation—which he calls prudential—over all others on some normative grounds. See Bobbitt, Interpretation, supra note 13, at 126-40. This Article does not urge judges to exercise deference for some normative reason. Rather, this Article argues that judges will on occasion exercise deference (as will members of the other branches of government) because of the practical necessities of the system of checks and balances.

\(^{296}\). See supra notes 142-80 and accompanying text.

\(^{297}\). See Brown, supra note 8, at 565-71; supra notes 182-93 and accompanying text.

\(^{298}\). See Bickel, supra note, at 111-98 (discussing the “passive virtues,” whereby the Court takes itself out of a case out of concern for its political legitimacy). The justices’ occasional invocation of the political question doctrine is an example of such behavior. See Nixon v. United States, 506 U.S. 224 (1993) (what it means for the Senate to “try” an impeachment is a political question committed to the discretion of the senate); Powell v. McCormack, 395 U.S. 486 (1969) (propriety of House’s refusal to seat a member for lack of qualifications was not a political question); Baker v. Carr, 369 U.S. 186 (1962) (whether state legislative apportionment that did not proportionally reflect the state’s population violated the Equal Protection Clause was not a political question); Coleman v. Miller, 307 U.S. 433 (1939) (issues concerning
The same can be said for constitutional theory. The Constitution itself does not prefer or require any specific constitutional theory or method. Rather, the interplay of checks and balances pushes federal judges to follow a theory or method if doing so will forestall checks from the other branches or the People. Part III develops this point in five sections.

The first three sections explain that the framers trusted the judicial branch to interpret the law because they assumed that federal judges would be lawyers and thus would possess the skill, knowledge, and discipline of a legal training. A judge's training in the legal method would constrain and guide the judge's discretion in deciding cases. In short, judges would do law, not politics. Consequently, the other branches and the People could check the judiciary if judges failed to do law. Thus, whatever arguments or actions constitute "doing law" at any given time will be the product of judges reacting to pressures exerted in the system of checks and balances.

The fourth section explains what implications the checks and balances approach to judicial craft and legal method have for constitutional scholarship. Ultimately this article concludes that constitutional scholars should stop their search for some overarching theory or method of interpretation, focusing instead on the real stuff of a living legal system, doing law. The fifth section concludes by examining two examples of how the system of checks and balances has shaped judicial review, suggesting where the scholarly focus should be.

A. Federal Judges and Legal Craft: The Intended Connection

The history of the drafting and ratification of the Constitution shows that the framers defined the role of federal judges by reference to the unique qualifications of those who were to hold the new positions. Federal judges were to be learned in the law, chosen for their knowledge of substantive law, their skill in applying legal method, and their personal integrity. Integrity was the ability to subordinate personal, selfish interests (the causes of faction) to the dictates of judicial craft. Presumably, as long as judges acted like lawyers, they would not incur a retaliatory check from the other branches or the People. If they strayed, however, they could be checked.

Hamilton makes this point when he compares the judge's role to that of the legislator. He argues that judges will be guided by "JUDGMENT" while legislators will be mere creatures of political "WILL." Hamilton explains further that the "judgment" exercised by the judiciary will be the product of the judges' knowledge of and

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skill in the law. Those selected as federal judges will presumably be lawyers, who have gained extensive knowledge of the precedents and statutes that constitute the law, as well as the accepted methods for applying that knowledge to concrete cases. The grant of Article III judicial power, then, rests on the expectation that federal judges will act like lawyers in deciding cases.

Hamilton makes the same point in defending the structure of the federal judiciary and responding to the argument that either Congress or the President, not the Supreme Court, should sit in review of lower court decisions. Hamilton explains the folly in having politically accountable actors review the decisions of law-trained judges:

There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; and in the last, to those of a temporary and mutable constitution. And there is still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice.

300. See id. at 439.
301. See id.; Powell, supra note 8, at 904 (“Although the Philadelphia framers did not discuss in detail how they intended their end product to be interpreted, they clearly assumed that future interpreters would adhere to then prevalent methods of statutory construction.”)
302. Professor Philip Bobbitt derives the same point from the fact of a written Constitution:

By relying upon a written instrument to perfect the constitutional understanding, the framers of the United States Constitution introduced the modalities of legal argument into the politics of the state. This has had a profound importance for constitutional interpretation. Since the Constitution was a written law, it had to be construed, and this was to be done according to the prevailing methods of legal construction.

Bobbitt, Interpretation, supra note 13, at 5; see also Powell, supra note 8, at 902 (“America's innovation was to identify the Constitution with a single normative document... and thus to create the possibility of treating constitutional interpretation as an exercise in the traditional legal activity of construing a written instrument.”).
303. The Federalist No. 81, at 451-52 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Lord Coke made a similar argument against allowing the crown to take from the judges whatever cases it pleased for decision: “[T]he King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels or goods, etc., but this ought to be determined and adjudged in some court of justice according to the law and custom of England...” Prohibitions del Roy (1607), in Coke, Twelfth Report, quoted in J.R. Tanner, Constitutional Documents of the Reign of James I, 186-87
According to Hamilton, federal judges will be selected for their legal training—their qualifications as lawyers. To find highly qualified lawyers, Hamilton acknowledged that the national government would have to encourage "such characters [to] quit[] a lucrative line of practice to accept a seat on the bench...." The federal government by guaranteeing that federal judges have life tenure, and that their "Compensation... shall not be diminished during their Continuance in Office." In his notes from the drafting convention, Madison recognized the special qualifications expected of federal judges, in comparison to legislators. During the convention, Charles Pinkney and Roger Sherman proposed that both houses of Congress appoint federal judges. Madison explained his objection to the Pinkney-Sherman proposal as follows:

[I] objected to appt. by the whole Legislature. Many of them were incompetent Judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expeditor of the laws prevail over a competitor not having these recommendations but possessed of every necessary accomplishment. [I] proposed that the appointment should be made by the Senate, which as a less numerous & more select body, would be more competent judges, and which was sufficiently numerous to justify such a confidence in them.

Madison distinguished between the qualifications for a federal judge and "a talent for business in the legislative field." Once again, the concern is that people skilled at law will be appointed to the federal bench.

Elbridge Gerry, Massachusetts delegate to the federal drafting convention, drew a similar distinction in arguing against including the Supreme Court in a council of revision. William Randolph proposed a council of revision composed of the President and certain

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(1930). This was so because court cases were "not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that man can attain to the cognizance of it...." Id. (emphasis added).

305. See id.
308. Id. at 232-33 (emphasis added).
309. Id. at 232.
310. See id. at 97-98.
federal judges. The council would review bills passed by Congress and could, on majority vote, veto any such bills. Gerry argued against the proposal:

Mr. Gerry doubts whether the Judiciary ought to form a part of [the council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved the power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures. 

According to Gerry, a council of revision would evaluate "the policy of public measures," and federal judges would perform a different task. Once again, there is a distinction between the work of the legislature and the work of judges.

Among current constitutional commentators, Justice Antonin Scalia has echoed the framers' expectation that lawyers—people who "do law"—would fill the federal bench. Specifically, Justice Scalia urged that judges approach the Constitution as a legal document, as a lawyer would, not as a blanket invitation to construct a just society:

The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers' work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is not a text like other texts . . . —well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it.

Regardless of whether one agrees with Justice Scalia's own approach to interpreting the Constitution, his larger point is sound. Constitutional interpretation must bear some relationship to

311. See id. at 21.
312. See id.
313. Id. at 97-98.
314. Rufus King, also in the Massachusetts delegation, made a similar objection: "[T]he judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." Id. at 98.
315. See Scalia, supra note 222, at 46-47.
316. Id. (emphasis added).
317. On constitutional interpretation, as well as on statutory construction, Justice Scalia describes himself as a textualist. See id. at 23-25, 37. By textualist, Scalia means a decision-maker who seeks to give the words of a document (constitution or statute) the meaning that those words had at the time they were drafted. See id. at 23-25.
318. Justice Byron White made a similar point in Bowers v. Hardwick, 478 U.S. 186, 194 (1986): "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." (emphasis added). The idea is that the Court must restrict itself to sources of law in making its decisions. To get away from such sources is to open the Court to criticism, making the Court "vulnerable" to political checks. Again, one does not have to agree with Justice White's holding in
a lawyer's work, otherwise the American legal system has gained nothing by entrusting that function to judges.

B. What Does It Mean to "Do Law"?

While a strict separation of legal craft from other influences seems impossible, or even naive, the framers' focus on legal craft provides a workable conception of the judicial role. At any given time, there is a loose consensus among the legal community—and among sophisticated non-lawyers—as to what counts and what does not count as "legal reasoning" or "legal argument." We do not receive "law" in some ideal form that has a priori roots. "Law is something we do, not something we have as a consequence of something we do." In doing law, the legal community forms certain practices to the exclusion of others. To give an obvious example, consensus exists that ad hominem attacks are not proper legal argument, but that analogies are often appropriate.

Bowers to agree that judges should be doing law, however that task is defined at a given time.

319. See, e.g., Ackerman, supra note 11, at 39.

I believe that American law in general, and constitutional law in particular, is a relatively autonomous part of our culture. It is relatively autonomous in that, at any moment of time, even the most powerful of our lawyers and judges are profoundly constrained by the patterns of argument built up by the legal community over the past two centuries of disputation—more powerful than the judges themselves recognize, for they do not consciously interrogate many of the core elements of their legal culture. They simply take them for granted as they go about their business deciding cases.

Id.; see also J.M. Balkin, A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason, in Law's Stories: Narrative and Rhetoric in the Law 211-24 (Peter Brooks & Paul Gewirtz eds., 1996) (discussing the relationship between rhetoric and reason in law); Balkin & Levinson, supra note 36, at 985; Bobbitt, Interpretation, supra note 13, at 37-39 ("[A]n interpretive community will determine the truth functions of a particular proposition . . ."); Wolfe, supra note 57, at 37 (describing "widespread acceptance of certain rules of legal interpretation during the period in which the Constitution was framed and put into effect . . .").


There is nothing more to constitutional law (or any other body of doctrine) than the use of the six modalities of argument [established by the practice of constitutional law]. For jurisprudence, both constitutional and general, the lesson is clear: the essential task of jurisprudence is the accurate description of our legal practices of argument. Theory is banished not because it is wrong, but because it is irrelevant. If law is an argumentative practice composed of the six modalities of argument, then the key to understanding law lies in understanding how these forms are deployed in legal argument. (footnotes omitted).

Id.


322. See Wolfe, supra note 57, at 37 (arguing that while the prevailing "rules of interpretation do not resolve all problems of interpretation," they "do narrow the range of differences greatly and provide a common standard for deciding issues"). Professor Bobbitt illustrates the point in distinguishing between legal and political arguments:
Debates over the proper practices in law take place over time. For example, legal scholars are engaged in an ongoing debate over the proper method(s) for interpreting statutes. Is text the primary, or sole, focus? Should judges consult legislative history? What role should legislative purpose, as opposed to legislative intent, play? According to many commentators, different practices prevailed at different times in English and American history. At any given time, a practitioner, commentator, or judge would be criticized for not following the prevailing view. This potential for criticism—to be seen as unlearned or an outlier—has a check on discretion. A tendency toward conformity influences judges no less than the rest of society, and is an intended influence on the judiciary: Judges would largely conform to the conception of legal method prevailing at the time they make their decisions.

What counts as legal argument will change over time. Some
practitioners, judges, and commentators will subject the current consensus to sustained criticism and, in doing so, will upset that consensus and may, in time, push us to a new consensus. Those advocating an outlying method bear the burden of proof within the community. As one commentator has aptly stated:

[I]t is important to distinguish between things taken for granted, and things up for grabs. Things taken for granted can be used in an argument, in a sense, without argument; things up for grabs must be defended. One can question things taken for granted, but the questions (ordinarily) don’t get one far. One can assert things up for grabs, but what is said (usually) feels as if it is simply being asserted. It feels, that is, as if it is just one view among many—respectable, but not compelling.

There is nothing inherently special about the then-prevailing methods of legal argument; they are held in place merely by an existing consensus. Thus, everything is potentially on the table—we are in a constant dialogue over what constitutes the legal craft. The current consensus is contingent, and there is no way to end the debate.

C. “Doing Law” as a Check on the Judiciary

To be seen by others as properly exercising Article III judicial power, then, federal judges must interpret the Constitution in a way that the coordinate federal branches and the People perceive as lawyer-like. Federal judges must persuade others that they are “doing law,” or else those others will question the judiciary’s authority to interpret the Constitution.

We have seen this rhetoric before. A common criticism of judicial nominees, and a war cry of some politicians, is that a judge should “interpret the law” and not “make law.” While this distinction is too simplistic to be sustained on its face, it really appeals to an underlying disagreement over both the methods used in and outcomes of judicial decisions. For example, in some cases, politicians use the argument to criticize non-originalist decisions, suggesting disagreement with constitutional method. In other cases, politicians use the argument to criticize particular case outcomes—such as the

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This agreement, I think, would be an uncontested discourse in the legal community. A contested discourse, on the other hand, is “a discourse where fundamentals in that discourse appear up for grabs; that participants in that discourse acknowledge the legitimacy of disagreement about these fundamentals; that disagreement is a sign of normalcy for a participant, not oddness.” Id. At any given time, the acceptability of some methods or arguments might be “up for grabs” in the legal community. Only time will tell whether these methods or arguments will become part of the community’s accepted practices, or whether they will be discarded.

326. See Lessig, Fidelity, supra note 325, at 1392-93.
327. Lessig, supra note 13, at 1837.
328. See Devins & Fisher, supra note 27, at 91-93.
Court’s recognition of an abortion right in *Roe v. Wade*—suggesting disagreement solely with the Court’s result. In either case, the criticism often reduces to the same thing: Judges are not properly doing law.329

Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt, among others, have used such arguments to criticize the Court. First, consider Jefferson’s main criticism of Marshall’s opinion in *Marbury v. Madison*,330 which focused on Marshall’s violation of a standard practice of legal decision-making. Recall that *Marbury* arose from a series of judicial appointments made by President John Adams and the Federalist-controlled Congress on the eve of Jefferson’s inauguration.331 As the final acts of the appointment process, the President would sign the judge’s commission, and the commission would be delivered to the appointee. When Jefferson took over as President, however, some of the commissions had yet to be delivered, and Jefferson ordered his Secretary of State, James Madison, to withhold those commissions. One of the undelivered commissions appointed William Marbury as a Justice of the Peace for the District of Columbia. When Madison refused to deliver his commission, Marbury sought a writ of mandamus from the Supreme Court directing Madison to deliver the commission. The suit set up a showdown between the Federalist-controlled Supreme Court and the newly elected Republican-Democratic President.

Marshall’s opinion for the Court held, in the following order, that: (1) Marbury had a right to his commission, (2) Madison had violated that right by not delivering Marbury’s commission, (3) United States law supplied a remedy for Madison’s violation of Marbury’s rights, and (4) the Supreme Court did not have jurisdiction to decide the case because the federal statute that conferred jurisdiction was unconstitutional. In criticizing Marshall’s opinion, Jefferson rightly

329. Such objections are routinely the stuff of confirmation hearings. Though tinged with political motivation, when the nominee holds or has held a judicial office, the hearings often focus on the nominee’s work as a judge. Or, if the nominee has extra-judicial legal writings, these writings are consulted as examples of the nominee’s ability to “do law.” Again, this is not to deny that criticisms of a nominee’s legal writings could not be used as cover for other motives, but it at least suggests that the overt battle must be fought in those terms. When there is nothing in the nominee’s legal reasoning to attack, the other-motivated politician is left with little or no ammunition for attack and the hearing must become overtly political. At that point, the politician will face the cost of being perceived as politicizing the nomination process, which includes criticism from the legal community and the mainstream media. Professor Bobbitt has an insightful discussion of the confirmation hearings over the nomination of Judge Robert Bork to the United States Supreme Court. See Bobbitt, *Interpretation, supra* note 13, at 83-108.

330. 5 U.S. (1 Cranch) 137 (1803).

noted that a court without jurisdiction does not have power to hear or decide the merits of a case. For this reason, it is accepted legal practice for a court to first decide whether it has jurisdiction over a case and, if not, end its consideration of the case. Yet, Marshall did just the opposite in Marbury; he first addressed the merits of Marbury's claims and, only then, asked whether the Court had jurisdiction. Thus, even though the Court did not have jurisdiction, Marshall addressed the merits and, in doing so, accused Jefferson of acting lawlessly in refusing to deliver Marbury's commission.

Marshall's backwards consideration of the issues in Marbury was poor legal method, and Jefferson rightly criticized Marshall on this basis. In a letter to Justice Johnson written in 1823, Jefferson wrote:

This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. ... [T]he question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery.... Could anything exceed [this] perversion of law?333

In a separate correspondence, Jefferson complained that, in Marbury, "the judges in the outset disclaimed all cognisance of the case; altho' they then went on to say what would have been their opinion, had they had cognisance of it."334 According to Jefferson, in Marbury, Marshall was not doing law, or was doing law incorrectly, because the Court's opinion broke with accepted legal practice.335 President Jackson, contrary to the Court's holding in McCulloch v. Maryland,336

332. See Powell, supra note 266, at 12 (describing all discussion in Marbury, other than the holding that the Court did not have jurisdiction, as "obiter dicta preliminaries"); Wolfe, supra note 57, at 87 ("Jefferson was furious that Marshall would criticize him on the merits for many pages before saying that the Court had no jurisdiction."). For a collection of contemporaneous criticisms along this line, see Johnny C. Burris, Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review, 12 Okla. City U. L. Rev. 585, 630-41 (1987).

333. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 3 The Republic of Letters, supra note 101, at 1862, 1864-65. In the same letter, Jefferson also criticizes Marshall's holding that Marbury was entitled to the commission. Specifically, Jefferson argues that the commission is like a deed to real property: neither is effective until delivered. See id. at 1865. Because Marbury's commission had not been delivered, his right to the judicial office had not vested. See id. In this passage, Jefferson is faulting Marshall's legal reasoning—Marbury was a failed (or poor) attempt at doing law because the Court did not apply the proper analogy between a judicial commission and a deed.


335. In a letter to James Madison, Jefferson further criticized Marshall's opinion as follows: "His twistifications in the case of Marbury ... shew how dexterously he can reconcile law to his personal biases." Letter from Thomas Jefferson to James Madison (May 25, 1810), in 3 The Republic of Letters, supra note 101, at 1631, 1632.

contended that Congress did not have power to incorporate a national bank and, on this basis, vetoed a bill renewing the Bank of the United States.\textsuperscript{337} Also, when Chief Justice Marshall struck down Georgia laws that effectively outlawed the Cherokee Nation,\textsuperscript{338} and the state ignored the Court’s order, President Jackson is to have said, “Well, John Marshall has made his decision, now let him enforce it.”\textsuperscript{339} In both cases, Jackson claimed that Supreme Court opinions only bound the other branches of government to the extent that those decisions were persuasive interpretations of the Constitution.\textsuperscript{340}

President Lincoln made no secret of his disagreement with the Supreme Court’s decision in \textit{Scott v. Sandford},\textsuperscript{341} which struck down the Missouri Compromise as unconstitutional. Lincoln argued that he owed obedience to the judgment in that specific case, but was free to reject the court’s reasoning and rationale in future cases.\textsuperscript{342} According

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\item \textsuperscript{337} See Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents 576 (James D. Richardson ed., 1896).
\item \textsuperscript{338} See Jean Edward Smith, John Marshall: Definer of a Nation 516 (1996) (“In the late 1820s, when gold was discovered on the Cherokee lands in Georgia, the state enacted a series of laws that abolished the Indian nation, distributed its territory (some nine million acres) to the several adjacent counties, and declared that after June 1, 1830, all Cherokee laws and customs would be null and void.”); Joseph C. Burke, \textit{The Cherokee Cases: A Study in Law, Politics, and Morality}, 21 Stan. L. Rev. 500, 523 (1969).
\item \textsuperscript{339} See Robert G. McCloskey, The American Supreme Court 77 (Daniel J. Boornstin ed., 1960) (“[T]he Court had... been defied in two spectacular cases by Georgia, and President Jackson’s unwillingness to back the judges had underlined the Court’s ultimate dependency on external support.”); Smith, \textit{supra} note 338, at 518; 1 Warren, \textit{supra} note 331, at 758-60. Jackson biographer, Robert Remini, however, casts doubt in the quotation: It was later reported by Horace Greeley that Jackson’s response to the Marshall decision was total defiance. “Well: John Marshall has made his decision: now let him enforce it!” Greeley cited George N. Briggs, a Representative from Massachusetts, as his source for the statement. The quotation certainly sounds like Jackson and many historians have chosen to believe that he said it. The fact is that Jackson did not say it because there was no reason to do so. There was nothing for him to enforce. Why, then, would he refuse an action that no one asked him to take? As he said, the decision was stillborn. The court rendered an opinion which abandoned the Indians to their inevitable fate.
\item \textsuperscript{340} See supra notes 38-41 and accompanying text.
\item \textsuperscript{341} 60 U.S. (19 How.) 393 (1856).
\item \textsuperscript{342} See Abraham Lincoln, The Lincoln-Douglas Debates 291 (Harold Holzer ed., 1993) (debate of Oct. 13, 1858) (“[W]e... oppose [Scott] as a political rule that shall be binding upon the man when he goes to the polls to vote, or upon the member of Congress, or upon the President, to favor no measure that does not actually tally with the principle of that decision.”). Lincoln explained in his First Inaugural Address: I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all
\end{itemize}
to Lincoln, the Constitution's meaning was not "irrevocably fixed" by the Supreme Court's decisions.\textsuperscript{343} It was with this understanding of each branches' role that he was able to sign a bill prohibiting slavery in the territories\textsuperscript{344} and, ultimately, unilaterally free southern slaves with the Emancipation Proclamation.\textsuperscript{345} Both actions were wholly inconsistent with the Court's opinion in \textit{Scott}.

The Supreme Court similarly struck down large portions of President Roosevelt's first two New Deals.\textsuperscript{346} In the face of these parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), \textit{in} 6 Messages and Papers of the Presidents 5 (James D. Richardson ed., 1897); \textit{see also} Wolfe, \textit{supra} note 57, at 114-15 (discussing limits of the precedential value of Supreme Court decisions).

343. See Lincoln, First Inaugural Address, \textit{supra} note 342, at 9-10.

344. \textit{See} Act of June 19, 1862, ch. 111, 12 Stat. 432 ("An Act to secure Freedom to all Persons within the Territories of the United States"). The Act provided: That from and after the passage of this act there shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in punishment of crimes whereof the party shall have been duly convicted.

\textit{Id.}

345. Abraham Lincoln, Emancipation Proclamation (January 1, 1863), \textit{reprinted in} 6 Messages and Papers of the Presidents 157, 158 (James D. Richardson ed., 1897). In that document, Lincoln "order[ed] and declare[d] that all persons held as slaves within said designated States... are and henceforward shall be free...." The "designated States" are, with certain local exceptions, "Arkansas, Texas, Louisiana... Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia...".

346. Many commentators describe the New Deal/\textit{Lochner} narrative as a struggle between a President and the Supreme Court. While this captures much of the picture, it misses the fact that the prior President, Herbert Hoover, had had a similar constitutional vision to the \textit{Lochner} era Court. On policy grounds, President Hoover was in favor of government intervention in the national economy. \textit{See} 2 Ackerman, \textit{supra} note 11, at 281-82; William J. Barber, \textit{From New Era to New Deal: Herbert Hoover, the Economists, and American Economic Policy}, 1921-1933, at 190-91 (1985). Yet, he believed that certain types of intervention, while economically sound, were beyond Congress' power to enact. Barber, \textit{supra}, at 190-91. For example, Hoover believed that wage and price stability was necessary for recovery from the Great Depression. Yet, he also believed that Congress did not have the power to enact such laws. \textit{See id.} Instead, he either used the prestige of the presidency to exhort employers and sellers to do so, or he approached the problem indirectly through laws that he believed were within Congress' power. \textit{See id.} at 191. Thus, it would be wrong to portray the Court as an aberrant institution throughout the \textit{Lochner} era. Rather, given that the Court's membership changes rather slowly, the Court was left behind by the rapidly changing politics spurred by the Great Depression.
decisions, Roosevelt mounted a political campaign against the Supreme Court, which included a plan to pack the Court with new justices sympathetic to his regulatory aims. After an intervening election that backed the President and Congress, the Supreme Court backed down, with a single, crucial justice changing his vote, though it is still disputed whether Roosevelt's political attack influenced this dramatic switch. At least one Supreme Court Justice has acknowledged that the Court properly yielded to the strong public opinion Roosevelt had marshaled behind his New Deal.

Whatever one thinks of the constitutional methods espoused by these various Presidents and politicians, each plays on a theme dating back to the framers: federal judges are given Article III power under the expectation that they will "do law," and the coordinate branches of the federal government, and the People, stand ready to check the judiciary if they believe federal judges are doing something other than law or have improperly done law. As discussed above, what it means to "do law" at any given time will be a descriptive matter, not a normative one. This will be true for constitutional law as it is in other areas of law. There is nothing in the Constitution or in the theory of checks and balances that defines the legal method. As Philip Bobbitt explained in his book Constitutional Fate, at any time there will be certain methods of argument that lawyers' and judges' practices will show are generally accepted as legal arguments. While the consensus of what counts as a legal argument, or what are proper uses of the different accepted methods, will change over time, the consensus at any given time will constrain judges. Judges who deviate from accepted practices open themselves to attack—constitutional check—by other branches and the electorate. Of course, judges can

347. See 2 Ackerman, supra note 11, at 317-33 (discussing the political context of and debate over Roosevelt's plan to pack the Court).

348. See id. at 328-35.

349. See Owen J. Roberts, The Court and the Constitution: The Oliver Wendell Holmes Lectures 61 (1951) ("Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy.").

350. I do not argue that the framers held the view that legal method is inherently contingent. Rather, regardless of the view of law they held, the framers expected judges to do law, and, in practice, what counts as law is contingent. The framers' intentions or expectations cannot change this state of things.

351. See Balkin & Levinson, supra note 36, at 985 (stating that what constitutes a valid legal argument "alters over time").

try to change or develop new methods of argument. Only time will
tell, however, whether these innovations are accepted as part of the
courts' legal function, or are rejected as a departure from that role.

The preceding discussion of judicial and legal method has profound
consequences for constitutional theory: The methods of constitutional
interpretation will be the product of the system of checks and
balances, and do not need independent justification under the
Constitution or some political theory or theory of justice. This does
not mean that constitutional theory is irrelevant to the constitutional
role of judges. Rather, under the checks and balances conception of
the judicial role, constitutional theory may be part of the judiciary's
political arsenal. As noted above, courts must anticipate the actions
of other branches and the electorate when reaching their decisions.

To gain acceptance and support from these constituencies, judges
must act like lawyers.

remains an active player in the system of checks and balances. Second, such a
reputation would make the other branches and the People more tolerant of specific
court decisions with which they disagree, in turn forestalling any checks against the
judiciary. See Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court
as a National Policy-Maker, 6 J. Pub. L. 279, 285 (1957); Devins & Fisher, supra note
27, at 97-98 ("Rather than definitively settling transcendent questions, courts must
take account of social movements and public opinion. When the judiciary strays
outside and opposes the policy of elected leaders, it does so at substantial risk. The
Court maintains its strength by steering a course that fits within the permissible limits
of public opinion."); Richard Fenston, The Supreme Court and Critical Elections, 69
Am. Pol. Sci. Rev. 795 (1975); Walter F. Murphy & Joseph Tanenhaus, Publicity,
Public Opinion, and the Court, 84 Nw. U. L. Rev. 985, 992 (1990); Tom R. Tyler &
Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal
Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703,
715 (1994); see generally David Adamany, Legitimacy, Realigning Elections, and the
Supreme Court, 1973 Wis. L. Rev. 790 (1973) (observing that the Supreme Court
considers generally accepted methods of legal reasoning in addition to contemporary
popular and political culture).

Indeed, as one commentator has asked rhetorically, "What theory could
possibly provide a persuasive and coherent rationale for the entire body of American
constitutional law as well as provide persuasive guidance for all future cases?"
Griffin, supra note 6, at 1766.

Also, as Professor Ackerman has argued, constitutional law should not be an
abstract quest for justice in specific cases. See 1 Ackerman, supra note 11, at 10-16.
Rather, constitutional law should be about deriving and defining the unique aspects of
our Constitution. If this system yields unjust outcomes or patterns of outcomes, then
that is an argument for changing the Constitution. But, it is not an argument for
judges, or any other decision maker, to ignore the established system in practice.
Unless, of course, the argument is that the People should resort to their reserved
power to alter or abolish the system. See supra notes 194-11 and accompanying text.

See supra notes 228-44 and accompanying text.

Michel Dorf's thumbnail description of Philip Bobbitt's constitutional views
gives a useful analogy: "From his perspective, the question [which is the legitimate
method of constitutional interpretation] makes as little sense as asking why the rules
of English require that plural nouns take plural verbs. Those are simply the rules of
the game; if you do not abide by them, you are playing a different game." Michael C.
Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of
D. The Implication for Constitutional Theory and Method

Legal commentators play a role in this constitutional system of checks and balances, though not the role many have claimed. Legal commentators should relinquish the search for the method of constitutional interpretation—the "Grand Unified Theory" of constitutional law. The Constitution simply does not contemplate such a theory and, as some commentators are suggesting, the search is futile.

Professor Bruce Ackerman's recent work provides a helpful example because he, under this Article's view, has it partly right. In the first two installments of his three-volume work *We the People*, Professor Ackerman offers both a descriptive and normative account of constitutional change in America. In the descriptive account, with great care, he chronicles how the interplay of checks and balances among the three branches of government and the People has led to changed understandings of different constitutional provisions. For example, the social and political upheaval after the Great Depression and throughout the New Deal led to a vast expansion of Congress' Commerce Clause power, extensive delegations of law-making power to federal administrative agencies, and dramatic withdrawal of judicial review under the Due Process Clause. These changes occurred over time as Congress, the President, and the courts clashed over specific constitutional issues, and the People made their voice heard through periodic elections. On this much Professor Ackerman and I would agree—the Constitution's meaning was determined in the give-and-take of the system of checks and balances.

Professor Ackerman's project, however, is more ambitious. In his normative argument, he develops a constitutional theory that distinguishes constitutional changes that are legitimate from those that are not. Professor Ackerman wants to identify something

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357. Lessig, supra note 13, at 1838-41.

358. The first volume, subtitled Foundations, offers brief introductory sketches of descriptive accounts of the founding, reconstruction and New Deal eras, while the second volume, subtitled Transformations, offers a detailed account of each era, as well as other instructive historical events. See generally 1 & 2 Ackerman, supra note 11. A recent symposium addressed various aspects of Professor Ackerman's historical account. See Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 Yale L.J. 1917 (1999). The third volume will turn to how well the Supreme Court has assimilated the lessons of our prior constitutional practice into its constitutional doctrines. See 2 Ackerman, supra note 11, at 251, 349.

359. See 1 Ackerman, supra note 11, at 47-50; 2 Ackerman, supra note 11, at 279-311.

360. See 1 Ackerman, supra note 11, at 47-50; 2 Ackerman, supra note 11, at 279-311.
essential in constitutional change—in the ebb and flow of the system of checks and balances—that will legitimate that change. This meta-
theory would allow political and legal actors to decide which
outcomes of the checks and balances process are binding (and
therefore part of the Constitution) and which are mere temporary,
ordinary laws that do not have constitutional status.\textsuperscript{361} For example,
in discussing the changes wrought by the New Deal, he frames his
central inquiry as follows: “Should the Roosevelt revolution be
viewed as a constitutive act of popular sovereignty that \textit{legitimately}
changed the preceding Republican Constitution?”\textsuperscript{362} He believes he
has found such a legitimating factor in his theory of constitutional
moments, which legitimates constitutional change outside the Article
V amendment process when all branches of the federal government
and the People concur with, or acquiesce in, the change after a period
of heightened debate.\textsuperscript{363}

\textsuperscript{361} See 2 Ackerman, supra note 11, at 261-65.
\textsuperscript{362} 2 Ackerman, supra note 11, at 280; see, e.g., id. at 28 (“If Americans of the
1990’s wish to revise their Constitution, what are the \textit{legal} alternatives they may
legitimately pursue?”); 1 Ackerman, supra note 11, at 6 (describing how gradual
popular assent enhances the constitutional legitimacy of governmental action); id. at 9
(defining the standard for determining whether political movements can “rightfully
claim” to have changed the Constitution); id. at 22 (urging search for conditions that
give lawmakers the “democratic authority to make fundamental changes in our higher
law”); id. at 44 (searching historical episodes to determine how law-makers “finally
\textit{earned} the constitutional authority to speak in the name of the People”).

363. Professor Ackerman summarizes the project as follows:
Decisions by the People occur rarely, and under special constitutional
conditions. Before gaining the authority to make supreme law in the name
of the People, a movement’s political partisans must, first, convince an
extraordinary number of their fellow citizens to take their proposed
initiative with a seriousness that they do not normally accord to politics;
second, they must allow their opponents a fair opportunity to organize their
own forces; third, they must convince a majority of their fellow Americans to
support their initiative as its merits are discussed, time and again, in the
deliberative fora provided for “higher lawmaking.” It is only then that a
political movement earns the enhanced legitimacy the dualist Constitution
accords to decisions made by the People.

1 Ackerman, supra note 11, at 6. Professor Ackerman breaks this extra-Article V
process, which he calls “higher law-making,” into four phases: “signaling phase,”
“proposal,” “mobilized popular deliberation,” and “legal codification.” See id. at 266-
67. He explains how these functions have been performed during past constitutional
movements, such as during the New Deal era. In doing so, he addresses questions
such as when a movement has coalesced enough support to propose its higher law-
making agenda to the People, and when the People have given such a proposal
sufficient focused and serious consideration, and assent, to constitute successful
higher law-making. See id. at 272-90. For our current purposes, however, we do not
need a detailed picture of Professor Ackerman’s theory. Rather, the important point
is that his work seeks to identify conditions under which the Constitution sanctions
extra-Article V higher law-making.

As seen in the preceding paragraph, Professor Ackerman’s normative project
focuses on moments of strong popular consensus that lead to a successful
constitutional revolution. In the descriptive part of his project, Professor Ackerman
argues that three episodes—the Founding, Reconstruction, and New Deal Eras—all
I would not join Professor Ackerman and others like him on their normative quest. Under the theory of checks and balances articulated in this Article, the Constitution has not anointed one theory or method as the way to interpret the Constitution. Rather, the Constitution has established the players (the three branches of the federal government and the People) and the ground rules (e.g., Article I, II, and III procedures) for an ongoing project of government. Constitutional methods and interpretations will be the necessary byproduct of this process. Congress, the President, and the People will expect judges to do law, and, if they fail to do so, or do something else (like politics), judges should expect a retaliatory check. Constitutional readings will emerge from this process, and it is the process itself, not some normative theory that anoints some readings but not others, that gives these readings their legitimacy.

The difference between the checks and balances approach and Professor Ackerman's work, then, is slight but significant. We both agree that the play of checks and balances has led to constitutional change over time, and that such change is part of the proper saw such successful constitutional revolutions. In contrast, Political Science Professor James A. Morone paints a picture of these three eras as brief bursts of popular lawmaking that ultimately failed to make any lasting, coherent change in American law. See James A. Morone, The Democratic Wish: Popular Participation and the Limits of American Government 9-15 (1990). According to Prof. Marone, popular pressure for social or legal reform builds until it provokes a popular response in law making. Id. at 9-11. Government then turns to implementing the new reforms through new institutions, at which time popular sentiment fades. Id. at 11-13. While these new institutions periodically expand the limits of government power, the public spirit that created the institutions cannot be maintained. Id. at 12-13. With the new institutions no longer in control of the reform movement that created them, the reforms are limited, compromised, and, in some cases, reversed during the play of normal politics. Id. at 13-15. Thus, contrary to Professor Ackerman, Professor Marone argues that American reform movements ultimately fail to remake American government or society in accord with their reform programs.

364. Like Professor Bobbitt, this Article rejects the search for normative justifications for methods of constitutional interpretation. Also, like Professor Bobbitt, this Article acknowledges that normative arguments must somehow justify the system of government that uses its force to impose on the liberty of individuals. The system of checks and balances, grounded in Madison's view of human nature and the best way to make law given that view, is part of the normative underpinnings.

365. Professor Ackerman, however, makes the important point that the legal community sometimes constructs narratives that hide constitutional change. For example, he describes a legal narrative about the Lochner era. According to Professor Ackerman, many lawyers and judges explain the Lochner era as a period when the Supreme Court departed from the proper understanding of federal power established in several opinions by Chief Justice John Marshall. See 1 Ackerman, supra note 11, at 42-43; 2 Ackerman, supra note 11, at 8-10; Robert L. Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645 (1946) (setting forth a version of the Lochner era narrative). The Court's rejection of Lochner and embrace of New-Deal type legislation, then, can be explained as merely a return to the proper understanding of the Constitution. 1 Ackerman, supra note 11, at 42-43. This narrative denies any possibility of changed constitutional meaning. Id.

On the role of social narratives in law, see Balkin & Levinson, supra note 36, at
working of the Constitution. Professor Ackerman and I divide, however, on what comes next. Professor Ackerman proposes that we search for a theory in the Constitution that would identify which changes are legitimate and which changes are not.

Under the checks and balances approach, no constitutional change is normatively privileged. Constitutional change occurred during the New Deal era because the play of checks and balances pushed in that direction. If the Court decides to retreat from the New Deal's expansive view of federal power, there are only two permissible breaks on such action. First, if the President, Congress, and the People are still strongly aligned in favor of the New Deal vision, the Court will face a check from those actors if its decisions erode that vision. If the will no longer exists, the Court may act without threat of retaliation. To say that the “will no longer exists” does not mean that the President, Congress, or the People have rejected the new Deal vision. Rather, even if support or agreement still exists for that vision, it is not strong enough to motivate a check on contrary Court action.

Second, even if no check is forthcoming, the Court may be criticized for not doing law. If the Court decides to reject New Deal precedents, it must explain its decision to do so in terms of legal arguments. For example, the Court must explain why the stare decisis preference for precedent has been overcome. Professor Ackerman could argue that patterns of actions by other decision makers, such as Congress, the President, and the People, should be given weight as a form of legal precedent. Indeed, Chief Justice Marshall made such an argument in upholding Congress' power to create a national bank. But, the argument would be that legal argument generally, not just constitutional argument, should pay closer attention to such “precedents.” The Constitution does not privilege any prior extra-Article V constitutional changes from the process of checks and balances.

366. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353-56 (1819) (explaining that passage of a national bank bill by the first Congress, which included members of the federal drafting and state ratifying conventions, was entitled to weight in deciding the constitutionality of a national bank).
367. Even amendments enacted through Article V processes are subject to change through the process of checks and balances. While the texts of such amendments would not, under current practice, be changed by extra-Article V means, the implementation of these amendments in decisions of the three branches might change their meaning over time. An extreme example of such transformative effect is the Privileges and Immunities Clause of the Fourteenth Amendment. Soon after ratification of the Fourteenth Amendment, the Supreme Court held that the Privileges and Immunities Clause protected only those “privileges” and “immunities” already protected from state infringement elsewhere in the Constitution. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78-79 (1872). Constitutional commentators widely agree that this was a misreading of the Clause, which effectively repealed part of the newly-enacted Fourteenth Amendment. See Erwin Chemerinsky,
Some might object that this Article's checks and balances theory of constitutional government would legitimate even potentially oppressive government action. This criticism is mistaken for two important reasons. First, checks and balances does not legitimize outcomes. Rather, it identifies the processes and constitutional structures that will themselves constrain government's pursuit of different outcomes. The system itself is the restraint, not some substantive standard against which to judge outcomes.

The Constitution contains clauses, such as the Contract Clause and the Equal Protection Clause, that contain substantive commitments. The meaning and efficacy of these substantive commitments is determined only through their application by government actors checking one another; that is the transcendent genius of the system. The substantive clauses of the Constitution provide potent rhetorical ammunition to the members of the three branches of government as they check one another's power and attempt justify their actions to the People. Ultimately, if all four quarters are unwilling to defend the Constitution's substantive commitments, those clauses are as good as lost.

This raises the second response to the potential for oppression: To paraphrase Benjamin Franklin, we have a constitutional government only if we can keep it. Examples from Nazi Germany to the current Constitutional Law: Principles and Policies (1997) § 6.3, at 377 ("The privileges or immunities clause was rendered a nullity by the Slaughter-House Cases and it has been ever since."). Given the anti-Reconstruction political tide of the time, however, the other branches and the People did not respond to this constitutional misreading.

368. See Bobbitt, Constitutional Interpretation, supra note 13, at 6-9, 119 (constitutional decisions are legitimate to the extent that they employ the accepted methods of interpretation).

369. Professor Ackerman has noted a distinction between constitutional process and substance. See 1 Ackerman, supra note 11, at 228.

370. Of course, the potency of the ammunition will depend on the weight various decision makers give textual arguments in constitutional interpretation. For example, the Court has practically ignored the text of the Eleventh Amendment in applying that provision. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) ("Despite the narrowness of its terms . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."). Also, the Court has effectively read the Privileges and Immunities Clause of the Fourteenth Amendment out of the Constitution. See supra note 367. Thus, to say that text has been dispositive, or even strongly weighed, in all constitutional interpretation would be incorrect.

371. Professor Van Alstyne has suggested that Congress may use the Constitution in a similar way: The Constitution's "written limitations may be useful politically; they may figure in congressional debates, furnishing argumentative force as well as a personal conscientious restraint, against the enactment of repressive bills." Van Alstyne, supra note 238, at 19; cf. 2 Ackerman, supra note 11, at 416 ("Taken by themselves, rules are lifeless things—marks on paper that neither control nor restrain. Once placed within a setting of principles, institutions, and precedents, they can play a useful supporting role.").

372. See Fred Barbash, The Founding 207 (1987) ("Well, Doctor, what have we
Russian Republic illustrate that a written constitution does not guarantee any set of substantive outcomes. In our own history, the Privileges and Immunities Clause of the Fourteenth Amendment illustrates the frailty of constitutional text. Since soon after ratification of the Fourteenth Amendment, the Court has interpreted that Clause as largely duplicative of rights guaranteed elsewhere in the Constitution. Standing alone, then, the “mere paper” of the Constitution cannot control government. Rather, it is only the vigilance and virtue of the People, in the end, that can save

got? A republic or a monarchy?” someone asked Franklin in the summer of 1787. [He] responded, ‘A republic, if you can keep it.”

373. See William L. Shirer, The Rise and Fall of the Third Reich 56 (1960) (the constitution of the Weimar Republic, under which the National Socialist party came to power, was one of the most liberal ever written in Europe). Professor Ackerman writes of Germany’s constitutional innovation of writing into the German Constitution that certain rights are unamendable. See 1 Ackerman, supra note 11, at 320. In suggesting such an innovation for the American Constitution, he urges: “Why not make our new Bill of Rights unamendable? Couldn’t a Hitler arise in America, no less than Germany?” Id. I agree, but urge that no paper Constitution would stand in that ruler’s way. The story of the Third Reich is rife with examples of the German government and People ignoring, through apathy, ignorance, or intimidation, gross violations of the Constitution of the Weimar Republic. Madison made a similar point in noting that some state governments had violated the separation of powers guarantees of their own state’s constitution. See The Federalist No. 48, at 281 (James Madison) (Clinton Rossiter ed., 1961) (“The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”). It is unclear why a prohibition against amendments would provide any more of a safeguard against abuse than an amendment provision that was so easily circumvented. See Posner, supra note 4, at 218-20 (responding to Ackerman’s argument, noting irony that Ackerman proposes unamendable provisions in the course of defending a theory that allows constitutional change outside the amendment process). Ultimately, it is the People’s constitution, not the Constitution itself, that determines whether government descends into despotism. Ackerman notes similar points when he refers to the need for a vigilant or virtuous People to sustain the American commitment to constitutional government. See 1 Ackerman, supra note 11, at 198 (discussing how we must economize on the resort to the limited quantity of virtue that the framers believed the People possessed); id. at 291 (“[T]he American Republic is no more eternal than the Roman—and it will come to an end when American citizens betray their Constitution’s fundamental ideals and aspirations so thoroughly that existing institutions merely parody the public meanings they formerly conveyed.”).

374. See U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”).

375. See 2 Ackerman, supra note 11, at 375-76. [All legal historians recognize that the Reconstruction Republicans—both in and out of Congress—placed their highest hopes on the Fourteenth Amendment’s solemn guarantee that no state shall “abridge the privileges or immunities of citizens of the United States.” And yet the courts have never seriously redeemed the promise of this text.

Id.

376. See Federalist No. 51 (James Madison).

377. See Bailyn, supra note 124, at 65-66.
American constitutional government. The framers assumed that those in power, being mortal, would inevitably seek to expand their power and designed a system to check those attempts. Essential to every aspect of checks and balances is accountability to various constituencies. Thus, if someday the People abdicate that role, the system is set adrift. Ultimately, no constitutional theory can save the People if they do not want to be saved.

Because the quest for grand constitutional theories is illusory, constitutional scholarship should instead evaluate the work of the judiciary as a product of legal craft, as that function is understood at any given time. Legal scholars ought to evaluate the Court’s arguments on their own terms. If the Court says that a particular doctrine or rule promotes efficiency, we ought to evaluate that claim’s logic as well as its empirical support. Also, we ought to evaluate the Court’s goals—is efficiency the proper goal in a given context—given the constitutional lawyer’s currently-accepted tools—text, history, structure, precedent, policy, etc. If the Court claims that one interpretive method or another—for example, text, structure, history, intent—supports or requires a particular result, we ought to examine the Court’s use of method. As academicians, we have the time and

378. See 1 Ackerman, supra note 11, at 27 (arguing that the “remarkable political capacity” of the American people is essential to efficacy of the Constitution).

379. See id. at 236-37 (discussing hypothetical case where “Democracy has died in America” due to extreme voter apathy). Professor Ackerman illustrates this idea with two important turning points in American history. Regarding the Reconstruction and New Deal eras, he asks: “Had the nation emerged from Civil War only to fight again about the terms of Reconstruction? Would the country respond to the Great Depression by following Germany down the road to dictatorship?” Id. at 211. In each case, the answer hinged on each branch’s response to the constitutional crisis that lay before it. And, “[r]ather than plunging down the path of total revolution, the response both times was revolutionary reform.” Id.

380. See Posner, supra note 19, at 2-10.

381. See Bobbitt, Constitutional Fate, supra note 13, at 3-8.

382. Professor Bobbitt refers to this as the “correct use” of method. Bobbitt, Interpretation, supra note 13, at 177; see also Bickel, supra note 22, at 98-110 (reviewing instances where legal commentators have critiqued the Court’s use of history in deciding cases); J.M. Balkin & Sanford Levinson, Constitutional Grammar, 72 Tex. L. Rev. 1771, 1775 (1994) (discussing Professor Bobbitt’s close scrutiny of the Court’s constitutional interpretation). Recently, Professor Akhil Amar has written that such a review of method in action is the best way to assess the strength his suggested method of “intratextualism”: Those readers looking for a general concluding section in this Article will not find one. Intratextualism is one among many interpretive tools, and like all tools it must ultimately be judged instrumentally. Does the tool work? Can the tool generate important, incisive, and illuminating readings of the Constitution? With this tool, can we see more clearly deep truths about the meaning of our Constitution? These questions are best answered by example rather than by a priori reasoning. If my examples have failed to persuade readers of the power and elegance of intratextualism, little more can be said. If, however, my examples have persuaded readers that a small and simple tool can in fact generate large and rich insights across a broad range of questions, little more need be said.
the incentive to critique the work of federal judges and assess their use of method. This work can then be used by others (members of Congress or the President, or the People), if they so choose, to evaluate the work of the judiciary and, in turn, respond to that branch.

Of course, on another level, commentators can and should analyze and critique the currently-prevailing legal practices. The critique, however, should not proceed from the assumption that the Constitution ordains a single method, but rather should compare the merits of each method against the expectations of legal reasoning. We should dwell on what makes reasoning "legal," as opposed to "political," and ask which method, or combination of methods, is most faithful to those values. This is the approach Justice Scalia takes in defending his version of textualism. He does not argue that something in the Constitution, its history, or its structure requires textualism. Rather, he argues that textualism is a method well suited to the training and expertise of lawyers, which is the reason lawyers are chosen as judges, and that no other method or theory of constitutional interpretation fits that bill. According to Scalia, all other methods merely ask a judge to register her vote on society's values, a task more akin to the legislator.

Regardless of whether one agrees with Justice Scalia's defense of textualism, it at least asks the right questions. Other authors have defended other approaches to constitutional interpretation as a better legal method. For example, Professor Jed Rubenfeld has argued that clauses of the Constitution have paradigm cases they were meant to address, and that interpretation should proceed by analogies to these paradigm cases. Again, this is a skill—reasoning by analogy—commonly associated with legal reasoning. Similarly, Professor Cass Sunstein has analyzed how judges who might disagree on first principles of constitutional law nevertheless can agree on outcomes in specific cases as well as opinions explaining those outcomes. In doing so, Professor Sunstein has helped us further understand how law is done in practice by judges charged with making legal decisions. Professor Richard Fallon's Harvard Law Review

383. See Balkin & Levinson, supra note 36, at 995-97 (discussing the question of how what is considered canonical in the law changes over time).
384. See Scalia, supra note 222, at 46-47.
386. See id.
Foreword has examined the judge’s complex task of implementing vague constitutional commands through judicially workable rules. Most recently, Professor Akhil Amar has articulated and defended the method of “intratextualism,” whereby one interprets words in one clause by examining how the Constitution uses the same language in other portions of the Constitution. In each instance, the commentator’s work has helped us better understand the practices that constitute the legal community.

Finally, I would be remiss if I did not commend the reader to Professor Ackerman’s discussion of constitutional interpretation over generations. As he rightly notes, anyone interpreting the Constitution faces a variety of sources of meaning deriving from different time periods. A key challenge for the interpreter is to assimilate these various sources into a coherent whole. For example, the founding era left us the Constitution’s original text as well as a mass of materials regarding its meaning (e.g., debates of the drafting and ratifying conventions, the Federalist Papers). About one-hundred-fifty years later, the New Deal era left us with some changed readings of the Constitution, though no formal amendments, as well as a historical record of those changes. For Ackerman, the interpreter’s essential challenge is to articulate the constitutional principles created during each era, and then to explain how the principles of the later era (here, the New Deal era) fit with, and possibly change, the principles of the earlier era (here, the founding era).

Professor Akhil Amar, a colleague of Professor Ackerman’s,

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390. See Fallon, supra note 87, at 57-58.
391. Amar, supra note 382, at 748.
392. Professor Lessig has recently explained one goal of his work in this way: “The reason is not to find what underlies a practice; rather the reason is to see whether something might be missing from an account of a practice.” Lessig, supra note 13, at 1841; see also Posner, supra note 4, at 431 (“We should be pragmatic about theory. It is a tool, rather than a glimpse of ultimate truth, and the criterion of a tool is its utility.”).

Stanley Fish has argued that we should further divide the legal community in identifying discrete practices. For example, the practices of legal commentators will differ from the practices of judges which will differ from the practices of practicing lawyers. See Stanley Fish, Dennis Martinez and the Uses of Theory, 96 Yale L.J. 1773, 1779 (1987). Indeed, as Judge Harry Edwards has recently complained, much of constitutional scholarship is irrelevant to judges and practicing lawyers. See Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 42-57 (1992). Hopefully, part of this disjunction would be addressed by abandoning the quest for grand constitutional theory.

393. Professor Ackerman addresses this question mainly in Chapter 6 of We the People: Foundations; see also 1 Ackerman, supra note 11, at 131-62. See also Friedman & Smith, supra note 6, at 77-92 (advocating constitutional interpretation that looks to all of American history, not simply focusing on the founding era).
394. See 1 Ackerman, supra note 11, at 160.

[We are left to piece together the different contributions of different generations — none of them complete, all of them important. While Reconstruction Republicans and New Deal Democrats shattered the...
has proposed a similar undertaking for properly incorporating the Bill of Rights against the states. Both projects aid in bettering our practice of constitutional interpretation.

In sum, legal commentators should focus on two main tasks. First, we should analyze constitutional questions and decisions using the tools of the legal craft, as currently conceived. Second, we should consider what methods do or should constitute the legal role—what is it that makes lawyers different from other professionals and

Founding vision, no generation has mobilized its political energies to reconcile these disparate achievements into a comprehensive whole, in the manner of the Philadelphia Convention. . . . Only one thing is clear: The Supreme Court cannot simply shut up shop until this happens. The flow of concrete cases forces the Justices to confront and reconcile . . . the disparate historical achievements of the American people.

Id.

Professor Ackerman devotes an entire chapter to explaining how one can read the Court's landmark cases Brown v. Board of Education, 347 U.S. 483 (1954) (holding that racially segregated public school system violated Equal Protection Clause), and Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that Connecticut statute that prohibited the sale of contraceptives violated constitutionally protected privacy interest), as attempts at inter-generational constitutional synthesis. See 1 Ackerman, supra note 11, at 131-62. Professor Ackerman will devote the third volume of We the People to further exploring how the courts have done and should do such inter-generational constitutional synthesis. See id. at 162.

395. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 215-30 (1998) (proposing a better method of incorporating the Bill of Rights); Amar, supra note 198, at 1131-33; Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1196-97 (1992) [hereinafter Amar, Rights and Fourteenth Amendment]. Soon after adoption of the Bill of Rights, the Court held that the first eight amendments did not apply against the states. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833). During the century after ratification of the Fourteenth Amendment, the question arose whether some provision of the Amendment, such as the Privileges and Immunities Clause or the Due Process Clause, made the first eight amendments applicable against the states. See U.S. Const. amend. XIV, § 1. In answering this question, members of the Court debated two main approaches: total incorporation or selective incorporation. See Chemerinsky, supra note 381, § 6.6.3, at 378-84. Under total incorporation, the Court would apply all eight amendments against the states; under selective incorporation, the Court would decide which rights in the first eight amendments were sufficiently fundamental to be incorporated against the states. Id. Under either approach, however, almost all the amendments that the Court ultimately incorporated would apply in the same way to both state and federal governments. See id. at 384-85 (“From practical perspective, except for the requirements of a 12 person jury and a unanimous verdict, the Bill of Rights provisions that have been incorporated apply to the states exactly as they apply to the federal government.”).

Professor Amar has suggested a third approach, which he calls refined incorporation, that would decide on a case-by-case basis, first, whether an amendment should be incorporated against the states, and if so, second, whether that amendment should apply in a different way against the states. Refined incorporation requires an interpreter to determine the principles underlying the original enactment of an amendment, and then to determine how those principles fit with principles embodied in the Reconstruction Amendments. Refined incorporation, then, is a form of inter-generational synthesis. See Amar, Rights and Fourteenth Amendment, supra note 409, at 1196-97.
politicians and thus entitled to exercise judicial power. The judiciary, then is in part a mirror of the profession.

E. Two Examples from the Case Law

The checks and balances view means that federal judges will tend, in varying degrees, toward pragmatic decision-making. In any given case, they will need to anticipate the responses of numerous groups. Specifically relevant to the present discussion, the courts must consider possible responses by the coordinate branches of the federal government and the People. The Court's recent decision in United States v. Lopez is one example of the checks and balances in action. Congress boldly passed the Gun Free School Zones Act of 1990, criminalizing the possession of guns near a school, to curry favor with the electorate. The courts checked Congress's ambitions by striking down the statute, warning that there are limits on Congress's power. Ambition checked ambition.

Lopez also shows the justices' awareness that the judiciary can be checked just as easily as it can check the other branches. In concurring, Justice Clarence Thomas offered an originalist reading of the Commerce Clause. According to Justice Thomas, an historically faithful reading of the clause would distinguish between the transportation and exchange of goods, which is within the historical meaning of "commerce," and activities such as manufacturing, agriculture, and mining, which are not within the historical meaning of that term. Justice Thomas is clearly convinced that the framers intended such a distinction when they used the word "commerce," and that the United States has strayed substantially from that original meaning during this century. Yet, despite his certitude, Justice Thomas hedges at the end of his opinion. Specifically, he writes:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past sixty years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.

The Court could not easily return to Justice Thomas's original meaning without upsetting much of the United States Code. To do so would be to upset layers of interlocking regulatory schemes, federal and state, and leave large chunks of society unregulated. State law and private conduct has built up in reliance on the new vision of

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397. See supra notes 173-88 and accompanying text.
399. See id. at 585-93 (Thomas, J., concurring).
400. See id. at 601 n.8 (Thomas, J., concurring).
federal power, and uprooting that extensive system would cause great damage to settled expectations. One of the law's great contributions, providing certainty in human affairs, would be undermined by a return to earlier Commerce Clause jurisprudence. If the Court did so, it could risk a check or rebuke from other branches or from the People, both of whom would be harmed. Justice Thomas, as well as other Justices in *Lopez*, recognized these realities and tempered their rhetoric accordingly.

The Court explicitly relied on similar considerations in upholding *Roe v. Wade*. In *Planned Parenthood v. Casey*, a three justice joint opinion considered whether it should overrule *Roe*. While indicating that they had doubts about *Roe*'s validity as an original matter, the joint opinion ultimately credited several arguments for following the core of that precedent. Among those reasons, the joint opinion reflected on the Court's place in the system of checks and balances in which judges are entrusted with the judicial function because they are expected to act like lawyers. According to the joint opinion, frequent overruling of precedent, especially under political pressure, creates the perception that judges are merely political actors, bending and swaying in the political winds, rather than skilled professionals exercising their craft. If the People or other branches believe the Court is abusing its power in this way, they may act to check the Court's exercise of power.

The joint opinion's defense of *Roe* rings hollow to those who believe *Roe* itself was a lawless decision. If *Roe* itself was not the product of legal reasoning, then refusing to admit the Court's original mistake merely compounds the problem. Also, overruling itself is not an admission that a prior court was acting lawlessly. Rather, reasonable disagreement is expected on difficult legal issues, and a

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403. In finding a due process right to terminate a pregnancy, *Roe* established a constitutional test that allowed different levels of government regulation during different trimesters of pregnancy. While *Casey* upheld the existence of an abortion right, that case reformulated the test into a single rule: Pre-viability abortion regulations may not impose an undue burden on a woman's right to terminate a pregnancy. See *Casey*, 505 U.S. at 846. One commentator has argued that *Casey* moved the Court's abortion test from the contested trimester approach in *Roe* to a standard that more closely mirrored public opinion. See Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate* 73-74 (1996).
404. See *Casey*, 505 U.S. at 965-66 (Rehnquist, J., dissenting in part).
405. See id. (noting that Court's "legitimacy" is linked to "people's acceptance" of the justices' decisions).
407. See *Casey*, 505 U.S. at 999 (Scalia, J., dissenting).
new consensus on the Court may lead to adoption of a different holding.\textsuperscript{409}

\textit{Lopez} and \textit{Casey} merely illustrate how justices sometimes explain their decisions in terms of potential checks from other branches and the People.\textsuperscript{410} These justices are acting as the Constitution intended—as actors within a complex system of checks and balances, ever-conscious of the need to stave off attacks from the coordinate branches and the People.

\section*{CONCLUSION}

This Article has defended two basic propositions. First, robust judicial review is an essential part of the American system of checks and balances. Robust judicial review means that federal judges owe no necessary deference to the constitutional judgments of the other branches of government. Judicial deference is not a constitutional requirement, but may be a political expediency as judges navigate the system of checks and balances. Judges must anticipate the reactions of other branches to court decisions and factor such reactions into their decisions.

Second, constitutional theory should end the quixotic quest for the method of interpreting the Constitution. Simply put, the checks and balances approach shows that the Constitution does not prefer any specific method or theory of interpretation. Rather, the Constitution anticipates that judges will act as lawyers, however that role is defined from time to time. When judges no longer appear to be doing law, the other branches should check the judiciary. In this system, commentators should critique judges' opinions as attempts at doing law. Additionally, legal commentators should discuss and critique the various ways of doing law, giving due consideration to the ends of law. It is this dialogue, and not some holy-grail-like quest for a Grand Unifying Theory of constitutional law, that judges, legislators, administrators, scholars, and lawyers should undertake.
