The Progressive Revolution in Politics and Political Science:
Transforming the American Regime

Edited by

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Chapter 6

Marbury v. Madison and the Progressive Transformation of Judicial Power

Edward J. Erler

> "there would always have to be present in the city something possessing the same understanding of the regime as you, the lawgiver, had when you were setting down the laws."—Plato, *Republic* 497c-d

> "those who are to be really guardians of the laws must really know the truth pertaining to them and capable of sufficiently interpreting it in argument and following it in deed, judging the things that come into being nobly and those that do not, according to the standard of nature."—Plato, *Laws* 966b

Chief Justice William Rehnquist recently remarked that "[t]he opinion in *Marbury v. Madison* is a remarkable example of judicial statesmanship.... The doctrine of judicial review—the authority of federal courts to declare legislative acts unconstitutional—is established, but in such a self-denying way that it is the Court's authority which is cut back."[1] There can be little doubt that Marshall's decision in *Marbury* was a consummate act of "judicial statesmanship," but there is considerable uncertainty as to whether its statesmanship resides in the establishment of "judicial review." So far from establishing "judicial review," Marshall argued in *Marbury* that the judicial power of the courts

to declare laws in conflict with the Constitution void was a power that was intrinsic to the very idea of a written constitution and thus a part of the "judicial power of the United States." "Judicial review" was therefore recognized but not "established" by the *Marbury* decision.

Whether the *Marbury* decision was "self-denying" is open to dispute. But what is not disputable is the fact that since the Warren Court era, judicial review has been transmogrified from an element of judicial statesmanship into a vehicle of judicial aggrandizement. For Marshall, the judicial power was always in the service of constitutional principles; in the contemporary universe of liberal jurisprudence judicial review has almost replaced the Constitution—to say nothing of constitutional principles. The Constitution, we are assured, is constantly evolving, and the Supreme Court is the engine of that evolution. Its role, in short, is to serve as a "continuing constitutional convention," revising and updating the Constitution to meet evolutionary demands. The Constitution, Justice William Brennan argued, must be kept abreast of the "evolution of our concepts of human dignity." The "evolutionary process," Justice Brennan assures us, "is inevitable and, indeed, it is the true interpretive genius of the text" since "the demands of human dignity will never cease to evolve." Given the inevitability of progress, it is impossible to rely on the original intent of the framers. "The genius of the Constitution," Brennan asserts, "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time."[2] Thus, a constitutional jurisprudence that "is rooted in the text of the Constitution as illuminated by those who drafted, proposed and ratified it" is wholly inadequate for a world that is constantly evolving toward more refined conceptions of human dignity.[3]

Many commentators agree that the high point of judicial supremacy was the Supreme Court's use of *Marbury* in *Cooper v. Aaron* (1958). "It is necessary," the Court announced in an opinion signed by nine justices, "only to recall some basic constitutional propositions which are settled doctrine."

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking

> for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* … that "it is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* [*v. Board of Education*] case is the supreme law of the land.[4]

Thus the Constitution was transmogrified by the Court's irrefragable logic into constitutional law. But as a matter of logic, the Court's "syllogism" is rendered defective when it is recalled that Marshall concluded his opinion in *Marbury* that "it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."[5] If, however, constitutional law rather than the Constitution becomes "the supreme law of the land," the Constitution would cease to be "a rule for the government of courts." It is significant to note that the Court in *Cooper* said that judicial supremacy had become an "indispensable feature of our constitutional *system*." In this calculus of judicial supremacy, the Constitution has been converted into mere process without purpose, a process that is wholly indifferent to ends.

An enthusiastic supporter of judicial activism, Kenneth Karst, was forced to admit that the logic of *Cooper* "was not self-evident." Indeed, Karst notes, the conclusion that "*Brown* was the supreme law of the land … carried the assertion of judicial power further than *Marbury* had taken it." And while the reasoning was not sound as a "doctrinal" matter, it did serve, according to Karst, a crucial "political" role: it "galvanized northern opinion" against racial segregation on the eve of the 1960 presidential election which "brought to office a president committed to a strong civil rights program."[6] This open defense of a politicized and activist Supreme Court seemed shocking when it was published nearly twenty years ago, but such arguments have become legion among the proponents of judicial activism. It seems almost quaint at this late date to recall Marshall's argument that since the Constitution resulted from the "original and supreme will" of the people,

its principles must be "deemed fundamental [and] permanent."[7] Under the tutelage of liberal jurisprudes, however, constitutional law has replaced the authority of the Constitution. The idea that the Constitution contains permanent principles derived from natural law or natural right is regarded as the merest delusion of an earlier age that also believed in ghosts.[8] This transmogrification was not, however, the work of *Cooper v. Aaron*, but stems directly from *Brown v. Board of Education*, the first case to declare in explicit terms the irrelevance of the Constitution.[9]

Karst notes that

> *Brown* was … the beginning of a new ordering of our institutions of government, one in which the judiciary—and the Supreme Court in particular—would play a more active role in articulating the nation's fundamental values and defending those values in the name of the Constitution.…
>
> The authoritative status of the Supreme Court's articulation of our national values is an undeniable fact in the American political order. In the nation's early days, the Supreme Court spoke with authority largely because it spoke in the name of the Constitution. Today, in contrast, our constitutional rights take at least some of their authority from the Court that declares them.[10]

The language here is almost breathtaking; *Brown* is a new constitutional order that takes the name, but not the substance, of the Constitution. *Brown* was a judicial revolution establishing new "fundamental values" that are legitimately defended only "in the name of the Constitution." Marshall's fundamental and permanent principles have been replaced by mere "values." The advantage of substituting values for principles, from the point of view of the judicial activists, is that "values" don't have to be defended by reason—indeed, they cannot be defended by reason because they are merely idiosyncratic preferences or choices. The idea that reason can decide between competing values is a mere chimera that seemed to have an unbreakable grip on the consciousness of the founding era. As we will see later, however extreme Karst's analysis of *Brown* might seem, his assessment is far too restrained.

State Constitutions and Legislative Supremacy

Many observers have noted that Marshall's assertion of the power to declare acts of Congress void was not novel. The way had been prepared, it is claimed, by previous federal cases and was accepted as an ordinary function of the judiciary by several states.[11] Marshall, of course, cites neither federal nor state precedents in support of his conclusion in *Marbury* that "an act of the legislature, repugnant to the constitution, is void."[12] Rather, the idea that legislative acts in conflict with the Constitution are void seems to Marshall to be an irrefragable conclusion from "the principles and theory of our government."[13] Marshall does obliquely refer to *Hayburn's Case* (1792), but that case, producing a variety of opinions among the justices on circuit, had no value as precedent and Marshall used it only on the issue of the appropriateness of mandamus as a remedy.[14]

Much energy, ingenuity and effort has been expended in canvassing the various state precedents that Marshall might have used to buttress his argument. It is sometimes argued that an understanding of the state precedents is essential to understanding Marshall's opinion. The assumption here is that Marshall would certainly have known about the state precedents and would have accepted them at face value. After an exhaustive review of the historical record, William Crosskey concluded that the precedents are "[i]n large part imaginary." Many of the cases relied upon are unreported and attempts to reconstruct the opinions suffer from various defects. Even in those cases where records survive, Crosskey alleges that they

> actually established no more, at most, than a right in the courts, in two or, possibly, three of the thirteen states, to carry on their own constitutional functions, in what seemed to them the way their state's constitution required; and, hence their right to disregard any act of their legislature, which in their judgment, sought to compel them to proceed differently.… And so far as is known, there was not a single instance when the Convention met, or even when it adjourned, in which any American court openly—or successfully, even in a covert way—had reversed a legislature's determination as to the nature of its powers, where no infraction of the reviewing court's own powers, or of the constitutionally required mode of its exercise of its own powers, had not been concerned.[15]

Robert Clinton, although disagreeing about the reliability of the state precedents, nevertheless agrees with Crosskey that judicial review, to the extent it existed in the states, was used by the courts only as a defensive mechanism in defense of judicial independence. This involved nothing more than "the idea of limiting legislative power by judicial nonapplication of statutes in certain cases."[16] The "certain cases" were only those of a "judiciary nature," involving questions of the independence of the judiciary. Leonard Levy's review of the state cases also led him to the conclusion that "[j]udicial review emerged … mainly in cases relating to the province of the judicial department or trial by jury. The precedents tend not to show that the courts could pass on the constitutionality of the general powers of the legislatures."[17] But even this limited notion of judicial review, Levy argued, "seemed novel, controversial, and an encroachment on legislative authority. Its exercise, even when imagined, was disputed and liable to provoke the legislature to retaliation."[18] As Marshall surely must have realized, there were no state precedents where judicial review had been exercised by a truly independent judiciary. And, there is no doubt that Marshall shared the view of both Madison and Hamilton that an independent judiciary was an essential ingredient of the separation of powers. Marshall's opinion in *Marbury* was principally an attempt to establish judicial independence in the Constitution's scheme of separated powers. It is doubtful that Marshall saw any of the state cases as providing any precedent.

A serious question thus arises about the relevance of the authority of pre-Convention precedents. In the "early State constitutions," Edward Corwin argued, the "legislature … *was practically omnipotent*."[19] As Madison argued pointedly in *The Federalist*, none of the states had provided for an effective separation of powers, relying in almost every instance on mere "parchment barriers." "[I]n no instance," Madison alleged, "has a competent provision been made for maintaining in practice the separation delineated on paper." But as Madison forcefully argued, "experience assures us" that such reliance "has been greatly overrated." Some mechanisms are necessary for fortifying "the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[20] Thus, legislative supremacy will result unless the executive and judicial

branches can be sufficiently "fortified." "Energy in the executive" and an "independent" judiciary are the indispensable fortifications against legislative encroachments. Legislative supremacy is an inherent problem of republican government, whether at the state or federal level, because of its "supposed influence over the people" (No. 48 at 309) who are the "only legitimate fountain of power" (No. 49 at 313). "[I]t is against the enterprising ambition of [the legislative] department," Madison warns, "that the people ought to indulge all their jealousy and exhaust all their precautions" (No. 48 at 309).

At the Constitutional Convention, Madison had argued that one of the objects of "a National Government" was to provide "more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention. Was it to be supposed," Madison queried, "that republican liberty could long exist under the abuses of it practiced in some of the States?"[21] Madison, of course, reiterated this argument and brought it to perfection in the tenth *Federalist*. At the Convention, Madison proposed a national negative on state legislation as a remedy for state abuses. The proposal would have given the national congress the power "to negative all laws passed by the several States contravening … the articles of Union."[22] By this proposal, Congress would have become the final arbiters of the federal relationship. Madison

> considered the negative … as essential to the efficacy & security of the Genl. Govt. The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. Nothing short of a negative on their laws will controul it … Confidence can not be put in the State Tribunals as guardians of the National authority and interests. In all the states these are more or less depend[en]t on the Legislatures … In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.[23]

Madison was emphatic in his insistence that no reliance could be placed in state judiciaries because none were sufficiently independent from legislative control. He alludes to the Rhode Island case of

Trevett v. Weeden which had been decided in 1786 (reports of the decision were being widely circulated in pamphlet-form during the Philadelphia Convention). In *Trevett,* the Rhode Island court had asserted the power to declare laws in violation of the constitution to be void, although in the actual decision the justices resorted to a technicality to avoid making a decision. This mild assertion of judicial power enraged the legislature and the judges were summoned to give an account of their pretended power. Finding that the judges were unable to acquit their pretensions, a motion was made to dismiss the judges from office. The motion failed because a persuasive argument was mounted that, under the Rhode Island Constitution, judges could be dismissed only on criminal charges. At the next annual election of the legislature, however, four of the offending justices were removed from the bench and four others more compliant to the wishes of the legislature were selected to replace them.[24] In Madison's view, an independent judiciary was a necessary ingredient in providing a robust separation of power and he did everything in his power at the Constitutional Convention to devise constitutional checks on both state and federal legislative power.

Gouverneur Morris, however, argued against the provision, noting that " the proposal … would disgust all the States. A law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National law."[25] Morris' argument eventually carried the vote and the proposal was rejected. On July 17, 1787 the first version of the Supremacy Clause was introduced as a substitute for the congressional negative. As it eventually emerged from the Convention, Article VI reads, in pertinent part, that:

> 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.

Madison was bitterly disappointed by the Convention's failure to pass the national negative, and his concerns were only partially assuaged by the addition of the Supremacy Clause.

Writing to Jefferson shortly before the Convention adjourned, Madison was pessimistic about the prospects of the new Constitution: "I hazard an opinion … that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts ag[ain]st the state governments."[26] Madison's next letter to Jefferson, written a little over a month after the end of the Convention, explained in greater detail the effects he anticipated from the failure of the federal negative. "Without such a check in the whole over the parts," Madison argued, "our system involves the evil of imperia in imperio." "It may be said," Madison speculated,

> that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal ag[ain]st a State to the Supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.[27]

Madison always maintained the necessity of a final arbiter to determine the boundaries of the federal system in cases of conflict, and in *The Federalist* he argued that the judiciary would indeed supply the national negative. In controversies relating to the boundaries between state and federal power, Madison conceded, "the tribunal which is ultimately to decide is to be established under the general government … The decision is to be impartially made, according to the rules of the Constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated" (No. 39 at 245-246). Many years later, reflecting on the

work of the Convention, Madison wrote that "the General Convention" vested authority "in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the exercise of its functions." This intention, Madison continued, is "expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land." This, Madison contended "was the prevailing view of the subject when the Constitution was adopted and put into execution." Madison punctuated his recollection with the statement that "I have never yielded my original opinion in the 'Federalist' No. 39 … [to] this construction of the Constitution."[28]

Marshall took a similar view in the Virginia Ratifying Convention when he asked a series of rhetorical questions in responding to critics of the proposed jurisdiction of the federal courts. "Is it not necessary," Marshall queried, "that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?"[29] Many years later in *Cohens v. Virginia* (1821)[30] Marshall answered these rhetorical questions and brought to perfection the argument derived from the Supremacy Clause that the Supreme Court was to play the dominant role in policing the federal relationship.[31]

Marshall, however, used an argument derived from the Supremacy Clause to justify judicial review that is not found anywhere in the writings of Madison. In the peroration to *Marbury* Marshall recognized "the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."[32] Marshall's previous paragraph had noted that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution have that rank." Marshall thus understood the word "pursuance" as "in accordance with" or "in conformity with" the Constitution. Thus inferior laws not in "pursuance" of the Constitution were not the "supreme law of the land" and were thus null and void. Any other interpretation would merely render the Constitution form without substance and would ultimately

dissolve the distinction between the Constitution as fundamental law and those ordinary acts of legislation authorized by the Constitution. It would convert the Constitution into mere process devoid of any purpose; in a word, it would utterly confuse means and ends. Throughout his career, Marshall's judicial statesmanship focused on securing the position of the Constitution as "fundamental" and "superior" law. As Charles Hobson has rightly noted, "[t]he formation of a supreme law as the original and deliberate act of the people was the indispensable basis for a theory of judicial review that was compatible with the principles of popular government."[33]

The proposal for a Council of Revision was another attempt on Madison's part to prevent the development of legislative supremacy in the proposed constitution. The Council would have been composed of "the executive" and "a convenient number" of the national judiciary.[34] Since the phrase "a convenient number" implied at least two members of the Supreme Court would be included on the Council, the Judiciary, as Nathaniel Gorham pointed out, would have predominance.[35] The Council's principal function would be to provide a "revisionary check on the Legislature" through the prior review of legislative proposals. It would, Madison argued, provide a defensive mechanism against "Legislative encroachments" for both the executive and judicial branches.[36] "Experience in all the States," Madison insisted, "had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions."[37] James Wilson, a future Supreme Court justice, and George Mason wished to extend the revisionary power beyond a mere checking function. "Laws may be unjust, may be unwise, may be dangerous, may be destructive," Wilson argued, "and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." A share in the revisionary power, however, will give judges "an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature."[38] Madison agreed: the Council of Revision "would … be useful to the Community at large as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities."[39]

A majority of the Convention, however, reasoned that such a mixture of executive and judicial power would make "statesmen of the

Judges."[40] Elbridge Gerry alleged that it was "foreign" to the "nature" of the judiciary to involve judges in "the policy of public measures."[41] In any case, Gerry argued, the revisionary council was superfluous because "the Judiciary … will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality."[42] Gerry distinctly anticipated judicial review as a defensive measure against "encroachments" on the judiciary. Clearly, however, the Council of Revision was intended to be something far more extensive. Luther Martin described the mixing of powers as "a dangerous innovation." "As to the constitutionality of laws," he averred, "that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative."[43] The proposal was thus defeated primarily because of the delegates' reservations about the integrity of the principle of separated powers.

Madison considered the failure to secure the revisionary council to be a major defeat. Madison seemed almost desperate in his attempts to provide adequate checks on legislative power. The legislature, Madison knew, was all too prone to overstep its constitutional limits in its attempt to aggrandize power. A fortified judiciary, and to a lesser extent, a fortified executive was needed to police the boundaries of the Constitution's separated powers. The Council of Revision was to provide a kind of pre-screening of legislation that amounted to judicial review before the fact. With the defeat of the council proposal did Madison also see this power devolving upon the Supreme Court in a similar way he saw the national negative resulting by default to the judiciary?

In *The Federalist*, Madison criticized Jefferson's plan, included in his draft constitution for Virginia and published in the *Notes on the State of Virginia*, to call constitutional conventions "for altering the Constitution, or *correcting breaches of it*" (No. 49, at 313). In one sense, Madison argued, the plan is "strictly consonant to the republican theory" since it recurs "to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others" (No. 49, at 314). Madison's principal criticism was that a frequent

appeal to the people would, by implying "some defect in the government," "deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest government would not possess the requisite stability." Recurrences to the people are thus "experiments … of too ticklish a nature to be unnecessarily multiplied" (No. 49, at 315). Frequent appeals would not only undermine reverence for the Constitution, but "would inevitably be connected with the spirit of pre-existing parties" so that "passions … not the reason of the public would sit in judgment." But constitutional government is designed to elevate reason over passion: "it is the reason alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government" (No. 49, at 317). Madison concluded that the separation of powers must be maintained only "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places" (No. 51, at 320). The institutional structure of the judiciary would render it least likely to be "connected with the spirit of pre-existing parties" and better placed to exercise reason in the control and regulation of the government.

Madison does not detail here the particular role of the judiciary, but there is little reason to doubt that he agreed with the principal points of Hamilton's analysis of the judiciary in the *Federalist* No. 78. Hamilton argued that an important function of the judiciary was "to guard the Constitution" by serving as the bulwark "of a limited Constitution against legislative encroachments" (No. 78, at 469). This was the precise role that Madison had envisioned for the revisionary council rejected by the Convention. Since guardianship of the Constitution cannot be entrusted to the people directly, there must be some agency within the separated powers that would serve as an institutional substitute for a frequent "recurrence to the people." This was the role that Hamilton envisioned for the Supreme Court when he thrust it in the role as the "bulwark" and "guard" of a limited Constitution. The principal function of the Supreme Court, therefore, is to serve as a sentinel over the "original" will of the people, thus making frequent "recurrence" to the people—with its attendant dangers—unnecessary. Any recurrence to the people—the ultimate sovereign—will be reserved for the most extraordinary occasions.

There was no indication in Hamilton's exegesis that the guardianship of the Constitution was necessarily limited merely to defenses of judicial power, although at the Convention, Madison on one occasion had intimated that the judicial power "ought to be limited to cases of a Judiciary Nature," and that the "right of expounding the Constitution in cases not of this nature ought not to be given to that Department."[44] This would seem to limit Hamilton's more sweeping charge that the Supreme Court be the guardian not only of individual rights but the rights of the Constitution as well. But there can be no doubt that Hamilton's detailed explication of judicial power in the *Federalist* No. 78—however much it may have expanded Madison's analysis—had a profound influence on Marshall's opinion in *Marbury v. Madison*.

Oliver Ellsworth, a future Chief Justice of the Supreme Court, had "approved heartily" of the motion to create a Council of Revision at the Convention.[45] The extent to which he believed that the Supreme Court might still fill something of the role contemplated in the defeated revisionary council was indicated in his comments before the Connecticut ratifying convention. "The Constitution defines the extent of the powers of the general government," Ellsworth argued.

> If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.[46]

Several months later, speaking before the Virginia ratifying convention, John Marshall, who would succeed Ellsworth as Chief Justice, was somewhat more circumspect when he contended that if the federal government "were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."[47] Marshall's statement is noteworthy because it

identifies the principal role of the Court as a guardian of the Constitution—not just the judiciary—against legislative usurpations. This was to become the primary theme of Marshall's opinion in *Marbury*.

It is important to note that there was no independent judiciary in the theories of Locke or Montesquieu, the two political philosophers who most influenced the framers. The creation of an independent judiciary was the exclusive work of the framers. Montesquieu's jury system was converted into a permanent and independent judiciary, and the judiciary was to serve a crucial role in the scheme of separated powers by providing a check on legislative power. The framers drew little from the experience of the states where separation of powers, while honored in theory by all state constitutions, was rarely honored in practice. Legislative supremacy in state governments, as Madison warned, was the principal cause of the "prevailing and increasing distrust of public engagements and alarm for private rights which are echoed from one end of the continent to the other" (No. 10 at 77–78). It was this legislative tyranny, abetted by majority faction, that the framers were determined to avoid in the new constitution, and an independent judiciary was crucial in preventing legislative usurpations.

Principles Long and Well Established

The concluding section of Marshall's *Marbury* opinion can only be described as a resort to first principles. "The question," Marshall wrote,

> whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.[48]

It almost goes without saying that Marshall does not rely on state or federal precedent for the explication of the "certain principles, supposed to have been long and well established." Rather, he immediately moves to the explication of these first principles in terms of the social compact theory of the origins of civil society. One of the staple precepts of social compact theory is the distinction between fundamental law and ordinary law. Marshall, of course, doesn't explicitly

refer to social compact, but his analysis, asserting the "original right" of the people to establish "their future government" on "such principles, as, in their opinion, shall most conduce to their own happiness" is the unmistakable language of social compact. This "original right," Marshall continues, is the basis upon "which the whole American fabric has been erected." William Nelson notes that Marshall "at no point in the opinion" invoked "the language of natural rights."[49] While it is true that the phrase "natural rights" is never used in the opinion, the "language of natural rights" is evident in the use of the term "original right" as well as reference to the "fundamental" principles of the Constitution which do not derive from the Constitution itself.

According to the Declaration of Independence "Governments are instituted among Men, deriving their just powers from the consent of the governed." This is the familiar language of social compact, as is the invocation of the "Right of the People to alter or to abolish" government when it becomes "destructive" of the "ends" for which it was established—the "Safety and Happiness" of the people. Madison frequently expressed the opinion that "the idea of compact … is a fundamental principle of free Government." "The original compact," Madison explained,

> is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, by which the people in their social state agree to a Government over them. These two compacts may be considered as blended in the Constitution of the U.S.[50]

Thus, Madison pointedly noted in *The Federalist* that the principal features of the Constitution were rooted in "the first principles of the social compact" (No. 44, at 282). Professor Harry Jaffa has rightly noted that "[t]he idea of compact is at the heart of American constitutionalism. It is at the heart of the philosophical statesmanship that made the Revolution, of which the Constitution is the fruit. In the most fundamental respect, compact is an inference from the proposition 'that all men are created equal.'"[51] The number of public documents and public statements by eminent statesmen of the founding period make it impossible to gainsay the importance attached to social compact, "whether expressed or presumed." But it is also important

to understand that the framers understood social compact as an expression of natural right—the theory of social compact is derived from the principles of human nature. Marshall's reliance on the social compact is, I believe, essential to understanding the deepest level of his analysis in *Marbury*.

Marshall writes that the "original right" of the people to form civil society "is a very great exertion; nor can it, nor ought it, to be frequently repeated."[52] This is clearly an echo of the Declaration's doctrine that "prudence" should govern the exercise of "original right": "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." Marshall's eminently reasonable conclusion is that "[t]he principles" established by this "great exertion" must be "deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."[53] Thus the principles of the Constitution, consistent with the requirements of prudence, must be "deemed" permanent. This does not, of course, foreclose any future resort to "original right," but because these principles emanate from the supreme authority of the people they are "designed to be permanent" and in fact are a permanent expression of the superior will of the people acting in their original capacity. This superior will can only be displaced when the people resume their original capacity and "alter or abolish government." It is the object of statesmanship, rightly understood, to supply the prudence that the people can exercise only on extraordinary occasions. Prudence, or practical wisdom, would calculate the application of permanent principles to changing circumstances and is an essential part of all three branches of government, but most particularly of the legislative and judicial branches.[54] From this point of view, guardianship of first principles—"the original will" of the people expressed in the Constitution—would seem to be the primary role of courts.

Marshall seemed to have understood the guardianship of first principles as the principal object of original intent jurisprudence. Corwin was only slightly exaggerating when he wrote that Marshall "was thoroughly persuaded that he knew the intentions of the framers of

the Constitution—the intentions which had been wrought into the instrument itself—and he was equally determined that these intentions should prevail. For this reason he refused to regard his office merely as a judicial tribunal; it was a platform from which to promulgate sound constitutional principles, the very cathedra indeed of constitutional orthodoxy."[55] With his penchant for understated hyperbole, Corwin might as well have argued that Marshall's conception of the Supreme Court's role was not unlike that envisioned for the Nocturnal Council in Plato's *Laws*.[56] In *Cohens v. Virginia* (1821) Marshall argued that the "American people, in the conventions of their respective states, adopted the present constitution." The Constitution thus is expressed in "the authoritative language of the American People."[57] The "maintenance" of the "principles established in the constitution … in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States."[58] Significantly, Marshall does not qualify the judicial department's role in maintaining the principles of the Constitution by limiting jurisdiction to cases of a "judiciary nature."

Marshall was not hesitant to draw arguments "from the nature of government, and from the general spirit of the Constitution,"[59] although he insisted that the spirit of the Constitution must be drawn from the words of the Constitution itself. "[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter," Marshall contended, "yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[60] The spirit of the Constitution as Marshall knew—and as Abraham Lincoln was later to argue—was derived from the "original will" of the people expressed in the social compact principles of the Declaration of Independence and embodied in the language of the Constitution. The words of the Constitution can only be understood and construed as expressions of those principles. Lincoln spoke of the "philosophical cause" of the founding, and in a much cited passage Lincoln said the principles of the Declaration were words "*fitly spoken*" which have "proved an 'apple of gold' to us. The *Union* and the *Constitution*, are

the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture."[61] Thus, in Lincoln's view—and I say Marshall's as well—the Constitution was meant to preserve the principles of the Declaration; those principles are thus the authoritative guide to the construction of the language of the Constitution.

"This original and supreme will," Marshall cogently argued in *Marbury*, "organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."[62] What seems therefore to be intrinsic to government derived from the exercise of "original will" is the separation of powers. As Madison had famously remarked in *Federalist* No. 47, "[t]he 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" (No. 47 at 301). For all of his vaunted argument about representative government in *Federalist* No. 10, Madison knew that the principle of representation was not enough to secure constitutional government. "[W]hile a dependence on the people is, no doubt, the primary control on government," Madison cautioned, "experience has taught mankind the necessity of auxiliary precautions" (No. 51, at 322).

But the separation of powers was not just an "essential precaution" against tyrannical government; it was also the key to "good government." The functional specialization of the branches would situate each branch so that each part would do its work well. The multimembered legislature, representing diverse interests, would be suitable for deliberation; the single executive for execution; and the independent supreme court for judgment. The key, according to Madison, was the independence of the branches. In remarks at the Constitutional Convention, Madison argued that "if it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised."[63] Indeed, the Declaration lists as one of its grievances against the King that "he has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." This grievance is offered as one of the elements

of the accumulated evidence that "evinces a design to reduce [the people] under absolute Despotism."

For Madison, the key to maintaining a separation of powers in practice was checks and balances—giving each department a mechanism of self-defense against the encroachments of coordinate branches. A complete separation of powers would be effective only in a mixed regime where the different powers of government could be distributed to the different classes in society. There the different branches of government would serve as a check on one another because they would reflect on the level of government the natural class antagonisms that existed in society. But in a regime where all power is derived either directly or indirectly from the people, some substitute for the mixed regime principle had to be found. That substitute was checks and balances, the principal means devised to republicanize the separation of powers.[64] But in this scheme, the Supreme Court appears not to have been apportioned any defensive weapons beyond "permanency in office." Judicial review, however, seems to have been widely regarded as an intrinsic part of constitutional government understood as limited government. Hamilton argued that "this doctrine is not deducible from any circumstance peculiar to the plan of convention, but from the general theory of a limited Constitution" (No. 81, at 482). There can be little doubt that this was also a part of Marshall's understanding when he referred to "principles long and well established."

The Defense of Judicial Power: Federalist No. 78

Hamilton argued in *Federalist* No. 78 that "the judiciary from the nature of its functions, will always be the least dangerous to the political rights of the Constitution" because it has "neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (No. 78, at 465). Indeed, "the natural feebleness of the judiciary" places it "in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches" (No. 78, at 466). Some method of fortifying the judiciary must therefore be devised because "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution" (No. 78, at 466). The "courts of justice are to be considered as the bulwarks of a limited Constitution against legislative

encroachments" and "the permanent tenure of judicial offices" will "contribute … to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty" (No. 78, 469). In short, a "permanency in office" will be "an indispensable ingredient" to the "firmness and independence" of the judiciary (No. 78, at 466).

But while permanent tenure is a necessary condition of independence, it doesn't appear to be a sufficient condition. A "limited Constitution" Hamilton remarks, is "one which contains certain specified exceptions to the legislative authority" (No. 78, at 466). He mentions only two examples, bills of attainder and ex post facto laws, remarking that "[l]imitations 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" (No. 78, at 466). If it might be argued that "the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution" (No. 78, at 467). Such a presumption would allow the legislature to judge in its own cause, enabling "the representatives of the people to substitute their will to that of their constituents." Rather, "[i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority" (No. 78, at 467).

In the separation of powers, "the interpretation of the laws is the proper and peculiar province of the courts." The Constitution is "fundamental law" and must be so "regarded by the judges" (No. 78, at 467). It belongs to the judiciary, therefore, to ascertain the meaning of the fundamental law as well as those legislative acts authorized by the fundamental law, and "[i]f there should be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents" (No. 78, at 467).

Hamilton was quick to add that the duty to interpret the law did not imply a superiority of the judiciary over the legislative branch, but rather "only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental" (No. 78, at 468). Thus, the distinction between "fundamental laws," the product of what Marshall described as the "original and supreme will," and ordinary acts of legislation, the product of an inferior and subordinate will, is fundamental to any notion of limited government. If the "courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments," the distinction between fundamental law and non-fundamental law must serve as the first principle of all its activities.

The possibility of a judicial encroachment upon legislative power, Hamilton says, is "in reality a phantom" (No. 81, at 484). This conclusion is supported by reflections on the "general nature of the judicial power," "the objects to which it relates," "the manner in which it is exercised," a proper understanding of the "comparative weakness" of the judicial branch and the recognition of "its total incapacity to support its usurpations by force" (No. 81, at 485). Besides, Hamilton avers, the "important constitutional check" of impeachment is "alone a complete security" against judicial usurpations (No. 81, at 485).

The judiciary's role in serving as a check on the legislative branch was described by Hamilton as defending the "political rights of the Constitution" (No. 78, at 465, 470–1; No. 73, at 443, 445). Hamilton seems to have distinguished the "political rights of the Constitution" from "the rights of individuals." As he pointedly remarked, the "independence of the judges is *equally requisite* to guard the Constitution and the rights of individuals … " (No. 78, at 469 [emphasis added]). And here Hamilton makes a curious allusion to the Declaration of Independence, remarking that "I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness" (No. 78, at 469). This is

a reminder that the most fundamental right of the people is the right of revolution and that the right of revolution is ultimately the right which guarantees all other rights. The judiciary should always be animated by the idea that its role in the vindication of "the rights of individuals" is to stand as "an intermediate body between the people and the legislature." The judiciary is to protect the "original will" of the people against any subsequent and subordinate will.

The greatest problem, as Hamilton gravely notes, is majority faction. Here the courts are to play a crucial role in preventing majority factions from denying rights of individuals and minorities. Madison had argued in *Federalist* No.10 that the prospects of republican government depended on finding a cure for the disease of majority faction. Republican governments, of course, have a natural and general tendency to faction, but while minority factions are compatible with republican government, majority faction is utterly incompatible with the existence of the "public good and private rights" (No. 10 at 80). Madison argued that the primary cure for the disease of majority faction was a governmental structure that would produce constitutional majorities as opposed to mere numerical majorities. In short, the problem was to find some method of insuring that the majority ruled in the interest of the whole of society rather than merely in the interest of a part. A diverse regime inculcating a multiplicity of interests would be the primary solution. Majorities would rule, but no majority would be animated by a single interest or passion. The competition between the various and interfering interests in society would insure that no majority would develop a sense of its own self interest *as a majority*. Such majorities—coalitions of various minority interests—would have little interest in invading the rights of minorities or of individuals. But as we have already seen, Madison believed that some "auxiliary precautions" were also necessary. It was left to Hamilton to argue that the courts would play a crucial role in minimizing the effects of majority faction not only on the "rights of the Constitution" but on the "rights of individuals" as well. The only alternative to judicial statesmanship, Hamilton seems to suggest, is resort to the right of revolution where the people resume, to use Marshall's phrase, their "original and supreme will."

Marshall was clear that in cases properly before it, the Court had a constitutional duty to decide. The Constitution, Marshall notes, "does

not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity', in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words" of Article III. But where jurisdiction does exist, the Court is obligated to render a decision. "It is most true," Marshall concedes,

> that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[65]

Here it is clear that the court's guardianship of the Constitution is limited to justiciable cases—this is a separation of powers requirement. But as the holding and the argument of *Cohens* indicates, the Court will approach the issue of justiciability with great latitude.

We should remind ourselves here of the dual function that Hamilton assigned to the judiciary—to protect the "rights of the Constitution" as well as "the rights of individuals." It is not clear from Hamilton's analysis whether these two different functions give rise to two different conceptions of judicial power or whether the vindication of the "rights of individuals" is at one and the same time the vindication of the "rights of the constitution." The charge that courts are "to be considered as the bulwarks of a limited Constitution against legislative encroachments" is, however, an extensive one and seems to extend beyond the "rights of individuals."

The Sole Province of the Judiciary

Marshall seems to have believed—at least as a preliminary matter—that "[t]he province of the court is, solely, to decide on the rights of individuals."[66] Madison expressed the same view when he introduced legislation to create a bill of rights in the first Congress on June 8,

1789. Madison distinguished "positive rights"—"those that result from the nature of the compact"—from natural rights which he described as "any one of the pre-existent rights of nature."[67] Positive rights in the Constitution are derived from natural rights, but they are positive rights to the extent that they depend on the social compact—the Constitution—for their existence. Trial by jury, Madison notes, is a positive right rather than a natural right. Yet it is "as essential to secure the liberty of the people as any one of the rights of nature." Rights, both natural and positive, when they are "incorporated in the Constitution" will be the special province, Madison argues, of the courts. "Independent tribunals of justice," he explained, "will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive. They will be naturally led to resist every encroachment upon the rights expressly stipulated for in the constitution by the declaration of rights."[68] Madison's position here seems to comport fully with both Hamilton's and Marshall's understanding of the role of the judiciary in the protection of individual rights.

As opposed to questions of individual rights, Marshall argued, "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[69] Thus the Court seemingly eschews jurisdiction wherever discretion is a proper part of the exercise of constitutional power. Many constitutional duties require the exercise of political discretion and the Court will only review the exercise of constitutional duties, not the discretion attached to it, as long as the exercise of discretion itself doesn't violate the rights of individuals. William Nelson argues that Marshall's "creative act" in the *Marbury* decision was "the distinction between law and politics" and that this distinction became "the foundation of Marshall's constitutional jurisprudence."[70] But it is clear from Marshall's careful language that the determination of which questions are "in their nature political" and those "which are, by the constitution and laws" is to be made by the judiciary. As one perceptive commentator notes: "While the courts might not meddle in the political sphere, they alone determine how far the forbidden sphere extends. By their authority to interpret the Constitution and laws they can limit law-maker and law-executor alike. The national courts thus not only judge under the laws but magisterially preside over them."[71]

What appears at first glance, then, to be a statement disclaiming "all pretensions" to "jurisdiction" where political questions are involved, actually extends the jurisdiction of the courts by asserting the pretension of authority to define what is merely political and discretionary and what is required by the Constitution and law. Besides other considerations, Marshall must surely have regarded the Constitution itself as "political" in the most decisive respect as the product of "reflection and choice" (No. 1, at 33). In short, Marshall certainly knew that the debate over ratification involved regime questions. There can be little doubt that Marshall believed that the defense of the Constitution demanded the partisanship of republican principles. Marshall wrote with similar studied ambiguity some sixteen years later in *McCulloch v. Maryland*: "Should Congress," he speculated, "in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."[72] Marshall here doesn't limit the "painful duty" to cases of a "judiciary nature." This statement reads as a comprehensive duty on the part of the courts to exercise general supervision over matters involving the constitutional separation of powers.

It is not reasonable from a constitutional perspective to allow the means to defeat the end, so even though Marshall seems to insulate political discretion from review, the exercise of discretion cannot be considered an end in itself. It must pursue constitutional purposes and be free from any implication that individual rights are being violated. Since executive discretion was properly and completely exercised, Marbury had acquired a vested right to his commission. And the very notion of the rule of law—indeed the core of constitutional government itself—demands that whenever government or the law has created an injury it must also afford a remedy. As Marshall noted,

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection …

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[73]

The proper remedy by legal usage and law was clearly a writ of mandamus ordering the Secretary of State to perform his non-discretionary duty to deliver the commission to Marbury.

The Construction of Article III

Marshall, of course, held that Section 13 of the Judiciary Act of 1789 which purported to authorize the Court to issue such a mandamus was unconstitutional and therefore void. It was unconstitutional because it attempted to add to the Court's original jurisdiction by an ordinary act of legislation. The list of original powers in the Constitution, Marshall reasoned, must be read as an exclusive list. Congress' power to make "exceptions" applied only to appellate and not to original jurisdiction. Confronted with such a conflict between fundamental law and ordinary law, the Court was obliged to adhere to the Constitution and ignore the law. As Marshall noted, in one of the most cited passages of the opinion, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[74] In the event of a conflict between the fundamental law of the Constitution and an act of legislation, the Court must, of course, choose the fundamental law. "Between these alternatives," Marshall argued, "there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."[75] If the Constitution is "superior paramount law," then "a legislative act contrary to the constitution is not law; if the latter … be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." The "theory" of limited government presupposes as a fundamental principle of a written constitution that "an act of the legislature, repugnant to the constitution, is void." And in determining whether an ordinary act of legislation is "repugnant," judges "in some cases"

must look into and interpret the Constitution, but presumably only to the extent necessary to decide the particular "case or controversy" before the Court. Thus, the duty of the judiciary to "say what the law is" also includes the duty to say what the Constitution as "fundamental law" is. No doubt the same principles of interpretation apply even though the superiority of the Constitution as "fundamental law" makes it a different kind of law. The principles of interpretation are the principles of reason—whether derived from common law principles or principles of natural right—and those principles must take into account the fundamental distinction between superior and inferior law.

Several commentators maintain that Marshall deliberately misconstrued the Constitution in order to enhance judicial power. The distinction between original and appellate jurisdiction, it is argued, is merely preliminary and "Congress may except certain cases otherwise subject only to the Court's appellate jurisdiction by *adding them to the Court's original jurisdiction*, which, it might be added, is precisely what Congress did in Section 13 of the Judiciary Act."[76] But if the "exceptions clause" authorizes Congress to make original what was in the Constitution merely appellate, then it would, in Marshall's terms, also authorize the Congress, by a parity of reasoning, to make what was original to the Court only appellate.

Evidence of the fact that the "distribution of jurisdiction" is merely provisional is said to be provided by the language of the Constitution itself—it is general and "it contains no negative or restrictive words." Thus counsel for Madison argued that there is no logical necessity to read the positive words assigning original jurisdiction as having a restrictive or exclusive force. The principle of interpretation that the inclusion of one thing is necessarily the exclusion of the other has no application here. The absence of any particular exclusion, it is purported, will support the interpretation that the list is provisional and can be expanded under the aegis of the exceptions clause.

But, as Marshall countered, "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all."[77] Marshall's conclusion seems to be irresistible: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall

be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."[78] "Form without substance," of course, is incompatible with the idea of a written constitution, because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[79] Rendering some provision "without effect" is tantamount to an amendment of the Constitution by interpretation alone.

Thus, while Marbury has a vested right to his commission, the Supreme Court cannot afford him a remedy because Section 13 of the Judiciary Act authorizing the Court to issue writs of mandamus is unconstitutional. Since in its nature the power of mandamus is an original, not an appellate power, Section 13 is unconstitutional as an attempt to amend the Constitution by an ordinary act of legislation. The Supreme Court need only refuse to act in order to enforce its opinion here. Section 13 applied only to the judiciary and the Court's refusal to exercise power under that section is sufficient to enforce its decision. And, although the case arose in the context of individual rights, it was not resolved on that basis since the Court ruled it had no means under the Constitution to compel the vindication of Marbury's legal right. The legislative attempt to add writs of mandamus to the arsenal of the Court's original powers was, in some sense, an attempt at aggrandizement—the increase of legislative power at the expense of the Constitution's express command to the contrary. Thus, one could argue that the Court did serve as a "bulwark" against legislative encroachment but it failed in its attempt to secure the rights of Marbury, because it was necessary to purchase the first achievement at the expense of the second.

Judicial Statesmanship

Many commentators have noted that Marshall could have avoided ruling on the constitutional issue by declaring that the Supreme Court had no jurisdiction to decide the case. But I think it is too obvious for argument that Marshall went out of his way, not so much to assert the power of judicial review, but to give the nation an authoritative discourse on the fundamental principles of the Constitution. In the wake of the election of 1800 and the attacks on the judiciary that followed

in its train, this was a necessary act of judicial statesmanship. Indeed, Marshall's conception of judicial statesmanship was to provide, on appropriate and propitious occasions, a powerful and authoritative explication or exegesis of fundamental constitutional principles. Marshall at least on one occasion referred to the Constitution as a "sacred instrument,"[80] and he seemed to have conceived of judicial statesmanship as providing authoritative commentary on the fundamental—and even sacred—law of the nation.[81] Creating reverence for the fundamental law was Marshall's most powerful contribution to making the Constitution an instrument "framed for ages to come, and … designed to approach immortality as nearly as human institutions can approach it."[82] The "framers must be unwise statesmen indeed," Marshall continues, "if they have not provided [the Constitution], as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter."[83] It is in the explication and defense of the fundamental law that Marshall lodged the "measure of self-preservation" in the Supreme Court.

Any attempt, of course, to issue a mandamus in the vindication of Marbury's claim would have ended in failure, since as we have seen the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (No. 78, at 465). *Marbury* is an example of the Court's power to make a final determination about the meaning of the Constitution because the statute in question was addressed to the Court. The Court merely had to refrain from acting to make its decision—and its interpretation of the Constitution—final. In other cases, where the cooperation of the legislative and executive branch is required, the Court's construction of the Constitution would not have the same air of finality.

The executive and legislative branches equally have the power and responsibility of constitutional construction. Congress, presumably, would not pass a law that it believed was unconstitutional, nor would the president sign a bill that he deemed unconstitutional. Courts also make judgments about the constitutionality of laws that come before them in the context of particular cases or controversies. Judges, of course, are bound by their constitutional oaths no less than presidents and members of Congress and are duty-bound not to apply laws they deem to be unconstitutional. But are the decisions of judges final? Does the judiciary because of its "peculiar province" to say what

the law is occupy a superior position with respect to the determination of constitutionality?

Whenever the Court declares a law unconstitutional it does so in the context of the vindication of particular constitutional rights. If, as Marshall noted, "[t]he province of the court is, solely, to decide on the rights of individuals" and the Constitution imposes a case-or-controversy rule on the Court's jurisdiction, then power to "open the Constitution" is limited to the resolution of particular cases. And, as Marshall argued, the Court can open the Constitution only as far as necessary to vindicate individual rights. The vindication of individual rights will usually mean that any legislation which is void because it is judged to be unconstitutional will bring dismissal of the case against the individual. It is a necessary inference, however, that all those similarly situated will receive the same judgments. But the Court's decision in the context of a particular case will be binding only on the parties. Does the Court's decision in a particular case control the legislative and executive branches as well? *Marbury's* emphasis on the rights of individuals seems to indicate that the decision would be binding on the other branches to the extent that the Court has the last decision, if not the final decision. In a case of dispute between the branches, each acting on its own interpretation of the Constitution, the only possible resolution would be a political one—unless the dispute was severe enough to warrant impeachment of the judges. If the executive continued to enforce the law, and even if Congress cooperated in the enforcement of the law in contravention of the Supreme Court's ruling, the issue would ultimately be decided in elections as the issue would be appealed to the people for ultimate resolution.

Abraham Lincoln and Judicial Power

This appears to be what Abraham Lincoln had in mind when he remarked in his First Inaugural, March 4, 1861 that

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel

> 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 over-ruled, 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.[84]

Four years earlier Lincoln had said, in explicit reference to the *Dred Scott* decision, that the Supreme Court's

> decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution.... More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this....
>
> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and reaffirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.
>
> But when we ... find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.[85]

Lincoln's view of the judicial power here is fully consistent with *Marbury's* insistence that the province of the Court is solely to decide individual rights. Lincoln, however, seems never to have questioned the fact that the *Dred Scott* case was properly before the Court.

Unlike the *Marbury* decision, however, the *Dred Scott* ruling sparked a political firestorm. *Marbury*, although couched in general terms, was a narrow decision invalidating an attempt on the part of Congress to increase the judicial power of the Supreme Court. *Dred Scott*, on the other hand, was nothing less than "a summons to the Republicans to disband."[86] The Republican Party was organized almost exclusively around opposition to the extension of slavery to the territories and the restoration of the Missouri Compromise slavery restrictions. As Harry Jaffa points out:

> The election of 1856 had revealed that the Democratic party was now a minority party in the nation as far as the presidential vote was concerned. The Whig and Know-Nothing parties were breaking up rapidly, and it was highly probable that the Republican party would become the majority party in the not very distant future.... The elections of 1856 carried the clear portent of an impending realignment of political strength in the nation, such as had not happened since 1800.[87]

The equivalent analogy for *Marbury v. Madison*, Jaffa argues, would be the declaration by the Marshall Court that "the repeal of the Judiciary Act of 1801 by Jefferson's party had been unconstitutional."[88] The *Dred Scott* decision branded the Republicans as the party of revolution against the Constitution. In many respects, Chief Justice Roger Taney's opinion in *Dred Scott* reads as an extended criticism of the Republican Party platform of 1856, and it was the Court's foray into politics that was the focus of Lincoln's opposition.[89]

Lincoln, of course, opposed the *Dred Scott* decision from the moment it was announced. In the first of many such accusations, Stephen A. Douglas, Lincoln's arch-nemesis, accused him of waging a "crusade against the Supreme court of the United States on account of the Dred Scott decision."[90] In the third Lincoln-Douglas debate, Douglas argued, in language suggestive of the decision in *Cooper v. Aaron*, that "[i]t is the fundamental principle of the judiciary that its decisions are final. It is created for that purpose, so that when you cannot agree

among yourselves on a disputed point you appeal to the judicial tribunal which steps in and decides for you, and that decision is then binding on every good citizen. It is the law of the land just as much with Mr. Lincoln against it as for it."[91] Lincoln gave an extended reply in the sixth debate: "We oppose the Dred Scott decision in a certain way," Lincoln stated. "We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled, but we nevertheless do oppose that decision as a political rule, which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision … We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject."[92] Lincoln was thus mindful of the fact that "[j]udicial opinions are merely explanations of the judge's reasons, and are no more 'the law' than the statement a president may issue when he signs a bill. Only the judgment is the legally operative act. The opinion is not itself a legally operative act, though it is significant because it helps predict how the court will rule in later cases. Consequently, though the court's *judgment* may bind other branches, its *opinion* is no more binding than a press release."[93]

Thus Lincoln's opposition was to the decision "as a political rule," to be overturned, if possible, by political means. In Lincoln's view, the decision was factually wrong, the product of a split court and derived from no precedent. It was thus politically vulnerable and Lincoln made a political issue of *Dred Scott*, eventually skewering Douglas on the contradiction between his advocacy of popular sovereignty—the right of local majorities to vote slavery "up or down"—and the Court's prohibition against voting slavery down because it deprived a slaveowner's right to property.

Lincoln was convinced that approval of the decision in the election of 1860 would lead to a "second Dred Scott decision" which would legalize slavery in every state as well.[94] Lincoln's logic was uncontestable: *Dred Scott* held that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." Under Article VI of the Constitution, "the Judges of every State shall be bound by it, any law

or Constitution of any State to the contrary notwithstanding." "Therefore," Lincoln concluded, "nothing in the Constitution or laws of any State can destroy the right of property in a slave."[95] Lincoln may or may not have known of the California Supreme Court case decided in January 1858 that made precisely this argument in upholding a slaveowner's right to take his slave to a free state.[96] In *Ex Parte Archy*, Justice Peter H. Burnett, citing *Dred Scott*, noted that "[i]t must be concluded that where slavery exists, the right of property of the master in the slave must follow as a necessary incident. The right of property is recognized by the Constitution of the United States. The right of property, having been recognized by the supreme law of the law, certain logical results must follow this recognition." Those "logical results" dictated that slave property must be protected as much as any other form of property and that "[n]o distinction can be made … between the different descriptions of private property." Thus, despite the fact that the California Constitution prohibited slavery, "in virtue of the paramount sovereignty of the United States, the citizens of each State have the right to pass through the other States, with any property whatever."[97]

Lincoln certainly knew, however, of a case, making its way to the Supreme Court from New York that presented the same issue.[98] Reference to *Lemmon v. The People*, decided by the New York Court of Appeals in March 1860, was made in the printed version of the "Cooper Union Speech." Although the speech was delivered before the decision was handed down, a note in the pamphlet reproducing the speech—a publication that Lincoln supervised—referred to the case. The New York Court of Appeals had held that a slave brought from Virginia, even merely as a sojourner, was freed by a New York law and that the privileges and immunities clause of the Federal Constitution could not be construed to give a citizen of another state "rights superior to those of any citizen of New York."[99] Lincoln's annotation to the "Cooper Union Speech" accurately stated that "the State of Virginia is now engaged in carrying this, the Lemmon case, to the Supreme Court of the United States, hoping by a decision there, in accordance with the intimations in the Dred Scott case, to overthrow the Constitution of New York."[100]

The logical necessity of a "second Dred Scott decision" was a constant theme of Lincoln's beginning with the "House Divided Speech"

in June of 1858.[101] His fears were not merely fanciful nor the product of an over-active conspiratorial imagination. The nationalization of slavery, of course, would have meant that the framers' intentions with regard to slavery—that freedom is the rule and slavery the exception in the Constitution—would have been overthrown. Lincoln fought mightily to return the issue of slavery to the position that the framers had left it—toleration by necessity until it was politically possible to exclude it entirely. The Constitution, Lincoln insisted, when understood in the light of the principles of the Declaration, had put slavery on the road to ultimate extinction.[102]

Lincoln's principal quarrel with the *Dred Scott* decision was Taney's egregiously mistaken view of the framers' intent on the issue of slavery in the territories. Lincoln's proof that the framers contemplated congressional regulation of slavery in the territories was derived from "contemporaneous construction" by the framers themselves. In his "Cooper Union Speech" Lincoln noted that sixteen of the thirty-nine members of the Constitutional Convention served in the first Congress of the United States and all supported the passage of the Ordinance which "forever prohibited" slavery in the Northwest Territory. Since, as Lincoln noted, the bill "went through all its stages without a word of opposition, and finally passed both branches without yeas and nays," this was "the equivalent to an unanimous passage."[103] These sixteen framers were also present when the Fifth Amendment was passed. The *Dred Scott* decision, of course, had held that the Missouri Compromise law—which used the same "forever prohibited" language of the Northwest Ordinance—was unconstitutional because it deprived a slaveowner of his property without due process of law in violation of the Fifth Amendment. Thus, Taney concluded, "[t]he only power conferred" on Congress by the Constitution "is the power coupled with the duty of guarding and protecting the owner in his rights."[104] But if the same Congress that passed the Northwest Ordinance also passed the Fifth Amendment it is impossible, Lincoln argued, to conclude that the two legislative acts contradict one another. Obviously the Congress—including sixteen framers—believed that the two acts were compatible and that regulation of slavery in the Northwest Territory was not a violation of due process. Lincoln's argument, it seems, is a complete refutation of Taney's decision in *Dred Scott* on the basis of a superior understanding of original intent.[105]

For Lincoln, the Court's decision in a particular case is not conclusive in all other cases, especially when the ruling of the Court is disputed and where there have been no authoritative precedents. Political opposition—to be decided ultimately in elections—is the proper remedy, Lincoln suggests, in those cases where the Court has overreached or has plainly made mistakes. Lincoln makes no reference to the constitutional remedy that Hamilton thought conclusive, the power of impeachment. Lincoln does, however, mention revolution and thus reminds us that the ultimate political authority rests in the "original and supreme" right of the people "to alter or abolish" government. Jaffa has noted that for Jefferson—whom Lincoln said was "the most distinguished politician of our history"[106]—"the right of revolution would forever underlie the right of free elections and would supply a compelling reason why governments ought to have such elections as authentic expressions, not only of the people's will, but also of those rights that are the authority of the people's will. That is to say, the wholesome fear of the people by governments would also be a wholesome fear informing the majority in its dealings with minorities."[107] This was Lincoln's view as he expressed it in the First Inaugural. "A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism."[108] "This country with its institutions," Lincoln continued, "belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it."[109]

Thus consent of the governed is not only the basis for the establishment of government, but is required for its operation as well. Elections provide the mechanism for periodic renewal of consent and the opinion that informs that consent is the "real sovereign" in every constitutional regime. Lincoln, as Jefferson before him, was always mindful that constitutional rights ultimately depend upon the right of revolution, a right which, as Marshall noted in *Marbury*, "seldom acts" but is always reserved by the people. It is a right which must be exercised with prudence, but it must never recede too far from the public consciousness.

Some have maintained that the Civil War itself was the second battle in the Revolutionary War, a completion of the principles announced in 1776.[110] Lincoln's whole political career was an effort to perpetuate the principles of the Declaration—the principles of social compact—as the foundation of the Constitution. The Constitution was fundamental law—"organic law" as Lincoln occasionally termed it—because it was an expression of natural right principles embodied in the Declaration, those principles that provided the implicit and explicit referent points for Marshall in *Marbury*. Lincoln's restoration of those principles during the secession crisis, however, was only momentary. Almost immediately after the Union forces proclaimed victory, the forces of Continental thought—principally Hegel and Darwin—overwhelmed the constitutional jurisprudence inspired by Lincoln and the principles of the Declaration. The forces of Continental thought were eventually concentrated in the Progressive movement, a movement that aspired, more than anything else, to read the natural right and natural law principles out of the founding and out of America's constitutional life.[111]

Progressivism and the Constitution: Fundamental Law and Organic Will

In the universe of the Progressives, history—or progressive history—had supplanted nature or natural right as the standard for morality and politics. Carl Becker, along with Charles Beard the most talented of the progressive historians, wrote in his seminal work *The Declaration of Independence,* first published in 1922, that the naive faith of the framers in universal principles derived from natural right or natural law "could not survive the harsh realities of the modern world,"[112] particularly after the "great discover[ies] of Darwin."[113] The unquestioned premise of Becker's thesis is that all thought is historically conditioned and limited to the historical circumstances that produced it. All thought is merely the epiphenomena of historical forces. Therefore "[t]o ask whether the natural rights philosophy of the Declaration is true or false is essentially a meaningless question."[114] It is "meaningless" because it ignores the historical insight that no thought can be said to "transcend" its own historical epoch. Becker himself never seems to have considered the possibility that this insight

was itself the product of his own historical epoch. Rather, he asserted the truth of the insights of the historical school as true for all thought. If all thought is "historical," why not his own? Becker and the historical school seemed either unaware of this question or utterly untroubled by it.

The Progressives took up the theme that the Constitution is process without purpose—whatever purpose there is in the world is assigned by evolutionary or progressive history, not framers of constitutions. The explicit goal of Progressivism was to free the Constitution from its moorings in the founding, most particularly from what were termed the "static" doctrines of the Declaration and its reliance on natural right.

In Madison's constitutional vision, the "reason … of the public" was the foundation for the moral and political order; it was particularly the foundation for limited government and the rule of law. For it is "reason alone," Madison argued, "that ought to control and regulate the government. The passions ought to be controlled and regulated by the government" (No. 49, at 317). The Progressives sought to elevate administration over government and thus replace limited government with the administrative state. The administrative state grounded itself, not in the "reason of the public," but in the "organic will" of the community. Organic law—the Constitution—is thus transformed into organic will. And, as everyone seems to realize, government derived from "organic will" requires unlimited government since there are no reasoned limits to what can be willed.

Woodrow Wilson, a leader of the Progressive movement, argued that the views of the framers had been exposed by Darwinian thought to be hopelessly outmoded—and dangerously naive. Darwin had made it possible to replace the "static" universe that informed the politics of the framers with one that viewed politics as a "living organism." "Liberty fixed in an unalterable law," Wilson said, "would be no liberty at all."[115] Wilson reserved particular animus for the constitutional separation of powers because it divided the "organic will" of the nation.

> [G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin.… No living thing can have its organs offset against each other as checks, and live. On the

> contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Living political constitutions must be Darwinian in structure and in practice.[116]

This Progressive critique of the founding finds its most powerful expression today in the rhetoric of the "living constitution," which must evolve and adapt to changing circumstances and especially to changing (and progressive) notions of morality.

The only principle of liberty that can be recognized within the Darwinian universe is the freedom to change or progress; but it is a change or progress that has no particular end or purpose. The Darwinian view makes it impossible to distinguish between liberty and necessity. And it is the conflation of liberty and necessity that forms the basis of the administrative state. It is necessity, not liberty and the consequent centrality of moral choice, that is the motive force at the core of the administrative state. Rights are no longer understood as the irrefragable dictate of human nature—that "all men are created equal"—but as simply "needs" or "values" competing for recognition in the political marketplace.

In the arena of constitutional law, nothing epitomizes the Progressive world-view more than Justice Oliver Wendell Holmes' dissenting opinion in *Gitlow v. New York* (1925). "If, in the long run," Holmes argued, "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[117] An eminent scholar has recently declared that this statement, so often celebrated in the circles of ideological liberalism, "may be the single most disgraceful sentence in our jurisprudence."[118] The reason this commentator regards the statement as "disgraceful" is because its author (and Justice Louis Brandeis who joined the dissent) "seem to have forgotten that our system of government is based on an original agreement (implemented by popular ratification) to unite in accepting only a form of government specifically designed to protect the inalienable rights of every citizen. Every system of government opposed to such an end is considered fundamentally illegitimate and inherently antagonistic to our own."[119] Thus Holmes would subordinate the "original and supreme will" of the people

to a subsequent and inferior will, thereby undermining the very foundation of the Constitution.[120]

Holmes seemed to argue that the people were free to use freedom of speech and free elections to destroy freedom. Freedom of speech was regarded by the framers, not as an end in itself, but as a means to secure free government. Free government was the end for which freedom of speech existed. In Holmes' analysis the means can be a mechanism for destroying the ends. The Holmesean position that free speech has no particular ends or purposes would be eminently sensible if the Constitution had no ends or purposes. The framers certainly believed that the Constitution was designed to protect liberty, not destroy it. And they were not disillusioned about the difference between freedom and slavery—freedom was not just another "fighting faith." It would be foolish to allow the indispensable means of preserving free government, freedom of speech, to destroy the ends of free government. But if ends disappear from the universe of constitutional discourse, it is difficult—indeed impossible—to discriminate among the means. Holmes, of course, did not believe that reason could determine moral principles nor in any way settle the question between competing moral claims. Moral principles were in Holmes' language merely "fighting faiths" competing for recognition in the public arena. The principles of the American Constitution as understood by its framers are no less a "fighting faith" than communism, fascism or wahhabism. "Fighting faiths" merely depend upon acceptance or commitment. And it is the strength of the commitment, not its intrinsic reasonableness, that determines whether it is accepted by the "dominant forces" of the community. Thus, in Holmes' view—the view that prevails in today's constitutional jurisprudence—all "fighting faiths" must be tolerated because reason cannot decide between them. Toleration seems therefore to be a value that transcends "fighting faiths." But how, in a universe where there are only "fighting faiths," does "toleration" find any ground of exemption? Surely Holmes must have realized that the dictatorship of the proletariat would have been the end of toleration. But he seems not to have thought the issue through adequately—he merely accepted the historicist premises of the movement of which he was, wittingly or unwittingly, a part. Today, Holmes' view is reflected in the Supreme Court's doctrine that "[u]nder the First Amendment there is no such thing as a false idea."[121]

BROWN V. BOARD OF EDUCATION AND THE CONSTITUTION

If Holmes understood the Constitution as merely instituting a process for decisionmaking that was indifferent to the decisions that were produced by the process, it was only a short step to reading the Constitution out of constitutional law entirely. That, I believe, was the work of *Brown v. Board of Education* (1954). The holding in *Brown* was eminently correct; any reasonable interpretation of the equal protection clause would have concluded that racial classifications can play no role in constitutional government simply because race is an accidental rather than an essential feature of human nature and the principles that flow from human nature—those principles adumbrated in the Declaration. There is abundant evidence that the framers of the Fourteenth Amendment believed it to be a completion of the founding in the sense that it finally brought the Constitution into formal harmony with the principles of the Declaration.[122]

William Nelson writes that "[i]n *Brown*, the Supreme Court rejected the narrow version of judicial review focusing on adherence to precedent, framers' intentions, and the Constitution's text." Nelson also rightly notes that *Brown* was a pivotal case in the Court's doctrinal move away from its main focus on the protection of individual rights to the protection of the group rights of "discrete and insular minorities."[123] The Supreme Court thus abandoned one of the primary injunctions of *Marbury* that "[t]he province of the court is, solely, to decide on the rights of individuals …" The Court's new role as "virtual representative" of "discrete and insular minorities" made forays into the area of politics and policy far easier for the Court.[124]

Chief Justice Earl Warren's opinion in *Brown* is utterly indefensible. In one of the most curious arguments ever mounted in a Supreme Court opinion, Warren asserted that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted."[125] The reason is that the intentions of the framers of the Fourteenth Amendment are "[a]t best … inconclusive."[126] "The most avid proponents of the post-War Amendments," Warren noted, "undoubtedly intended them to remove all legal distinctions … Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be

determined with any degree of certainty."[127] Why the opponents of the Fourteenth Amendment are included in the argument is something of a mystery—after all, they lost! To aver that there was opposition to the amendment and that this opposition renders the discovery of intent doubtful defies logic. What is even more puzzling is the fact that the Chief Justice admitted that the "most avid proponents"—presumably including those who drafted the amendment—"*undoubtedly* intended" to remove all legal distinctions among American citizens. Yet in the light of the undoubted intentions of the framers, Warren casually rejects the reliability of such intentions and turns to the more reliable evidence of modern psychology.[128]

Once it is assumed that the intentions of the framers can play no role in the decision of the case, it becomes necessary to find some other authoritative source as ground for the opinion. Warren found this in the authority of modern social science, specifically modern psychology. Modern psychology buttresses the idea that "separate is inherently unequal" because the mere fact of separation "generates" among school children "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[129] Thus, "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority."[130] *Plessy* had held that any "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[131] The difference between the *Brown* decision and *Plessy* was in the interpretation of the facts, not in the principle of constitutional construction. *Plessy* had held that a "feeling of inferiority" was not a fact of inferiority from the point of view of the equal protection clause. *Brown*, on the basis of the findings of modern psychology, held that a feeling of inferiority must now be regarded as a "fact" of inferiority. But modern psychology can hardly provide the stable ground for constitutionalism that is available in the Constitution itself. The tenets of modern psychology change—or "progress"—frequently; the principles of the Constitution were designed, in Marshall's memorable phrase to be "permanent."

In his dissenting opinion in *Grutter v. Bollinger*, Justice Clarence Thomas complained about the fact that the majority opinion "relies

heavily on social science evidence to justify" its decision on diversity. Thomas cited credible studies that "heterogeneity actually impairs learning among black students … and that black students experience superior cognitive development at Historically Black Colleges."[132] Does this new evidence require a new Supreme Court ruling resurrecting the "separate but equal doctrine?"

The reliance on social science evidence makes it easy—indeed necessary—to ignore the Constitution. Once the Constitution can be safely ignored, then there is no reason not to adopt other constitutions that might seem to be more attractive at the moment. References to international law and international conventions—as well as international public opinion—are becoming more frequent in Supreme Court decisions. In a recent speech to the American Constitution Society, Justice Ruth Bader Ginsburg stated that "[o]ur island or lone ranger mentality is beginning to change." Justices, she said, "are becoming more open to comparative and international law perspectives."[133] Indeed, in her concurring opinion in *Grutter v. Bollinger* (2003), Ginsburg cited the International Convention on the Elimination of All Forms of Racial Discrimination in support of the decision to uphold an affirmative action program at the University of Michigan law school.[134] The Court cited the opinion of "the world community" in *Atkins v. Virginia*, holding that the execution of the mentally retarded violates the Eighth Amendment's restrictions against "cruel and unusual punishment,"[135] and Justice David Souter—in a most incredible display of myopia—even relied upon the Zimbabwe Supreme Court to buttress his opinion that excessive delays in executing the death penalty amount to "cruel and unusual punishment."[136] More importantly, Justice Anthony Kennedy cited cases from the European Court of Human Rights as evidence that homosexual sodomy "has been accepted as an integral part of human freedom in many other countries." Kennedy used this evidence to conclude that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[137] Justice Antonin Scalia in an acerb dissent warned that "[t]he Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court … should not impose foreign moods, fads, or fashions on Americans.'"[138]

Scalia's point about the danger of using foreign—even European—precedents is well taken. It suffices only to recall Justice Taney's opinion in *Dred Scott*. Taney relied on the "public opinion … which prevailed in the civilized and enlightened portions of the world at the time the Declaration of Independence and … the Constitution of the United States was framed and adopted" to buttress his argument that no black of African descent could ever become a citizen of the United States. "[T]he public history of every European nation," Taney reports, "displays … in a manner too plain to be mistaken" that blacks had "been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit." The "fixed and universal" opinion "in the civilized portion of the white race" regarded blacks of African descent as mere articles of "merchandise and traffic" to be "bought and sold … whenever a profit could be made by it."[139] Reliance on European opinion, rather than the language of the Declaration and the Constitution interpreted according to the true intentions of the framers, led Taney to the wholly erroneous conclusion that blacks of African descent were not included in the Declaration's injunction that "all men are created equal" and therefore could never be citizens of the United States. Lincoln's refutation of Taney's reasoning in the "Standard Maxim Speech" and the "Cooper Union Speech" is unassailable. But Lincoln's unassailable logic did not prevent civil war—and may have precipitated it.

It would be bold (and perhaps hyperbolic) to argue that the increased reliance on European opinion that seems to be making headway in the Supreme Court is the *terminus ad quem* of the *Brown* decision and the Progressive revolution it culminated. But the evidence ineluctably points in that direction.

Endnotes

1. William H. Rehnquist, "Remarks of the Chief Justice: My Life in the Law Series," *Duke Law Journal* 52 (2003): 789–90.

2. William Brennan, "The Constitution of the United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University, October 12, 1985, reprinted in *The Great Debate: Interpreting Our Written Constitution* (Washington, D.C.: The Federalist Society, 1986), 19, 25, 23.

3. Ibid., 35. Curiously enough, Brennan asserts that there is one constitutional principle that is "fixed and immutable"—that capital punishment "is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." This "fixed and immutable" view, however, is at odds with the literal language of the Constitution which lists "capital" crimes in the Fifth Amendment along with a due process requirement for depriving a person of life, liberty or property. It almost goes without saying that the Fifth Amendment was passed contemporaneously with the Eight Amendment's ban on "cruel and unusual punishment." This seems to be proof that the framers did not regard capital punishment as cruel and unusual. Brennan wisely does not attempt to explain the unexplainable: how it is possible for one "fixed and immutable" point to exist in a constitutional universe that is constantly evolving.

4. Cooper v. Aaron, 358 U.S. 1, 17 (1958).

5. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 179-80 (1803).

6. Kenneth Karst, "Cooper v. Aaron," in *Encyclopedia of the American Constitution*, Leonard Levy, et al., eds. (New York: Macmillan Publishing Company, 1986), 2:502.

7. Marbury v. Madison, 176.

8. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 39.

9. A commentator on an earlier draft of this article disagreed that *Brown* was the first case explicitly to declare the irrelevance of the Constitution. That "honor," he declared, belonged to *Dred Scott*, the first "substantive due process case." In an argument redolent of Robert Bork's claims in *The Tempting of America* (New York: The Free Press, 1990), this commentator maintained that Taney manufactured a right that was nowhere to be found in the Constitution—the right to own slaves. Thus Taney "poured substance" into the due process clause of the Fifth Amendment, a provision that was intended only to protect procedure. Defining "substance" is properly a role for the legislature and the Court had usurped legislative power in an unconscionable act of judicial activism. The notion that the Constitution does not recognize the right to hold slaves is, of course, utterly ludicrous. The three-fifths clause and the fugitive slave clause, however much they may have been compromises with

constitutional principle, are nonetheless recognition of the right to property in slaves. Besides, if the Court had reached out to overrule the Missouri Compromise, it was merely ratifying what Congress had *already done* in the Kansas-Nebraska Act of 1854. Among a host of other considerations, the author of the Kansas-Nebraska Act, Stephen A. Douglas, stated repeatedly on the floor of the Senate that the constitutionality of the act was a matter to be determined by the Supreme Court. (*Congressional Globe*, 34th Cong., 1st Sess. 797, 1371-72 [1856]; See David M. Potter, *The Impending Crisis, 1848-1861* [New York: Harper and Row, 1976], 74, 116, 161, 271, 276, 285, 292, 294, 403, 410.) President Franklin Pierce in his message to Congress in December, 1855 had opined that the Missouri Compromise "restrictions were, in the estimation of many thoughtful men, null from the beginning, unauthorized by the Constitution … and inconsistent with the equality of these States." And in his last message to Congress in December 1856, delivered while the *Dred Scott* decision was under deliberation by the Supreme Court, Pierce pronounced the Missouri Compromise law a "mere nullity" and a "monument of error and a beacon of warning to the legislature and the statesman." (*A Compilation of the Messages and Papers of the Presidents,* James D. Richardson, ed. [Washington, D.C.: Bureau of National Literature and Art, 1905], 5:348, 401.) Thus, if *Dred Scott* was an example of judicial activism, it was authorized *in advance* by the legislative branch and had the explicit approval of the executive branch! The notion of "substantive due process" was wholly unknown to Taney and his contemporaries. Indeed, Taney was adamant in his professed adherence to original intent jurisprudence: the Constitution, Taney wrote, "must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning … and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States" (Dred Scott v. Sandford, 60 U.S. [19 How.] 426 [1857]). In his desire to adhere to original intent, Taney was eminently correct; but his constitutional construction was utterly wrong. He was unable to uncover and articulate the original intent of the Constitution. But no one can doubt that his analysis—however mistaken—centered on the Constitution. As we will see below, *Brown*, on the other hand, explicitly rejects any reliance on the Constitution.

10. Karst, "Constitutional Equality and the Role of the Judiciary," in *The Promise of American Politics: Principles and Practice After 200 Years*, Robert Utley, ed. (Lanham, Md.: University Press of America, 1989), 211.

11. Robert L. Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kan.: University Press of Kansas, 1989), 43–55; William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Lawrence, Kan.: University Press of Kansas, 2000), 35–40; an excellent summary is Scott D. Gerber, "The Myth of *Marbury v. Madison* and the Origins of Judicial Review," in *Marbury v. Madison: Documents and Commentary*, Mark A. Graber and Michael Perhac, eds. (Washington, D.C.: Congressional Quarterly Press, 2002), 1–15. "There is no question that *Marbury* is a landmark case. However the case simply established, once and for all, a doctrine that has deep roots in early American constitutional theory and practice."

12. Marbury v. Madison, 177.

13. Ibid., 178. See Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, Kan.: University Press of Kansas, 1996), 58: "The omission of citations to authorities was no doubt deliberate, for Marshall was surely acquainted with the so-called 'precedents' for judicial review. From his perspective these cases were not needed to establish the principle of judicial review, however useful they might be as illustrations of the principle. He firmly believed that judicial review was grounded in the very nature of American constitutionalism, if not confirmed by the text of the Constitution itself. A practice that was sanctioned by the highest authority did not require further support."

14. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). See Charles G. Haines, *The American Doctrine of Judicial Supremacy* (Berkeley: University of California Press, 1932), 173–79.

15. William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), 2:974–75.

16. Clinton, *Marbury v. Madison and Judicial Review*, 56, 55, 66–67, 76.

17. Leonard Levy, "Judicial Review, History, and Democracy," in *Judicial Review and the Supreme Court*, Leonard Levy, ed. (New York: Harper Torchbooks, 1967), 11.

18. Ibid., 10.

19. Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9 (1910): 102, 108 (emphasis original); Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review* 30 (1925): 511, 513–14, 527, 534–36.

20. Alexander Hamilton, James Madison, John Jay, *The Federalist Papers,* Clinton Rossiter, ed. (New York: New American Library, 1961), No. 48, 309. All further references to *The Federalist Papers* will be in the text.

21. *The Records of the Federal Convention of 1787*, Max Farrand, ed. (New Haven: Yale University Press, 1966), 1:134.

22. Ibid., 2:27.

23. Ibid., 2:28; 1:164-65, 447.

24. Haines, *The American Doctrine of Judicial Supremacy*, 109-12; Crosskey, *Politics and the Constitution in the History of the United States*, 2:965-968; Clinton, *Marbury v. Madison and Judicial Review*, 51-53. Clinton uses *Trevett v. Weeden* as part of the evidence from state judiciaries that "the theory of judicial function proposed by the Founders and later expounded by Marshall and his Court was quite well-developed by the 1780s." But it is clear that Madison believed that lack of judicial independence made the Rhode Island court ineffective as a check on legislative power, regardless of how sound the arguments of the judges might have been in theory. What was lacking in Rhode Island—and in all the states—was a mechanism for enforcing the separation of powers in practice, a mechanism that required a truly independent judiciary possessing the power to declare laws of coordinate branches "null and void." See *The Records of the Federal Convention of 1787*, 2:93. Thus, as Madison indicates, the Rhode Island case was hardly a precedent for the independent judiciary that was contemplated in the Constitution of 1787.

25. *The Records of the Federal Convention of 1787*, 2:28.

26. Letter to Thomas Jefferson, Sept. 6, 1787, in *The Papers of James Madison*, Robert Rutland, et al., eds. (Chicago: University of Chicago Press, 1977), 10:163-64.

27. Letter to Thomas Jefferson, Oct. 24, 1787 in ibid., 10:209-11.

28. Letter to Thomas Jefferson, June 27, 1823, in *The Writings of James Madison*, Gaillard Hunt, ed. (New York: G. P. Putnam's Sons, 1900-10), 9:142. See Letter to Spencer Roane, June 29, 1821, in ibid., 9:65.

29. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Jonathan Elliot, ed. (Philadelphia: J. B. Lippincott Co., 1836), 3:654.

30. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 381-82, 414 (1821).

31. One perceptive commentator argues that Marshall also "interpreted the contract clause in the spirit of Madison's negative on state laws and brought within its purview a larger class of state legislation than was contemplated by anyone at the time the Constitution was adopted … [H]e believed … that the contract clause, like the negative, would embrace not only past and present evils but also guard against unforeseen cases that might arise in consequence of state legislative ingenuity." Hobson, *The Great Chief Justice: John Marshall and the Rule of Law*, 78.

32. Marbury v. Madison, 180.

33. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law*, 62.

34. *The Records of the Federal Convention of 1787*, 1:21.

35. Ibid., 2:79.
36. Ibid., 2:74.
37. Ibid.; 2:76 (Morris) and 1:254 (Wilson).
38. Ibid., 2:73 and 2:78 (Mason).
39. Ibid., 2:74.
40. Ibid., 2:75.
41. Ibid., 1:98.
42. Ibid., 1:97.
43. Ibid., 2:76–77.
44. Ibid., 2:430.
45. Ibid., 2:73.
46. *The Debates In the Several State Conventions On the Adoption of the Federal Constitution,* 2:196.
47. Ibid., 3:553.
48. Marbury v. Madison, 176.
49. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, 63.
50. Letter to Nicholas P. Trist, February 15, 1830, in *The Writings of James Madison*, 9:355; see Letter to Daniel Webster, March 15, 1833, in ibid., 6:605; "Sovereignty," in ibid., 9:570–71.
51. Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, Md.: Rowman and Littlefield, 2000), 27.
52. Marbury v. Madison, 176.
53. Ibid.
54. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–15 (1819).
55. Edward S. Corwin, *John Marshall and the Constitution* (New Haven: Yale University Press, 1920), 122.
56. Plato, *Laws* 968a–b.
57. Cohens v. Virginia, 380–81.
58. Ibid., 382.
59. Ibid., 384
60. Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 202 (1819). Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 587, 645 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 135 (1810). Hamilton wrote in *The Federalist*, that "there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this

doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution" (No. 81, at 482 [emphasis original]). While there is nothing in the Constitution that "directly" empowers the Court to construe the Constitution according to its "spirit," it is authorized by the "general theory of a limited Constitution," i.e., *from its "spirit."*

61. "Fragment on the Constitution and the Union," in *The Collected Works of Abraham Lincoln,* Roy Basler, ed. (New Brunswick, N.J.: Rutgers University Press, 1953), 4:168-69.

62. Marbury v. Madison, 176.

63. *The Records of the Federal Convention of 1787*, 2:56.

64. For an extended account of the theory of the separation of powers, see Edward J. Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991), 39-57.

65. Cohens v. Virginia, 264.

66. Marbury v. Madison, 170.

67. *Annals of Congress* (Gales and Seaton ed., 1834), 1:454.

68. Ibid., 1:458.

69. Marbury v. Madison, 170.

70. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, 59.

71. Robert K. Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press, 1968), 201.

72. McCulloch v. Maryland, 423-24.

73. Marbury v. Madison, 163.

74. Ibid., 178.

75. Ibid., 177.

76. William W. Van Alystyne, "A Critical Guide to Marbury v. Madison," 1969 *Duke Law Journal* (1969): 32. This argument was also suggested by Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, N.J.: Princeton University Press, 1914), 4-5.

77. Marbury v. Madison, 174. David Currie argues in *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* (Chicago: University of Chicago Press, 1985), 69, that "Marshall himself was to reject the implications of the *Marbury* reasoning in *Cohens v. Virginia*, where he declared that Congress could grant appellate jurisdiction in cases where the Constitution provided for original." I believe this assessment is mistaken. It is true that Marshall admitted that in "the reasoning of the court in support of [the *Marbury*] decision some expressions are used which go far beyond" what was necessary. Nevertheless, Marshall argued, there is

no inconsistency in the two decisions. "It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in the construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention" (*Cohens v. Virginia*, 393). In other words, whether general language is to be construed as exclusive or inclusive depends upon what constitutional principle is at issue and which reading will "preserve the true intent and meaning of the instrument" (Ibid.). In *Cohens*, reading the Article III language as exclusive—as *Marbury* did—would defeat the framers' intention that the Court be given "final construction" of the Constitution where a state court has ruled on a federal issue (Ibid., 173). Where a case should have been original to the Supreme Court, the Court can nevertheless still take jurisdiction in its appellate capacity when necessary to render a final judgment. The construction of constitutional language must always be governed by the ends of the Constitution, and this means, above all, its "fundamental principles." The argument that *Marbury* and *Cohens* were in conflict was also suggested by Corwin, *The Doctrine of Judicial Review*, 6.

78. Marbury v. Madison, 172.

79. Ibid.

80. U.S. v. Maurice, 26 F. Cas. 1211, 1213 (1823).

81. See Edward S. Corwin, *John Marshall and the Constitution*, 2-3.

82. Cohens v. Virginia, 387.

83. Ibid.

84. *The Collected Works of Abraham Lincoln,* 4:268.

85. Ibid., 2:401

86. Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates* (Garden City, N.Y.: Doubleday and Co., 1959), 286.

87. Ibid., 285-86.

88. Ibid.

89. *The Collected Works of Abraham Lincoln*, 2:551; 3:80, 232, 242, 255.

90. "Speech of Stephen A. Douglas, Chicago, July 9, 1858," in *The Lincoln-Douglas Debates of 1858*, Robert W. Johannsen, ed. (New York: Oxford University Press, 1965), 31. See *The Collected Works of Abraham Lincoln*, 3:9, 54, 242, 259, 267, 287.

91. *The Collected Works of Abraham Lincoln,* 3:143.

92. Ibid., 3:255.

93. Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 182, 183, 186; much the same point was made by Edward S. Corwin, "What Kind of Judicial Review Did the Framers Have in Mind?" in *Corwin's Constitution: Essays and Insights of Edward S. Corwin*, Kenneth Crews, ed. (New York: Greenwood Press, 1986), 84. This essay was first published in 1938.

94. *The Collected Works of Abraham Lincoln*, 2:467, 552–53; 3:29, 89, 225–26, 230–31, 232, 550; 4:151

95. Ibid., 3:230–31, 250, 421.

96. In re Archy, 9 Cal. 147 (1858).

97. Ibid., 162. See William E. Franklin, "The Archy Case: The California Supreme Court Refuses to Free a Slave," *Pacific Historical Review* 32 (1963): 137–154.

98. "Cooper Union Speech," in *The Collected Works of Abraham Lincoln*, 3:548; Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, N.C.: University of North Carolina Press, 1981), 316–338.

99. Lemmon v. The People, 20 N.Y. 562, 609, 611 (1860). "The [New York] Legislature had declared, in effect, that no person shall bring a slave into this State, even in the course of a journey between two slaveholding States, and that if he does, the slave shall be free. Our own citizens are of course bound by this regulation. If the owner of these is not in like manner bound it is because, in his quality of citizen of another State, he has rights superior to those of any citizen of New York … and is entitled to have those laws enforced in the courts, notwithstanding the mandate of our own laws to the contrary." In disallowing the privileges and immunities claim the court argued that "the owner cannot lawfully do anything which our laws do not permit to be done by one of our own citizens, and as a citizen of this State cannot bring a slave within its limits except under the condition that he shall immediately become free, the owner of these slaves could not do it without involving himself in the same consequences."

100. *The Collected Works of Abraham Lincoln*, 3:548–49. See Lemmon v. The People, 20 N.Y. 562, 628 (1860). The Virginia slaveowner had claimed protection for his property under the privileges and immunities clause of Article IV. The New York Court of Appeals rejected this argument, noting that the relation of master and slave "exists, if at all under the laws of Virginia, and it is not claimed that there is any paramount obligation resting on this State to recognize and administer the laws of Virginia

within her territory, if they be contrary or repugnant to her policy or prejudicial to her interests."

101. Ibid. 2:467, 552–53; 3:29, 89, 225–26, 230–31, 232, 550; 4:151.

102. Ibid., 2:461, 492, 498, 514; 3:18, 92–93, 117, 180–81, 276, 307, 404.

103. Ibid., 3:527.

104. Dred Scott v. Sandford, 452.

105. See supra note 3.

106. *The Collected Works of Abraham Lincoln*, 2:249.

107. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, 8, 280–81, 416.

108. *The Collected Works of Abraham Lincoln*, 4:268. See "Speech at Chicago," December 10, 1856, 2:385: "Our government rests in public opinion. Whoever can change public opinion, can change the government, practically just so much. Public opinion, on any subject, always has a 'central idea,' from which all its minor thoughts radiate. That 'central idea' in our political public opinion, at the beginning was, and until recently has continued to be, 'the equality of men.'" See 2:405; 256, 281–82; 3:27, 312–13; 4:17.

109. Ibid., 2:269.

110. See Edward Erler, "From Subjects to Citizens: The Social Contract Origins of American Citizenship," in *The American Founding and the Social Compact,* Thomas G. West and Ronald J. Pestritto, eds. (Lanham, Md.: Lexington Books, 2003), 166.

111. The depth of Lincoln's philosophic statesmanship and the power of his philosophic rhetoric are indicated by a comparison of the rhetorical structure of the First and Second Inaugural. The First Inaugural begins with custom ("In compliance with a custom as old as the government itself …") and ends with nature ("… the better angels of our nature."); the Second Inaugural begins with a "second coming" ("At this second appearing to take the oath …") and ends with peace among nations ("… a lasting peace, among ourselves, and with all nations."). Thus the First Inaugural represents an appeal to reason whereas the Second represents an appeal to revelation. Harry Jaffa has argued—perfectly in the spirit of Lincoln—that the genius of the American founding is the recognition of the claims of both reason and revelation. The truth of the Declaration of Independence, Jaffa asserts, is "a truth no less of unassisted human reason than of divine revelation" (*Original Intent and the Framers of the Constitution: A Disputed Question* [Washington, D.C.: Regnery Gateway, 1994], 350; *New Birth of Freedom: Abraham Lincoln and the*

Coming of the Civil War, 122, 146, 403). It is obvious, however, that the "somber theology" of the Second Inaugural has none of the optimism of the First Inaugural. The two speeches represent a move from comedy, as it were, to tragedy.

112. Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Alfred A. Knopf, 1942 [originally published in 1922]), 279.

113. Ibid., 274.

114. Ibid., 277. See Jaffa, *New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, 73–152. Jaffa provides a definitive critique of Becker.

115. Woodrow Wilson, *Constitutional Government*, in *The Papers of Woodrow Wilson,* Arthur S. Link, ed. (Princeton, N.J.: Princeton University Press, 1968), 18:71.

116. Ibid., 106.

117. Gitlow v. N.Y., 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). John Marshall as a young man had studied assiduously Alexander Pope's *Essay on Man*, writing long passages in his copy book. Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1929), 1:44–45. Corwin perceptively captured the difference between the founding era and the Progressive era by noting that: "The *Essay on Man* filled, we may surmise, much the same place in the education of the first generation of American judges that Herbert Spencer's *Social Statics* filled in that of the judges of a later day." *John Marshall and the Constitution*, 28.

118. David Lowenthal, *Present Dangers: Rediscovering the First Amendment* (Dallas: Spence Publishing Co., 2002), 37.

119. Ibid., 35.

120. Madison, in his essay "Sovereignty" explained with mathematical precision the social contract origins of civil society and its relation to majority rule. "Whatever be the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in and exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed" (emphasis original). *The Writings of James Madison,* 9:570–71. Thus, for Madison, even "unanimous concurrence" is bound by what is "*rightful*" or intrinsically just. As a "plenary substitute" for the whole, the majority can also legitimately do only what is "rightful." It may not, any more

than unanimous consent, invade the rights of individuals or minorities. We note also that the Declaration specifies that consent authorizes only the "just powers" of government, not all powers.

121. Gertz v. Welch, 418 U.S. 323, 339 (1974); Barenblat v. U.S. 360 U.S. 109, 146 (1959); Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988); Waters v. Churchill, 511 U.S. 661, 672 (1994).

122. See Erler, *The American Polity: Essay on the Theory and Practice of Constitutional Government*, 4-17.

123. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, 120, 124. See Erler, "The Future of Civil Rights: Affirmative Action Redivivus," *Notre Dame Journal of Law, Ethics and Public Policy* 11 (1997): 33-40, 49-54 (1997) and Erler, "Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education," *Harvard Journal of Law and Public Policy* 8 (1985): 399-426.

124. See Erler, "Discrete and Insular Minorities," *The Encyclopedia of the American Constitution,* 2:566-68 and Erler, "Judicial Legislation," in ibid., 3:1040-43.

125. Brown v. Board of Education, 347 U.S. 483, 492 (1954).

126. Ibid., 489.

127. Ibid.

128. See Erler, "Brown v. Board of Education at Fifty," *Claremont Review of Books* 4 (2004), 47-52.

129. Brown v. Board of Education, 494.

130. Ibid.

131. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

132. Grutter v. Bollinger, 539 U.S. 306, 364 (2003) (Justice Thomas dissenting).

133. Gina Holland, "Ginsburg: International Law Shaped Court Rulings," *Associated Press*, Aug, 2, 2004.

134. Grutter v. Bollinger, 539 U.S. 306, 344 (2003).

135. Atkins v. Virginia, 536 U.S. 304, 316 (2002).

136. Knight v. Florida, 528 U.S. 990, 996 (1999) cert. denied (Justice Souter dissenting from the denial of certiorari).

137. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

138. Ibid., 598 (quoting Foster v. Florida, 537 U.S. 990).

139. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), 407.