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TEXT AND PRINCIPLE IN JOHN MARSHALL'S CONSTITUTIONAL LAW: THE CASES OF *MARBURY* AND *MCCULLOCH*

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INTRODUCTION

After two centuries of practice, difficulties confronting American constitutional law have been increasingly formulated in terms of the conflicting characterizations of the Constitution in two of Chief Justice John Marshall's leading opinions, *Marbury v. Madison*[1] and *McCulloch v. Maryland*.[2] The *Marbury* constitution is "superior paramount law, . . . the fundamental and paramount law of the nation"[3] that extends the restraint of law to government. Its binding quality derives from its commitment to writing, in contrast to an unwritten constitution that cannot bind literally or legally. The written Constitution is to be enforced in court in conformity with conventional legal standards and norms. Its meaning in particular cases is to be determined through exposition of its text in light of intent, and in fidelity to the requirement that judges enforce existing law and not make new law.

The *McCulloch* constitution stresses the differences in the "nature,"[4] "character. . . and. . . properties"[5] of the law that governs government from those of ordinary law. Constitutional provisions, by design, lack the "prolixity"[6] or substantive content of conventional legal text. As part of an instrument "intended to

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

2. 17 U.S. (4 Wheat.) 316 (1819); *see generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1-14, 73-75, 105-06 (1962) (discussing constitutional law in the context of *Marbury* and *McCulloch*); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-54 (1989) (discussing constitutional law in the context of *Marbury* and *McCulloch*).

3. *Marbury*, 5 U.S. at 177.

4. *McCulloch*, 17 U.S. at 407.

5. *Id.* at 415.

6. *Id.* at 407.

endure for ages to come,"[7] they set out the objects and ends of government in general terms. In fulfillment of governmental responsibility to meet the unpredictable exigencies and "crises of human affairs,"[8] application of broad constitutional principles in particular cases involves adaptation and interpretation in light of contemporary needs and values.

Conflict between the *Marbury* and *McCulloch* constitutions did not manifest itself until considerably after Marshall's tenure on the Court. It was brought to the surface by difficulties in the two great enterprises of twentieth-century judicial review. The first denied to government authority to regulate the economy on the grounds that such regulation violated a constitutional liberty of contract and associated rights of property, as well as the scope of national authority over commerce. This position was intelligible as enforcement of text and an original intent under the *Marbury* constitution.[9] However, in denying to government the capacity to respond to the challenges generated by industrialization and urbanization, including the great depression, *Marbury* laid bare difficulties in its characterization of the "law" that governs government. When Justice Arthur Sutherland, following *Marbury*, argued that Contract Clause text and intent denied Minnesota authority to pass debtor relief legislation in the middle of the depression,[10] Chief Justice Charles E. Hughes countered by invoking *McCulloch*.[11] Within a few years of this exchange, the Court retreated from its insistence that the Constitution denied government the tools of modern economic regulation.[12] In the process, it validated important parts of the *McCulloch* constitution.

The second great enterprise of twentieth-century judicial review was its heightened protection of individual liberties and civil rights under the Bill of Rights and Fourteenth Amendment that began as the Court retreated from its strong defense of property rights. Leading decisions in this area held that long-standing state governmental practices violated constitutional

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7. *Id.* at 415.

8. *Id.*

9. Since the 1930s, the doctrine of liberty of contract has been understood to rest in extra-textual sources. When first enunciated, it was intelligible as judicial exposition of the word "liberty" as informed by an existing legal content based in common law. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). *See also* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 166-67 (1996) (Souter, J., dissenting) (commenting on the place of text and common law in the liberty of contract cases of the late nineteenth and early twentieth centuries).

10. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448-65 (1934).

11. *Id.* at 442-43.

12. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

limits, reinterpreted in light of contemporary needs and values. Practices so overturned included racial segregation,[13] legislative apportionment plans devised before urbanization,[14] insulation of state governments from the limits of the Bill of Rights,[15] and relatively restrictive conceptions of freedom of speech and press.[16] These decisions strained, in varying degree, *Marbury's* law enforcement rationale, but are readily accounted for as adaptation of principle under *McCulloch*. However, under separation of powers meeting contemporary needs and implementation of contemporary values is a legislative, not judicial, responsibility. Consensus on the results of key individual and civil rights decisions has quieted this objection in these cases but the objection returns with every contentious Court holding and the *McCulloch* constitution cannot meet it. *McCulloch* thus provides a superior account of American constitutional development and constitutional law's results, but is less able than *Marbury* to reconcile judicial authority over legislation with the requirements of law and democracy.[17] At the end of the twentieth-century, as the Court returns to federalism questions without abandoning authoritative exposition of constitutional limits, the conflict between the *Marbury* and *McCulloch* constitutions expresses constitutional law's central dilemma.

In this paper I will examine the conflict from the perspective of Marshall's work and intentions. I will start from the proposition defended elsewhere[18] that the *Marbury* of 1803 was not understood to have the meaning now attributed to it, as given above. This developed over the course of the nineteenth-century in response to Marshall's initiatives, and it is the substance and

13. Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

14. Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

15. Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the Sixth Amendment's right to a jury trial into the Fourteenth Amendment's restrictions on the states); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Fifth Amendment's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment's right to assistance of counsel); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment); Everson v. Board of Educ. of Ewing Township, 330 U.S. 1 (1947) (incorporating the Establishment Clause). *See, e.g.,* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause).

16. Schenck v. United States, 249 U.S. 47, 51-52 (1919) (rejecting the First Amendment claim in this case, but noting that freedom of speech was no longer restricted to the prohibition of prior restraints); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

17. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing so without direct invocation of *McCulloch*).

18. *See generally* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

consequences of these initiatives that are inconsistent with the conceptualization of the Constitution in *McCulloch*. I will argue that the initial and only tenable conception is some form of that depicted in *McCulloch*. Marshall, for reasons I will consider, initiated the modern *Marbury* constitution by textualizing and legalizing constitutional principle. He did so without open acknowledgment and his innovations were accepted without awareness of the transformation they entailed. Textualization is most visible in the Contract Clause cases, where the latent conflict between text and principle was masked by the overlap of exposition of Contract Clause text with defense of the principle of vested rights. In a less obvious way, and despite the rhetoric of *McCulloch*, Marshall also textualized and legalized the grants of power in the federalism cases. The conflict between text and principle was masked in these cases by the Marshall Court's acceptance of legislative adaptation of the grants of power, and by the constitutional authorization to the judiciary to maintain the supremacy of national law.

In the last third of the nineteenth-century judicial invalidation of legislation expanded, likely beyond Marshall's expectations. It did so under the modern reading of *Marbury*, which was then articulated for the first time.[19] This modern reading "codified" nineteenth-century practice, in the process supporting its expansion. Over the next century, as the Court applied and interpreted the entire constitutional text, enforcing its interpretation of the grants and limits on power over legislative ones to the contrary, the problems visible but muted in the Contract Clause cases came to the fore. Constitutional text is too general and its purposes too different from those of ordinary law for its reliance on ordinary law means to produce results conformable to the requirements of that law or to constitutional purposes. The regular practice of constitutional law is driven inevitably to encroachment on legislative authority and to contemporary, extra-textual sources for its substantive content. This accounts for the emergence of the *McCulloch* constitution, which now coexists uneasily with that of *Marbury*. Understanding the origin and transformations of the *Marbury* and *McCulloch* constitutions cannot resolve the problems of legitimacy and practice this historical development has generated. However, it can clarify our understanding of them, identify certain proposed solutions as unworkable, and help devise more satisfactory ones. In seeking this clarification it is important to recognize that both the *Marbury* and *McCulloch* constitutions have been formed and

19. ROBERT L. CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 117-25 (1989) (documenting the paucity of citations to and discussions of *Marbury* in the context of judicial review during the first two-thirds of the nineteenth century).

transformed by historical developments. Just as the initial Constitution was textualized and legalized, the *McCulloch* constitution is seen today through the lens of this legalized one. My ultimate conclusion is that modern constitutional law is a complex mixture of *Marbury* and *McCulloch* in which the *McCulloch* constitution necessarily predominates.

I. ENFORCING FUNDAMENTAL LAW

Looking backward from *McCulloch* and *Marbury,* the safest generalization is that at the founding there existed no conception of the modern *Marbury* constitution. The *Marbury* of 1803 rested in the universal and hence unarticulated understanding that constitutions, or fundamental law, were different in kind from ordinary law and that each presented distinct enforcement problems. The judicial enforcement contemplated in the *Marbury* of 1803 was an extraordinary political act that judges were allowed to perform, and was limited to the concededly unconstitutional act. Its legitimacy was connected to the uniquely judicial responsibility to ordinary law but enforcement of the Constitution was not an extension of that authority, as it is understood today.[20]

The political character of constitutional enforcement followed from the recognition that it is impossible to bind sovereign power with the routine, peaceful mechanisms with which societies bind individuals. Sovereign power inheres in the dominant political and social forces in the community and only they are capable of constitutional violation. Attempted violations that do not command the support of these forces are amenable to correction by them. If the dominant forces initiate and/or support genuine violation there is no other force available in the community to counter it. If a court attempts to do so it stands in opposition to societal force, not as an agent of that force, as is the case in ordinary law. It is thus unavoidably political. To succeed it must rally the community to reaffirm principles it showed itself willing to violate, a process I characterized as a peaceful substitute for revolution.[21]

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20. *See* SNOWISS, *supra* note 18, at 1-89.

21. *But see* Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom,* 1993 SUP. CT. REV. 329, 335-349 (arguing that my account of the original understanding is unsustainable). My account may be unsustainable, but it cannot be for the reasons that Alfange gives, for these betray a failure to understand the key components of the argument. The most basic is failure to understand the depth of the difference in kind between fundamental and ordinary law and the resulting sense in which judicial enforcement of the Constitution was understood to be a political act. Alfange acknowledges two differences: that fundamental law is supreme and, as it is addressed to government, a court, in refusing to enforce an act is "necessarily exercising

The understanding that constitutions lack a routine enforcement mechanism informed the Constitutional Convention's reliance on checks and balances and the extended republic to achieve the limited government universally sought at the American founding. Nothing in subsequent adoption of the Bill of Rights, or support for its judicial enforcement by leading members of the founding generation changed this understanding.[22] More importantly, two hundred years of constitutional law validates the initial understanding. Our genuine constitutional violations, almost a century-long denial to African-Americans of elementary due process and the equal protection of the laws under the Fourteenth Amendment and of voting rights under the Fifteenth Amendment, were impervious to judicial correction. At the same time, modern judicial review occupied itself with choosing among competing legitimate interpretations of the Constitution which, by definition, do not violate it. The full force of this obvious and uncomplicated point has been obscured by the rhetoric of the modern *Marbury* constitution that sees all judicial determinations of constitutionality over a legislative or executive one, to the contrary, as "enforcement."

A corollary of the absence of a routine enforcement mechanism for constitutions is their necessary dependence on voluntary compliance. No regime could survive genuine constitutional violation with the frequency with which ordinary law anticipates violation by some individuals. It would either end violently, or lapse into general repression. This is the burden of Learned Hand's observation that "a society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save. . . ."[23] Equally important, constitutional maintenance, unlike that of ordinary law, does not require authoritative resolution of contending, legitimate interpretations. Short of the necessarily rare unambiguous violation, challenged governmental actions remain in force, as does the integrity of constitutional principle, while the country debates its proper application.

Debate at independence over whether the judiciary could refuse to enforce certain legislative acts took place against this shared understanding. The legitimacy of such a judicial authority

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power over another branch of the government." *Id.* at 339. But the key difference is the inability to subject restraints on sovereign power to routine and peaceful, or legal, enforcement in circumstances of genuine violation. Restraint on sovereign power, be it effectuated by a court, a revolution, or the force of another sovereign, is always and necessarily political. I will identify other misunderstandings in Alfange's analysis that follow from this fundamental one at appropriate points below.

22. *See* SNOWISS, *supra* note 18, at 91-99.

23. LEARNED HAND, THE SPIRIT OF LIBERTY 181 (Irving Dilliard ed., 1952).

was still unresolved at the time of the Constitutional Convention. During the 1790s opposition to it disappeared with acceptance of an argument first made by James Iredell in 1786[24] and repeated with approval by Alexander Hamilton in *The Federalist No. 78*,[25] James Wilson in *The Works of James Wilson*,[26] Spencer Roane and Saint George Tucker in *Kamper v. Hawkins*,[27] William Patterson in *Vanhorne's Lessee v. Dorrance*,[28] and John Marshall in *Marbury v. Madison*.[29] The authority here defended centered on enforcement of constitutional limits within an existing natural and common law tradition of limited government. It was not directed at enforcement of the Constitution's provisions on federalism or the grants of power that implemented them. These provisions were newly created for the union of the American states, and enforcement of the supremacy of national law implementing the Constitution's principles of federalism had been given to the courts in the Supremacy Clause.[30] As could be expected, this authorization did not resolve all problems connected with judicial resolution of the conflicts over federalism. However, it did remove objection to judicial authority to hold some legislation unconstitutional, and to make final determinations of constitutionality in the face of contending, legitimate interpretations. In tracing the antecedents of what are today the *Marbury* and *McCulloch* constitutions I will follow the initial practice of treating the limits and grants of power separately.

II. ENFORCING CONSTITUTIONAL LIMITS

The initial debate over judicial authority to refuse to enforce an unconstitutional act took place in the context of English thought and practice. England was the model of successfully

24. 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-49 (1949).

25. THE FEDERALIST NO. 78, at 98-106 (Alexander Hamilton).

26. 1 THE WORKS OF JAMES WILSON 329-30 (Robert G. McCloskey, ed., 1967).

27. 3 Va. (1 Va. Cas.) 20, 35-40, 77-81 (1793).

28. 2 U.S. (2 Dall.) 304, 308-09 (1795).

29. 5 U.S. (1 Cranch) 137, 176-80 (1803).

30. U.S. CONST. art. VI. The new version of Iredell's argument in *Kamper v. Hawkins* and *Marbury v. Madison* were made in the context of concurrent review and separation of powers, and the constitutional provisions there interpreted were neither specific limits on government nor grants of power to Congress, but ones on judicial organization. In *Kamper* the Virginia Court applied the newly articulated defense of judicial authority over legislation to its acknowledged authority to defend its own constitutional sphere, in the course of invalidating legislative assignment of equity jurisdiction to common law courts. *Kamper*, 3 Va. (1 Va. Cas.) 20; *Marbury*, 5 U.S. 137. *See* SNOWISS, *supra* note 18, at 83-89 (discussing the relationship of *Kamper's* concurrent review to Iredell's defense of judicial autority over legislation, and to *Marbury*). *See also infra* note 186.

limited government and Americans accepted without dissent the goal of limited government and many of the particular limits identified in natural law principles and common law precedent. In England, enforcement or preservation of limited government was left in legislative hands under the practice of legislative omnipotence. Judicial enforcement of recognized limits was explicitly rejected by William Blackstone, the leading English legal authority in the American states.

American constitutionalism has been so linked to judicial review that the conjunction of limited government and legislative omnipotence is jarring. Blackstone's defense of the latter rested in the unavailability of a routine check on ultimate power that has been obscured by American practice: "[Parliament] hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding [all] laws. . ., this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."[31] To sanction an appeal from sovereign authority, including one to the judiciary, would be to promote anarchy. It would "set the judicial power above that of the legislature, which would be subversive of all government."[32] Blackstone left no doubt about legislative omnipotence by illustrating with the hypothetical example of a law making a man judge of his own cause. This was, by existing standards, a concededly unreasonable act, but Blackstone concluded:

> [I]f we could conceive it possible for the parliament to enact that [a man] should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.[33]

In the aftermath of a successful revolution against monarchical power it was hard to quarrel with locating ultimate power in parliament. Confidence in legislative omnipotence was reinforced by the composition of the English parliament, which in its inclusion of Commons, Lords, and Monarch was itself a system of checks and balances among the major social and political forces.

Americans were the beneficiaries of both the English and American revolutions. In the aftermath of the American revolution power also flowed to legislatures. Unlike the case in England exercise of this power in the American states provoked concern for the preservation of limited government. Anxiety was fueled by anti-loyalist and debtor relief legislation and by denial of

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31. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (Harper and Brothers from the 21st London ed., 1954).

32. *Id.* at 91.

33. *Id.*

trial by jury in cases touching vested rights. In this setting of revolutionary instability and untested, wholly republican legislatures, there was significant interest in enlisting the judiciary in support of limited government. To legitimate a judicial check it was necessary to answer Blackstone's objections.

The successful response to Blackstone was made by James Iredell, and published in 1786 in a North Carolina newspaper under the title "To the Public."[34] He repeated this argument in 1787 in a letter to Richard Spaight,[35] then serving as a delegate from North Carolina to the Constitutional Convention. It rested in the existence of a written constitution in contrast to England's unwritten one. This Constitution, Iredell argued, bound the legislature literally, the way an unwritten constitution admittedly could not. It was, he insisted, supreme binding law, but the binding quality of American constitutions inhered in explicit limit on government itself, not in any quality as supreme ordinary law. Explicit written constitutions did not, as they could not, challenge the difference in kind between fundamental law and ordinary law, with its attendant differences in enforcement and finality of interpretation. However, they did make it possible to say, as it was impossible to say in England, that an unconstitutional act was void. This formulation, moreover, carried the meaning that a concededly unconstitutional act was void. It was the first of Iredell's two-step defense of judicial refusal to enforce an unconstitutional act that was to make its way into *Marbury*. The second was that judges, in meeting their responsibility to expound, or to say what the ordinary law is, could not enforce that which, in its violation of the constitution, was void or not law. This argument presumed no judicial authority to expound the constitution authoritatively or to say what the law of the constitution is. Rather it grew out of the judiciary's unique responsibility to expound, or to say what the ordinary law is, and its authority in common with the other branches to "regard," or "not close its eyes to" explicit American fundamental law. Assertion of this latter authority was in direct response to Americans who, following Blackstone, argued that the Constitution was a law to the legislature only. Judicial authority to regard the Constitution was an expression of the equality of the branches under explicit fundamental law in contrast to the legislative omnipotence of England and to the judicial supremacy of modern constitutional law. Absence of any judicial claim to expound the Constitution authoritatively in the initial argument was reflected in the repeated invocation of and compliance with the rule that judges should not refuse to enforce an act unless

34. MCREE, *supra* note 24, at 145-49.
35. *Id.* at 172.

there was no doubt about its unconstitutionality.[36]

The concededly unconstitutional act is trivial and irrelevant to the experience of American constitutional law, but in the years following independence was at the center of theoretical and practical concern. Theoretically, as we have seen, establishing the invalidity of a concededly unconstitutional act joined the argument as Blackstone posed it in his defense of legislative omnipotence. Practically, the concededly unconstitutional act addressed the fears generated by the legislative irresponsibility of the revolutionary era. Limited government itself, and protection of vested rights in particular, was thought to be imperiled. From hindsight it is also easy to dismiss this fear as excessive. However, from the perspective of the participants the record of state legislatures threatened the achievements of the revolution.

Three points about this consensus of the 1790s are crucial for understanding subsequent developments. The first is its subordination of the written to the explicit Constitution, as reflected in all the formulations of Iredell's argument other than *Marbury*. The three leading ones—Iredell's *"To the Public"*, Hamilton's *The Federalist No. 78*, and in *The Works of James Wilson*—made no mention whatever of the written Constitution. Iredell traced judicial authority to the Constitution's status as a "fundamental" and "unalterable [law of the State];"[37] Wilson to its status as "supreme" law;[38] and Hamilton to a "limited" Constitution.[39] Joseph Story, writing in 1833, identified *The Federalist No. 78* as the best statement of judicial authority to refuse to enforce an unconstitutional act, and located it in the "general theory of a limited constitution."[40]

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36. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (demonstrating Iredell's acceptance of the doubtful case rule); Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 77 (1793) (rejecting the claim that the Constitution was a rule to the legislature only); SNOWISS, *supra* note 18, at 46-52 (analyzing Iredell's argument); SNOWISS, *supra* note 18, at 60-62 (reviewing Supreme Court compliance with the doubtful case rule before *Marbury*).

37. MCREE, *supra* note 24, at 148. Iredell referred to the written Constitution in the formulation of his argument in his letter to Spaight. *See id.* at 172. Alfange pointed to Iredell's reference to the Constitution as "a law of the State" as evidence he understood judicial review to be a legal rather than political act. Alfange, *supra* note 21, at 340. However, my argument does not depend on whether the founding generation referred to the Constitution as law, but on whether I have properly identified what they understood the attributes of that law to be. Neither does it require, as Alfange thinks necessary, any open acknowledgment by judges overturning legislation that they are performing a political act. *Id.* at 339. It is precisely the overlap in terminology between the original and modern defenses of judicial review that has obscured the original distinctions and understanding.

38. THE WORKS OF JAMES WILSON, *supra* note 26, at 329.

39. HAMILTON, *supra* note 25, at 100.

40. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1583, 1576 N.2 (Charles C. Little & James Brown, 2d ed. 1851)

Early defenses of judicial authority over legislation that did mention the written Constitution underscore its significance as a vehicle for the explicitness of limited government. In *Vanhorne's Lessee v. Dorrance* William Patterson argued: "in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America . . . [e]very State in the union has its constitution reduced to written exactitude and precision."[41] Iredell's letter to Spaight pointed out that "the Constitution [is] not . . . a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse. . ."[42] Saint George Tucker argued that opposition to a judicial check on legislation was unsustainable in the presence of a written constitution which had a "real existence," whose "principles can be ascertained from the living letter, not from obscure reasoning or deductions only."[43]

Second, derivation of judicial authority over unconstitutional acts from explicit fundamental law left unresolved the precise content of judicially enforceable binding fundamental law. Justices Samuel Chase and James Iredell conducted the most famous debate on this point in *Calder v. Bull*. Chase maintained that in a government "established on express compact, and on republican principles," judges could refuse to enforce an act "contrary to the great first principles of the social compact. . . ."[44] Iredell denied this authority, arguing that the "ideas of natural justice are regulated by no fixed standard, [and] the ablest and purest men have differed upon the subject. . . ."[45] However, acts that violated the "marked and settled boundaries" of legislative power "define[d] with precision" in the American constitutions were "unquestionably void," and judges could rightly refuse to enforce them.[46]

The Chase-Iredell debate was over what constituted the explicitness of American fundamental law, not one between contending modes of interpreting supreme, ordinary law. For Chase the decisive explicitness inhered in the "express" character of American compacts in contrast to the fictional or imaginary ones of other regimes. Express American compacts were the product of its particular revolutionary experience. As one against a colonial power, the American Revolution had broken completely from the previous regime leaving its citizens in the approximation

(1833).

41. 2 U.S. (2 Dall.) 304, 308 (1795).
42. MCREE, *supra* note 24, at 174.
43. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 78 (1793).
44. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
45. *Id.* at 399.
46. *Id.*

of a real state of nature. Saint George Tucker articulated the significance of these circumstances in the course of defending the binding character of Virginia's written constitution, despite the fact that it had been framed by a convention not appointed for this purpose, that other actions of the same body were conceded to be ordinary law, and that the constitution had not been extraordinarily ratified:[47]

> There was at least the shadow of legal, constitutional authority in the convention parliament of England in 1688, as the ordinary legislature; and the national assembly of France was constitutionally assembled under the authority of the government it subverted. The convention of Virginia had not the shadow of a legal, or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law . . . namely the people, in their sovereign, unlimited, and unlimitable authority and capacity.[48]

The act of taking Virginia out of a "state of nature,"[49] Tucker and his fellow judges insisted, was the crucial consideration in making Virginia's constitution supreme, binding law.[50] Whatever its procedural defects, the force of circumstances reconstituting government in the aftermath of a complete rupture made it an express compact, and this status enabled it to bind subsequent legislatures the way the products of the ordinary revolutionary parliaments of Europe could not. American circumstances, moreover, gave all the states express compacts, all of which rested in republican principles and limited government. Chase was not wrong in locating their content in the wide and deep consensus on the "great first principles of the social compact,"[51] but neither was Iredell in pointing out that the consensus was not total.[52] Express compacts, nevertheless, constituted the deepest source of binding fundamental law: they made possible the idea of an unconstitutional act, and thereby of judicial authority over such an act. Express compacts supported the initial openness to judicial invalidation of legislation even in the absence of an extraordinarily adopted constitution, as in Virginia, and in the absence of any

47. *Kamper*, 3 Va. at 27-28, 36-37, 46-47, 57-58 (1793) (discussing the defects of the Virginia constitution as binding law).

48. *Id.* at 74.

49. *Id.* at 36.

50. *Id.* at 27-28, 36-37, 46-47, 57-58. The judges also pointed to the Constitution's subject matter and to its subsequent popular acceptance as a constitution. *See id.* at 27-28, 37-38, 46-48, 57-58, 69-74.

51. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388; Chase's examples of laws that violated these principles were those that "punished a citizen for an innocent action[,] . . . that destroys . . . lawful private contracts[,] . . . that makes a man a Judge in his own cause or . . . that takes property from A. and gives it to B."

52. *Id.* at 399.

post-colonial constitution, as in Rhode Island.[53] As extraordinarily adopted written constitutions became the norm they were increasingly invoked to establish the reality, precision, visibility, and explicitness of the limits of American fundamental law, and were routinely referred to as supreme, binding law. But the primacy of express compacts explains the dominance of Chase's position well into the nineteenth-century.[54] Marshall's successful textualization of the Constitution was not the vindication of Iredell over Chase but the transformation of both.

Third, whether as "the great first principles of the social compact," or the "marked and settled boundaries" of the written Constitution, constitutional limits were general principles, whose force and meaning were subject to expansion, qualification, and adaptation, as were the grants of power so characterized in *McCulloch*. In *McCulloch* the central property of the grants was their prospect for adaptation, rendering them virtually contentless. The 1790s defense of judicial authority over legislation focused exclusively on constitutional limits and on their core meaning fashioned from long political struggle and extensive common law development. It was only this established meaning and existing law that judges could enforce against conceded violation. Beyond this, adaptation of constitutional limits was understood to be a legislative responsibility. That is the meaning of the doubtful case rule.

III. THE CONTRACT CLAUSE CASES

Transformation of the principled limits on government into written, legal text took place in Marshall's Contract Clause opinions, the main limit on power enforced against legislation in the initial practice of judicial review.[55] It was achieved in the doing with no acknowledgment or discussion. The process is visible only through comparison of Marshall's opinions with those of his colleagues. Marshall fixed the meaning of the clause

53. At independence, Rhode Island amended its colonial charter without making new fundamental law. Rhode Island also produced one of the leading instances of judicial refusal to enforce legislation under the Articles of Confederation. The case, *Trevett v. Weeden,* is best known through a pamphlet written by the defendant's lawyer. *See* James M. Varnum, "The Case Trevett against Weeden," microprint in Charles Evans' American Bibliography no. 20825 (American Antiquarian Society). *See* SNOWISS, *supra* note 18, at 27-30 (discussing the connection between the American revolutionary experience and judicial authority over legislation).

54. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law,* 12 MICH L.REV. 247, 249 (1914) (noting the dominance of Chase's position). *See infra* note 105 and accompanying text.

55. The only other limit so enforced was the prohibition on the states from emitting bills of credit in U.S. CONST. art. I, § 10, cl. 1. *See* Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830).

through textual exposition while his colleagues relied exclusively on extra-textual sources, either natural law principle or common law precedent on the law of contracts. It is important to stress that use of textual exposition to determine constitutional meaning was not itself innovative. The decisive innovation was judicial reliance on an arguable exposition to fix the meaning of the Constitution for the purpose of enforcing it against legislation. This made the judiciary the authoritative expounder of constitutional text, attaching, in the process, the judicial responsibility in ordinary law to the Constitution and obscuring the difference in kind between them.[56]

Marshall's innovations did not go unchallenged but their precise character and full import went unrecognized, then as now. At the time he made them their novelty was concealed by the degree to which his practices conformed to existing expectations. This pattern is visible first in *Marbury*. Nothing in Marshall's defense of judicial authority to refuse to enforce an unconstitutional act challenged the self-understanding of the 1790s. It differed only in emphasis, one too slight to have caused notice but too artful to be accidental. *Marbury*, for one thing, followed the form of the existing two-part defense of judicial authority over unconstitutional legislation: the first defended the proposition that an unconstitutional act is void, and the second judicial refusal to enforce such a concededly unconstitutional act. The argument is illustrated with hypothetical examples of clear constitutional violations. Next, judicial authority over unconstitutional acts is said to follow from its authority to expound ordinary law. *Marbury* makes this point in the paragraph beginning "[i]t is emphatically the province and duty of

56. I stress this point because it is another the significance of which Alfange missed. In *Judicial Review and the Law of the Constitution* I argued that 1790s judicial review acknowledged the absence of judicial authority to expound the Constitution authoritatively and that the doubtful case rule reflected this understanding. SNOWISS, *supra* note 18. Alfange understood me to claim that the doubtful case rule denied any judicial authority to expound the Constitution. Alfange, *supra* note 21, at 342. He countered his formulation of my position with cases in which Supreme Court Justices invoked the rule and expounded constitutional text. *Id.* at 342-44. As these were all cases in which the Court upheld challenged legislation, they support rather than invalidate the claim I did make. After making the initial argument I did not use the word "authoritatively" in every reference to this point. Alfange cited one such reference in setting out his formulation of my position. *Id.* at 342. However, the absence of judicial authority to expound the Constitution authoritatively is central to the difference in kind between fundamental law and ordinary law delineated in JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION, is spelled out fully in the first formulation of the argument, and is reiterated in later contexts. SNOWISS, *supra* note 18, at 49-51, 125, 173.

the judicial department to say what the law is."[57] The word law here refers to ordinary law and no one in 1803 would have read it any differently. This argument repeats Iredell's in *"To the Public,"* that judicial responsibility to expound and interpret, or say what the ordinary law is, precluded enforcement of an act that, in its conceded unconstitutionality, is void or not law.[58] The conflict of laws analogy used to support this judicial authority is also taken directly from Iredell and others. In its original form it served only as precedent for judicial refusal to execute some duly enacted legislation.[59]

Marbury's departure from the 1790s consensus consists in its many references to the written Constitution. Marshall started, as had the earlier formulations, with the limited Constitution. The American Constitution, he pointed out, not only organizes and empowers government but "establish[es] certain limits" on the branches or "departments" that it created, "and that those limits may not be mistaken or forgotten, the constitution is written."[60] This is a totally innocuous remark then and now. It also maintains the original significance of the written Constitution as explicit fundamental law. In the rest of the opinion he mentioned the written Constitution nine times. I have found only ten references to the written Constitution in all the previous defenses of judicial authority over unconstitutional acts combined, and there are no such references in the leading ones.[61] Five of the ten are in Patterson's opinion in *Vanhorne's Lessee v. Dorrance* where, as elsewhere, the status of the written Constitution as a vehicle for the explicitness of fundamental law is clearly stated.[62] One of *Marbury's* references invokes the "theory . . . essentially attached

57. Marbury v. Madison, 5 U.S. 137, 177 (1803).

58. Ultimately, Alfange never indicated what is wrong with my core reinterpretation of *Marbury* as a response to Blackstone's defense of legislative omnipotence. He addressed this question twice, first in connection with Marshall's formulation in *Marbury,* and again with respect to Tucker's in *Kamper v. Hawkins.* His discussion of *Marbury* is rendered useless by his incorrect assumption that the original understanding required overt discussion of judicial review as a political act. *See* Alfange, *supra* note 21, at 338. In discussing Tucker's formulation Alfange says that "perhaps" my reading (which Alfange did not summarize accurately) is correct. But he nevertheless concluded, without argument, that the conventional modern reading was "more likely." *Id.* at 341. It is only familiarity that makes it seem so, despite the near universal agreement shared by Alfange, that the defense of judicial review in this modern reading is illogical. *Id.* at 422.

59. *Kamper v. Hawkins,* 3 Va. (1 Va. Cas.) 20, 31-32 (1793) (stating the original meaning most clearly). MCREE, *supra* note 24 at 172-73); HAMILTON, *supra* note 25; THE WORKS OF JAMES WILSON, *supra* note 26, at 328.

60. *Marbury v. Madison,* 5 U.S. (1 Cranch) 176 (1803).

61. *See supra* notes 37-40 and accompanying text; SNOWISS, *supra* note 18, at 113 n.17 (citing to cases mentioning the written Constitution in 1790s defenses of judicial review).

62. *See supra* notes 41-43 and accompanying text.

to a written constitution." On examination, this theory turns out to be "that an act . . . repugnant to the constitution, is void."[63] This is the central, and powerful, theory of eighteenth-century judicial review, but is too trivial to sustain the modern practice. Its defense connects *Marbury's* emphasis on the written Constitution to a different theory, that commitment to writing made the Constitution supreme ordinary law subject as is that law to authoritative judicial application and interpretation. There is universal agreement that this is not a particularly good theory but it is the best one we have to justify the legalization of the Constitution that had already taken place.

Marbury's second departure from existing formulations is not so much a departure as a precursor of the innovations to come. It is the observation that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule," inserted after the declaration that "[i]t is emphatically the province and duty of the judicial department, to say what the law is."[64] This is the closest *Marbury* came to claiming judicial authority to expound the Constitution authoritatively, a reading made possible by use of the comprehensive term "rule" instead of "law," and by the modern assumption that the Constitution is included within the words law and rule. However, this reading, according to another staple of modern criticism, assumes what has to be proven, that the province and duty of the judicial department includes authoritative exposition of the law of the Constitution. In 1803 such a claim would have been totally insupportable, as the doubtful case rule indicates. Even today, while we accept this exposition in practice, its legitimacy has yet to be established on anything but historical grounds. This provocative second sentence is, however, a forerunner of Marshall's subsequent exposition of Contract Clause text in the course of invalidating legislation. In 1803 it was unexceptional, if unnecessary, verbiage that did not challenge the central claim of the 1790s consensus, repeated in *Marbury*, that American courts could "regard" or not "close their eyes on the constitution."[65]

Marshall's Contract Clause opinions, similarly, could be accommodated within existing expectations although not as easily as was *Marbury*. In each Marshall extended the Constitution's prohibition against laws impairing the obligation of contracts to circumstances not explicitly identified in its text, but not prohibited by it. His primary reliance was on text, reinforced by the suggestion that the reading he was giving it was compatible with the framers' intent. In *Fletcher v. Peck*, Marshall concluded

63. *Marbury*, 5 U.S. at 177.
64. *Id.*
65. *Id.* at 178-79.

that he could find no motive for the framers' "implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter."[66] In *Dartmouth College v. Woodward* Marshall granted that the rights of the parties to the charter, or contract, at issue in this case were not "particularly in the view" of the framers of the clause. However, he insisted that the general words of the Contract Clause could not exclude its application to this circumstance "unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."[67] In response to the contention, repeated in his opinion in *Sturges v. Crowninshield*, that "the mind of the Convention was [not] directed" to the bankruptcy law now under review, Marshall argued:

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.[68]

As we know, he never found anything absurd, unjust, or mischievous enough to defeat what he called the literal construction and plain meaning of constitutional text.

One of the more striking aspects of Marshall's Contract Clause opinions is the extent of discussion generated by such spare text. Space does not permit reproducing these discussions here, but it is necessary to read them in their entirety to get the full flavor of their textual reliance. Also, it is necessary to compare Marshall's opinions with those of his colleagues to appreciate the innovativeness of this textual reliance. There were five opinions in which Justices other than Marshall supported overturning legislation considered under the Contract Clause: William Johnson's concurrence in *Fletcher v. Peck*;[69] Story's opinion for the Court in *Terrett v. Taylor* and his concurrence in *Dartmouth v. Woodward*;[70] Bushrod Washington's concurrence in

66. 10 U.S. (6 Cranch) 87, 138 (1810).

67. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644, 645 (1819).

68. 17 U.S. (4 Wheat.) 122, 202-03 (1819). *See* SNOWISS, *supra* note 18, ch. 5, (discussing Contract Clause cases).

69. 10 U.S. (6 Cranch) 87, 143 (1810).

70. Terrett v. Taylor, 13 U.S. (9 Cranch.) 43 (1815); *Dartmouth*, 17 U.S. at 666.

Dartmouth v. Woodward[71] and his opinion for the Court in *Green v. Biddle.*[72] None used textual exposition to establish the meaning of the Constitution and the consequent invalidity of the legislation. Johnson's *Fletcher* concurrence is probably the best known of these opinions. Its holding rested on "a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[73] This principle was vested rights. Equally important, Johnson denied that the legislation constituted a violation of the contracts clause. Although he did not object to inclusion of public contracts within the operation of the clause, he expressed concern over application and interpretation of the word "obligation."[74]

Story's opinion in *Terrett v. Taylor* overturned an act of the Virginia legislature that claimed lands held by the Episcopal Church and previously confirmed to it by legislation that had accompanied disestablishment.[75] It concluded "and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals. . . ."[76] Story did not identify the "letter" of the Constitution violated by this legislation.

This same indirect treatment of constitutional text is visible in Story's concurring opinion in *Dartmouth.*[77] In the course of answering whether a charter incorporating a private charity dedicated to public purposes was a contract within the meaning of the Contract Clause, Story noted that "the constitution . . . did not mean to create any new obligations . . . . [O]n the other hand . . . the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law."[78] He then continued the exhaustive discussion of common law precedents on the law of contracts, with which he had opened his opinion, to demonstrate that the *Dartmouth* charter was protected by the Constitution.[79] The leading precedent was *Phillips v. Bury,*[80] an English case which held that a private charity, although dedicated to general public purposes, was nevertheless private.[81]

71. 17 U.S. at 654.
72. 21 U.S. (8 Wheat.) 1 (1823).
73. 10 U.S. at 143.
74. *Id.* at 144-45.
75. 13 U.S. (9 Cranch) 43 (1815).
76. *Id.* at 52.
77. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
78. *Id.* at 683.
79. *Id.* at 683-712.
80. Skin. 447 (1695).
81. *Id.* at 670. Justice Marshall's references to common law precedent in *Dartmouth* were as minimal and indirect as were Justice Story's references to constitutional text. *Id.* at 633-34.

Washington's concurrence also relied on *Phillips v. Bury*.[82] Washington's opinion in *Green v. Biddle* held legislation passed by Kentucky to compensate settlers for improvements made to land to which they did not have title, and from which they were subsequently ejected, to have violated a compact between Virginia and Kentucky entered into on the separation of Kentucky from Virginia.[83] It was by virtue of this violation of the compact, determined by examination of common law, that the Kentucky law was held to have violated the Constitution. There were only passing references to the Contracts Clause in this opinion and no exposition of its text.[84]

Opinions sustaining legislation that Marshall held to be unconstitutional contain additional evidence of the novelty of the Chief Justice's reliance on authoritative exposition of constitutional text. In the face of ambiguous text other Justices invoked the doubtful case rule[85] and examined the text in light of the "universal understanding of the American people" at the time of the framing.[86] Johnson's opinion in *Ogden v. Saunders*, upholding a prospectively operating bankruptcy law, indicated that the unanimity of *Sturges*, decided eight years earlier, and overturning a bankruptcy law applied to a contract entered into before passage of the act, was "as much . . . a compromise, as . . . a legal adjudication."[87] The *Sturges* minority, Johnson noted, accepted Marshall's determination as it "could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the Constitution."[88] This was hostility to retrospective legislation. Johnson's *Ogden* opinion also criticized Marshall's textualism directly, observing that the Constitution should be interpreted in terms of its "general intent" without "subjecting it to a severe literal construction, which would be better adapted to special pleadings."[89]

Johnson's comment on *Sturges* lays bare the overlap of principle and text that shielded Marshall's innovations in the Contract Clause cases.[90] While Marshall was expounding text his

82. *See id.* at 665 (citing Phillips v. Bury, Skin. 447 (1695)).

83. 21 U.S. (8 Wheat.) 1 (1823).

84. *Id.* at 74-85. Washington also relied on *Fletcher v. Peck* to counter the claim that a compact between two states was not a contract within the meaning of the Constitution. *Id.* at 92.

85. *See* Craig v. Missouri, 29 U.S. (4 Pet.) 410, 444, 458-59 (1830) (reflecting the opinions of Justices Johnson and McLean respectively); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270, 294 (1827) (reflecting the opinions of Justices Washington, Smith and Thompson respectively).

86. *Ogden v. Saunders*, 25 U.S. at 277.

87. *Id.* at 213; Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819).

88. *Ogden*, 25 U.S. at 272-73.

89. *Id.* at 286.

90. *Id.* at 272-73.

fellow Justices were defending the "principles of natural justice,"[91] "the general principles of law,"[92] and the "true spirit of the constitution."[93] Marshall acknowledged this overlap in *Fletcher v. Peck*, concluding that the legislation was void "either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States."[94] He also addressed the relationship between the spirit and the words of the Constitution, at the heart of his textualization of principle, in one passage in his *Sturges'* opinion.[95] Here he raised and rejected a defense of bankruptcy laws, grounded in the contention that while such laws could be said to be "within the very words of the constitution," they were not "within its spirit."[96] Marshall prefaced his reply with the observation that "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."[97] This procedure is the inversion of an otherwise uniform practice. No other Justice thought exposition of words appropriate for fixing the meaning of the Constitution over a contrary legislative interpretation.

Legalization of principle, as indicated above, was the consequence not simply of its subjection to textual exposition, but to authoritative judicial exposition in cases of doubt. This departure from existing expectations was obscured by the compatibility of Marshall's results with the requirements of the doubtful case rule. This is clearest in *Fletcher v. Peck*.[98] There could be no stronger compliance with the rule than that manifested in Johnson's concurrence: the act was void for violation of a principle that would "impose laws even on the Deity."[99] As the rest of Johnson's opinion indicates, however, for him this same holding was a doubtful reading of text.[100] The holding in *Dartmouth* also passed the doubtful case rule: for Marshall's colleagues there was no doubt what common law precedent required.[101] *Dartmouth's* status as a doubtful reading of text is

91. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810); Terret v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815).

92. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 654, 683, (1819); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 74-85 (1823).

93. *See* Ogden v. Sanders, 25 U.S. (12 Wheat.) 213, 272-73 (1827) (characterizing the basis of the unanimous result in *Sturges v. Crowinshield*, 17 U.S. 122 (1819)).

94. *Fletcher*, 10 U.S. at 139.

95. *Sturges v. Crowinshield*, 17 U.S. (4 Wheat.) 122 (1819).

96. *Id.* at 202.

97. *Id.*

98. *Fletcher*, 10 U.S. at 143.

99. Id. at 143

100. *Id.* at 143-45.

101. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 669-70, 683-708 (1819).

reflected in the contraction of its precedential force in *Charles River Bridge*.[102] As noted above, while the holding in *Sturges v. Crowinshield* reflected the true spirit of the Constitution, it was simultaneously an arguable reading of text.[103] Marshall, moreover, never criticized the doubtful case rule openly, and on two occasions explicitly reaffirmed it. He did so in *Fletcher v. Peck*, in the course of upholding a statute whose validity no one doubted,[104] and again in *Dartmouth*.[105]

Marshall's capacity to confound principle and text and to maintain some kind of compliance with the doubtful case rule was facilitated by confinement of judicial invalidation of legislation, outside the federalism cases and concurrent review, to the Contract Clause. Contract Clause purposes were a central component of the principle of vested rights and of limited government, *per se*, and laws that impaired the obligation of contracts were widely referred to as "contrary to the first principles of the social compact."[106] Story's chapter on the Contract Clause in his *Commentaries* ended by asserting the invalidity of an act that violated the principle of vested rights even in the absence of a textual prohibition:

> Whether . . . independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no state government can be presumed to possess the transcendental sovereignty, to take away vested rights of property . . . by a mere legislative act.[107]

When this passage is read together with Story's opinions in *Terrett v. Taylor* and *Dartmouth v. Woodward* it is an open question whether he understood Marshall's to rest, essentially, in textual exposition.[108] If we could imagine a judicial review operating today limited to application of the First Amendment's protection of freedom of speech, and dedicated to expanding the force of its protections, in which some Justices stressed the fundamentality of the right and others concentrated on

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102. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

103. Sturges v. Crowinshield 17 U.S. (4 Wheat.) 122 (1819).

104. *Fletcher*, 10 U.S. at 128.

105. *Dartmouth*, 17 U.S. at 625.

106. THE FEDERALIST NO. 44 (James Madison). *See also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

107. *Supra* note 40, § 1399. Story's reference to the American revolution is additional evidence of the centrality of this experience in ending legislative omnipotence and making possible the existence of an unconstitutional act. *See supra* notes 42-50 and accompanying text.

108. *Terret*, 13 U.S. (9 Cranch) 43 (1815); *Dartmouth*, 17 U.S. (4 Wheat.) 518 (1819).

applicability of its text to circumstances not immediately in the mind of the framers, we could see how easy it would be to confound principle and text and to participate in stretching the doubtful case rule without seeing it as being violated.

Lastly, textualization and legalization of principle were facilitated by the abandonment of seriatim opinion-writing, a decision made in response to Marshall's urging.[109] This gave the Chief Justice a virtual monopoly that he exploited masterfully. From today's perspective Marshall's exposition of text appears so commonplace as hardly to draw attention. His opinions make those of Johnson in *Fletcher*,[110] Story in *Terrett* and *Dartmouth*,[111] and Washington in *Dartmouth* and *Green*[112] seem anomalous, vestiges of a bygone alternative whose theoretical integrity is no longer accessible. However, it is, in fact, Marshall's opinions that are anomalous. None of the eighteenth-century state court precedents for judicial review rested in textual exposition[113] and no other Supreme Court Justice determined the unconstitutionality of legislation on the basis of an arguable reading of text. Under Marshall's leadership, recourse to first principles and existing substantive law was marginalized as he insisted on collecting the Constitution's spirit from its words, and as he applied what he called the plain meaning of words and literal construction of text to new circumstances.

This was the form followed in Roger Taney's invalidation of the Missouri Compromise in *Dred Scott*, the next major "enforcement" of a constitutional limit after the Contract Clause.[114] Today we say that the substantive reading of the due process clause, as given in *Dred Scott*, is an extra-textual one.[115] But *Dred Scott* expounded the word property in Fifth Amendment text and the result was no more extra-textual than was Marshall's reading of the Contract Clause.[116] Both are authoritative readings of arguable text that are best understood as judicial adaptation of principle in violation of the doubtful case rule.

IV. ENFORCING THE PRINCIPLES OF FEDERALISM

Enforcement of the Constitution's principles of federalism,

109. *See* DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 45-47, 168-89 (1954).

110. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

111. *Terret*, 13 U.S. (9 Cranch) at 43; *Dartmouth*, 17 U.S. (4 Wheat.) at 518.

112. *Dartmouth*, 17 U.S. at 518; Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

113. The only exception was *Kamper v Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793). Like *Marbury*, *Kamper* was an exercise of concurrent review that required interpretation of constitutional provisions on judicial organization. *See supra* note 30 and *infra* note 186.

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

115. *Id.*

116. *Id.*

particularly the supremacy of national law, stood on different ground from enforcement of its limits. Article VI made national law supreme over state law and assigned responsibility for maintaining this supremacy to the courts. It also designated the Constitution as part of the supreme law of the land. Together with the Article III provision granting the federal judiciary jurisdiction over cases arising under the Constitution, the Supremacy Clause authorized the courts to overturn state laws that conflicted with national legislation as well as the Constitution's limits on the states. The latter, in Story's summary, prohibited three kinds of state action: that "incompatible with the interests of the union," such as duties on imports; with its "peace and safety," such as the declaration of war; and with the "principles of good government," such as the emission of paper money.[117] This judicial authority replaced the negative on state legislation that contravened the Articles of Union that had been lodged in the national legislature early in the Constitutional Convention under the Virginia Plan.[118] The judicial check, Story concluded, was "thought . . . preferable" by the convention, and was "by far the most acceptable to the states."[119]

As indicated by the Virginia Plan, enforcement of limits on the state governments is not an intrinsically judicial responsibility. At the same time nothing precluded such assignment in the Constitution. This decision contributed to legalization of fundamental law, independently of Marshall's actions. One important result was to make enforcement of the Constitution's principles of federalism an exercise in the conflict of laws. However, it was a complicated exercise that maintained the understanding that although designated as the supreme law of the land, the Constitution remained different in kind from ordinary law. It came closest to functioning as supreme, ordinary law in the relationship between national and state legislation. Here the Supremacy Clause assigned to the judiciary the responsibility of any judiciary, that of peaceful arbiter of societal conflict. Without such an arbiter the union would likely dissolve and to fulfill this function the arbiter was obliged to provide finality in doubtful cases. Although it was possible for courts to provide finality by deferring routinely to the congressional determination of constitutionality implicit in its legislation, there is no evidence of such an expectation. This would, for one thing, defeat the advantage gained by the states in replacing congressional with

117. STORY, *supra* note 40 at § 1641. The examples are Story's.

118. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 47 (Max Farrand, ed., 1937). *See also* Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government,* 36 WM. & MARY Q. 215 (1976).

119. STORY, *supra* note 40, § 1641.

judicial enforcement of the principles of federalism. Lodging this responsibility in the courts not only left the initial determination in a state institution, but by the structure of the judicial system, allowed for, if not invited, argument on the constitutionality of national legislation. The Judiciary Act of 1789, which authorized appeals to the Supreme Court where state courts denied a claim based in national law, anticipated such a possibility. The federalism cases also presented no line comparable to that between concededly unconstitutional acts and doubtful cases that existed for constitutional limits. Relevant constitutional provisions lacked the pre-existing content of the limits, experience of how they would work in practice, and consensus on what constituted a violation. The doubtful case rule, significantly, was never invoked in this context.

No comparable requirement of finality existed for the purpose of enforcing the explicit limits on the states, particularly the "principles of good government," the only ones actually to find their way to the courts. Here the doubtful case rule was applicable and was uniformly invoked. Marshall's colleagues relied on it continually in the Contract Clause cases and even he gave it lip service in the course of undermining it.

Story's *Commentaries* contain additional evidence that enforcement of the principles of federalism and of the grants of power implementing them, and of the principles of good government and of constitutional limits generally, were initially understood to be different enterprises, each legitimated in different terms.[120] Story prefaced his detailed examination of the individual provisions of the Constitution with discussion of three "preliminary" issues: the nature of the Constitution, finality in constitutional controversies, and the rules of constitutional interpretation.[121] This discussion was exclusively one of federalism. The full title of the chapter addressing the first issue was "Nature of the constitution—whether a compact."[122] Here Story denied that the Constitution was a compact, insisting that it established a national government whose authority in particular cases was not dependent on the consent of the states....[123] The next chapter was entitled "Who is the final Judge, or Interpreter, in Constitutional Controversies."[124] The answer was the Supreme Court, but the support for this answer was not the argument of *Marbury* but the constitutional provisions implementing the principles of American federalism: the Supremacy Clause and

120. STORY, *supra* note 40.
121. *Id.*, Book III, chs. III, IV, and V, respectively.
122. *Id.* at ch. III *passim*.
123. *Id.* § 322 and Book III, ch. III, *passim*.
124. *Id.* at ch. IV.

Article III's "arising under" Clause.[125] The alternative to judicial resolution of constitutional controversies was not legislative but state resolution, a position that Story argued was incompatible with "preserv[ation of] the Constitution as a perpetual bond of union."[126]

The last of these preliminary chapters was entitled "Rules of Interpretation of the Constitution."[127] Story started by noting applicability of Blackstone's rules of statutory interpretation to "all instruments" including the U.S. Constitution. These instruct judges to seek meaning "according to the sense of the terms, and the intentions of the parties." Intentions, in turn, are to be "gathered from the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law."[128] He then turned from these "elementary" rules to more "definite" ones for construing the U.S. Constitution.[129] These were all rules for construing the powers of the national government in the context of federalism. Story devoted greatest space to rejecting a rule that the powers of the national government should be "construed strictly, in all cases, where the antecedent rights of a state may be drawn in question."[130] He also considered whether implied powers were among the grants of power[131] and whether national power was exclusive or to be exercised concurrently with the states.[132] The chapter ended with rules governing the construction of constitutional words. Echoing Marshall in *McCulloch*[133] Story concluded "we should never forget, that it is an instrument of government we are to construe...."[134] The "truest exposition," Story continued, is that "which best harmonizes with [the Constitution's] design, its objects, and its general structure."[135] This conclusion repeated a longer formulation of the same point made earlier in the chapter that also drew on *McCulloch's*[136] discussion of the grants of power: "In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also

125. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
126. STORY, *supra* note 40, §§ 376, 385; STORY, *supra* note 40, ch. IV.
127. STORY, *supra* note 40, at 134.
128. *Id.* § 181.
129. *Id.* § 404.
130. *See Id.* at § 410 and §§ 411-23 (quoting from 1 BLACKSTONE'S COMMENTARIES 151 (Tucker ed.).
131. *Id.* §§ 433-34.
132. STORY, *supra* note 40, §§ 435-47.
133. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
134. STORY, *supra* note 40, § 455.
135. *Id.*
136. *McCulloch*, 17 U.S. at 316.

viewed in its component parts."[137]

Thirty-three chapters later, in one entitled "The Judiciary—Powers and Importance of," Story defended judicial authority to declare unconstitutional laws "void and inoperative."[138] He defended this authority with the argument of the 1790s and reproduced FEDERALIST NO. 78 and *Marbury*[139] almost in their entirety.[140] This argument and these sources were conspicuously absent from his defense of the Supreme Court as the "final judge in constitutional controversies." It was not a continuation or repetition of this discussion of enforcement of the principles of federalism but an addition to it directed at enforcement of constitutional "prohibitions or limitations"[141] and limited government *per se*. It was the now classic repudiation of legislative omnipotence under explicit fundamental law.

"The power of interpreting the laws," Story indicated, "involves necessarily the function to ascertain, whether they are conformable to the constitution, or not; and if not so conformable, to declare them void and inoperative."[142] In the 1790s understanding, as we have seen, and as Story's grammatical structure indicates, the power of interpreting the laws referred exclusively to ordinary law, not the law of the Constitution. Judicial ascertainment of their conformity to the Constitution was made necessary by its responsibility to ordinary law, to preclude executing an act that in its violation of the Constitution was void or not law. Story continued the argument in these terms: judicial authority over legislation was necessary to preclude a legislative omnipotence "like that claimed for the British Parliament." Its source was "the very theory of a republican constitution of government,"[143] and the "general theory of a limited constitution."[144] Story referred once to the written Constitution in this context and this reference, together with his primary stress on the limited Constitution, reflected the original significance of the written Constitution as a vehicle for the explicitness of limited government. Repeating the link Hamilton had made in *The Federalist No. 78* between judicial independence and its responsibility for constitutional enforcement, Story argued that independence was particularly important in republics that "possess a written constitution, with defined powers and limited

137. STORY, *supra* note 40, § 405.
138. *Id.* at § 1576.
139. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
140. STORY *supra* note 40, § 1576 nn. 1 and 2.
141. *Id.* at § 1576.
142. *Id.*
143. *Id.*
144. *Id.* at § 1583.

rights."[145]

Story's defense of judicial enforcement of constitutional limits was directed at those of both national and state power.[146] This indicates that even with the Supremacy and "arising under" Clauses, judicial responsibility for maintaining constitutional limits was distinct from its authority as "final Judge . . . in Constitutional Controversies" over the supremacy of national legislation. Defense of limited government was to be carried out where there were no controversies, where the established meaning of the principles of limited government were enforced against violation under the doubtful case rule.

V. INTERPRETING THE GRANTS OF POWER

Marshall's contribution to legalization of the grants of power is less visible than to the limits as there were fewer opinions overturning legislation written by other Justices. The leading case was *McCulloch v. Maryland*, the occasion for Marshall's characterization of the grants as general principles with a "nature," "character," and "properties," different from those of ordinary law.[147] Contrast between a constitution and an ordinary legal code, and characterization of constitutional provisions as broad and open to adaptation, is not in itself controversial. It is controversial today in the context of modern judicial review because of the breadth of power it gives to judges. It was controversial at the time of *McCulloch* as part of the unresolved controversy over application of the principles of federalism embodied in the American Constitution.[148] Strict construction, under which Congress' enumerated powers were to be narrowly read was the position of those for whom the public good was best served by the states' retention of substantial power. Marshall's insistence on the openness and adaptability of the grants expressed a conception of federalism in which public well-being depended on the capacity of the national government to meet the responsibilities entrusted to it free of unwarranted claims made by the states.[149] "[T]he question respecting the extent of the powers actually granted," Marshall observed in *McCulloch*, "is perpetually arising, and will probably continue to arise, so long as our system shall exist."[150] This has shown itself to be the case, but the most contentious aspect of the *McCulloch* constitution today is not its

145. STORY *supra* note 40, § 1610.
146. *Id.* at § 1576.
147. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
148. *Id.*
149. *Id.* at 408.
150. *Id.* at 405.

relation to federalism but to judicial review.[151]

McCulloch's characterization of the grants as principles open to adaptation was accompanied by the expectation that adaptation was a legislative, not judicial, responsibility. It was part of an effort to forestall future challenges to the exercise of national power. The grants were not, however, open to infinite adaptation.[152] Congress, Marshall indicated, could not exercise power prohibited to it.[153] Presumably this was a reference to the Constitution's explicit prohibitions such as the denial of authority to tax exports or to establish a religion. Marshall did not discuss the nature or properties of these limits, and it was unlikely anyone thought such a discussion necessary. To the extent the limits were enforceable in court, it was to defend their core established content under the doubtful case rule. To the extent the limits were also principles of government to be adapted to the various crises of human affairs, this too was a legislative responsibility.

Despite Marshall's identification of the grants as principles he treated them in important ways as courts treat ordinary legal text. This is most visible in the contrast between his opinion for the Court and Johnson's concurrence in *Gibbons v. Ogden*.[154] The Court was unanimous in invalidating a state regulation held to conflict with an exercise of national authority over commerce. The main substantive difference between Marshall and Johnson was whether the state regulation would be invalid had Congress not legislated on the subject. Johnson held that it would be and Marshall reserved judgment on this point. The more interesting difference was how each determined the meaning of the Commerce Clause. Marshall continued the textualization of principle characteristic of his Contract Clause opinions. The Commerce Clause gives Congress power to "regulate commerce with foreign nations and among the several states." To determine the extent of power actually granted Marshall expounded the word "among."

Although long, this exposition is worth reproducing:

> The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that

151. *Id.* at 316.
152. *McCulloch* 17 U.S. at 316.
153. *Id.* at 421.
154. 22 U.S. (9 Wheat.) 1, 222 (1824).

> commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.[155]

This passage is remarkable, among other reasons, for the extent of the verbiage extracted from the word "among." Johnson's opinion, in contrast, engaged in no textual exposition, insisting that the Constitution's language was "simple, classical [and] precise."[156] However, constitutional meaning did not come from these words, but from the intent they expressed, and this was determined by historical inquiry. After several pages chronicling the dislocations of commerce under the Articles of Confederation Johnson concluded that:

> The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.[157]

It was only after so determining constitutional meaning from intent that Johnson turned to its words: "And the plain and direct import of the words of the grant, is consistent with this general understanding." This observation is the extent of Johnson's textual analysis. It was followed by rejection of textual exposition as a method for determining constitutional meaning in the context of enforcement:

> It is not material, in my view of the subject, to inquire whether the article a or the should be prefixed to the word "power" [in the commerce clause]. Either, or neither, will produce the same result:

155. *Id.* at 194-95.
156. *Id.* at 223.
157. *Id.* at 225-26.

> if either, it is clear that the article the would be the proper one, since the next preceding grant of power is certainly exclusive, to wit: "to borrow money on the credit of the United States." But mere verbal criticism I reject.[158]

Johnson's rejection of "verbal criticism" is the same objection he was to make three years later, and quoted above, in response to Marshall's exposition of Contract Clause text.[159] As in the Contracts Clause cases Johnson's approach to the Constitution was the exact converse of Marshall's. Johnson moved from constitutional intent to words, while Marshall reversed that order:

> As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.[160]

This was Marshall's preface, in *Gibbons*, to determination of the meaning of the Commerce Clause through exposition of "commerce," "among," and "power."[161]

The contrasting opinions in *Gibbons* make it easier to see elements of legalization in *McCulloch* that are less obvious than in Marshall's other opinions. Alone among his major discussions of the grants or limits Marshall did not here collect constitutional meaning from its words. *McCulloch's* determination that Congress had broad implied powers was made by analysis of the Constitution's objects, ends, and nature. The existence and scope of these powers were "deduced from the nature of the [Constitution's enumerated] objects. . .inferred from the nature [and language] of the instrument,. . ."[162] and ascertained . . . by the nature and terms of the [power] grant[ed]. . . ."[163] Textual exposition of the Necessary and Proper Clause, undertaken in reply to that made by those denying the existence of implied powers, was subordinate to inference and deduction from constitutional ends, nature, and structure. By today's standards, as for the textual exposition of the Contract and Commerce Clauses, such inference and deduction seems too commonplace to warrant attention. However, it becomes noteworthy in contrast to

158. *Id.* at 226-27.
159. *See Ogden*, *supra* note 89 and accompanying text.
160. Gibbons v. Ogden, 22 U.S. 1, 188-89 (1824).
161. *Id.* at 189-222.
162. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407.
163. *Id.* at 410.

Johnson's recourse to an avowedly political decision-making embodied in an extra-constitutional historical intent. Marshall shared Johnson's nationalist version of intent but he did not rely on it as the source of constitutional meaning. Rather that was extracted methodically from sources internal to the Constitution, much as lawyers and judges extract meaning from any legal instrument.

VI. THE BACKGROUND ENVIRONMENT FOR LEGALIZATION

A variety of political and social conditions provided a receptive environment for Marshall's deliberate legalization of fundamental law. One, as suggested above, was the Constitution's designation of the courts as arbiters of the controversies over federalism in doubtful cases. This made unexceptional authoritative judicial interpretation of the grants of power and the judicial refusal to enforce some duly enacted legislation. The absence of pre-existing content for the grants also made application to them of the methods for statutory interpretation less striking and innovative than for the limits, although Johnson's *Gibbons* opinion indicates that even here judicial determination of constitutional meaning, in the context of overturning legislation, was not routinely sought through such means.[164] The net result of the Supremacy Clause, nevertheless, was generation of a discourse of constitutionality, starting with Section 25 of the Judiciary Act of 1789, and an ongoing practice of constitutional law more legal than was the judicial defense of limited government as understood in the consensus of the 1790s.

Legalization was also fostered by the change in political climate between the successful repudiation of legislative omnipotence in the 1790s and the first Contract Clause case in the Supreme Court. With the passing of the revolutionary era and the success of the Constitution of 1787 fear that republican majorities would not respect vested rights abated, but acceptance of a judicial check on legislation outlived this fear. As a result, from Iredell's successful rebuttal of Blackstone judicial authority over unconstitutional acts was a disembodied power accepted without significant dissent but not used.[165] In the process the political and revolutionary quality of genuine constitutional violation and enforcement receded from consciousness. With the exception of

164. *Gibbons*, 22 U.S. 1

165. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (noting both the widespread acceptance of judicial authority to "declare an act of congress to be unconstitutional" and the absence of Supreme Court adjudication "upon the point"). *See also* James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 227 (1992) (noting that in the highly partisan congressional debate over repeal of the Judiciary Act of 1801 a "clear majority" of those addressing the issue, "including many Jeffersonians," accepted judicial authority over legislation).

the legislation overturned in *Fletcher v. Peck,*[166] that challenged in the Contract Clause cases was neither the product of legislative willfulness nor harbingers of legislative omnipotence. Even for *Fletcher,* the circumstances that had given rise to the case were long gone[167] and the legislative excess associated with it no longer a threat. The Contract Clause cases after *Fletcher* were characteristically modern, presenting arguable interpretations of the Constitution, certainly if understood as text, and largely also as principle.[168] Without Marshall's leadership it is by no means certain any of them would have been found to violate the Constitution. To the extent judicial resolution was perceived as political, it was already political in the modern sense of requiring a choice among competing legitimate values already made by the legislature.[169]

Both the original climate and the significance of its disappearance were captured, unintentionally, in Judge John Gibson's critique of judicial review in *Eakin v. Raub,* written in 1825.[170] Gibson directed his main criticism at *Marbury* but commented briefly on Patterson's formulation of the same argument in *Vanhorne's Lessee v Dorrance,*[171] particularly Patterson's hypothetical examples of constitutional violations, such as denial of trial by jury, the franchise, and religious liberty. Gibson dismissed these as irrelevant. In their magnitude they constituted a "revolution[ary]... usurpation of the political rights of the citizens" against which, Gibson agreed, a "citizen should resist with pike and gun" and the "judge . . . with habeas corpus and mandamus. It would be his duty, as a citizen, to throw himself into the breach, and if it should be necessary, perish there."[172] However, he concluded, this did not demonstrate that the judiciary was a "peculiar organ, under the constitution, to prevent legislative encroachment on the powers reserved by the people."[173]

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166. 10 U.S. (6 Cranch) 87 (1810).

167. *Id. Fletcher* resolved a controversy dating to the mid-1790s. At that time the Georgia legislature had authorized large land grants in an action associated with widespread bribery of its members. *Id.* at 87-127. A subsequent legislature rescinded the original grant jeopardizing the title of those who had purchased from the original grantees. *Id.* In *Fletcher* the Supreme Court invalidated the rescinding act and upheld the title of those purchasers. *Id.*

168. *See supra* text accompanying notes 97-103.

169. *See* ALEXI DETOCQUEVILLE, DEMOCRACY IN AMERICA, 99 (J.P. Mayer, ed. & George Lawrence trans., Doubleday 1969) (1966). This is the sense of political thought associated with Alexis deTocqueville's observation that in America, important political questions are treated as legal ones. *Id.*

170. 12 Serg. & Rawle 330, 343-58 (1825) (Gibson, J., dissenting).

171. 2 U.S. (2 Dall.) 304 (1795).

172. *Eakin,* 12 Serg. & Rawle at 356.

173. *Id.* at 355. Gibson, like deTocqueville, saw the practice of the 1820s as

Gibson's characterization of the judicial defense of principle as jumping "into the breach" "with habeas corpus and mandamus" aptly captured the character of late eighteenth-century judicial review as an extraordinary political act in defense of first principles.[174] But Gibson failed to appreciate how representative Patterson's examples were and the extent to which they were an accurate reflection of the self-understanding of the 1790s. Tucker's formulation used the identical examples of denial of free exercise of religion and trial by jury.[175] Iredell used hypothetical examples of acts abolishing trial by jury and those passed after the legislature had abrogated established elections,[176] and he expressed the same shared understanding when he called the judicial power over legislation a "delicate and awful" power.[177] Marshall also referred to judicial review as delicate[178] but never as awful. By 1825 it was, in any case, already unintelligible in these terms, as Gibson's discussion indicates.

The third contributing factor to legalization of fundamental law was the public receptivity to a strong judicial presence in the political life of the country. This receptivity antedated Marshall's innovations and continues to this day. It supported the initial search for a judicial check on the excesses of revolutionary era legislatures, contributed to the rapid acceptance of Iredell's rejection of Blackstone's strictures on judicial authority, and underlay the openness to Marshall's legalization of fundamental law. This same public and professional support sustains constitutional law today in the face of the widespread recognition that judicial resolution of doubtful constitutional cases outside the need for an authoritative arbiter requires a value choice that is appropriately legislative not judicial.

Finally, I am not arguing that the modern practice was the inevitable consequence of Marshall's innovations or that he self-consciously sought to create the institution as we have known it since the end of the nineteenth-century. It is impossible to know Marshall's specific purposes, but they may have been considerably narrower. He directed legalization of principle to the two upon

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political in the modern sense. He recognized the judicial inability to enforce a constitution against genuine violation. *Id.* at 354. He also rejected the authoritative judicial exposition of the Constitution short of such violation, that he was then witnessing, on the ground that it was a legislative responsibility. *See* SNOWISS, *supra* note 18, at 177-83 (discussing Gibson further).

174. *Eakin*, 12 Serg. & Rawle at 356.

175. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 79-81 (1793).

176. MCREE, *supra* note 24, at 174.

177. Calder v. Bull, 3 U.S. 386, 399 (1798).

178. Dartmouth v. Woodward, 17 U.S. 518, 625 (1819); Fletcher v. Peck, 10 U.S. 87, 128 (1810). In *Ogden v. Saunders*, Marshall used the phrase "delicate and important." 25 U.S. 213, 332 (1827).

which he considered the fate of the new regime to rest: a national government able to pursue the public interest free of disabling and unwarranted claims made in the name of the states, and sanctity of contract. The latter was the principle of limited government widely thought at the founding to be most in danger in a republican regime. Legalization of principle moved responsibility for its delineation and defense from the public sphere and the political branches to the courts. This likely reflected Marshall's greater confidence in an elite judiciary over a republican citizenry and its representatives.[179] It was also likely an expression of Marshall's self-confidence, as head of the judiciary in the crucial formative period of nation building. Beyond this, replacement of natural law principles with text-based positive law reinforced these principles in crucial ways. First, it extended their application to circumstances not reachable by natural or common law. Second, it brought to vested rights and sanctity of contract the qualities of unthinking obedience and routine force associated with ordinary law. Natural law restraints are in their nature revolutionary and destabilizing, even when invoked in court. As a positive law restraint, the Contract Clause was not only subject to authoritative judicial exposition, but law itself became an operative check on popular will. This ordinary legal check was not contemplated in the original judicial refusal to enforce a concededly unconstitutional act and was not part of the system of checks and balances built into the Constitution. Its acceptance as a regular restraint on democratic will is connected with being that of law. To anticipate for a moment, by the beginning of the twenty-first century this check is increasingly seen, for good reason, as one of judges rather than law. I will return to this central problem of constitutional law below. Here I want to stress the origin of this check, and this problem, in Marshall's unacknowledged legalization of fundamental law.

It is an open question whether Marshall contemplated the modern institution in which courts routinely provide authoritative interpretation of the entire constitutional text outside the doubtful case rule and of a need to resolve particular conflicts between national and state laws. I suspect that he did not because of the magnitude of its departure from legal and republican norms and because it was not crucial for the success of the new regime. However, Marshall did provide the institutional forms of the modern practice, without which I do not see how the constitutional law we know could have come into being. Constitutional law developed through institutional momentum within a favorable

179. *See generally* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 15-18 (1996) (giving a somewhat different explanation of the legalization of fundamental law).

environment. It is one viable, if problematic, form of constitutionalism whose problems are traceable to its peculiar origin. Marshall's precise motivation is less important than recognition of constitutional law's full novelty, and its origin in an evolutionary process in the absence of internal theoretical coherence.

VII. THE MODERN *MARBURY*

Dred Scott,[180] decided in 1857, displayed the essential components of modern constitutional law. The Court overturned legislation on the basis of an arguable reading of constitutional text, both a limit and a grant of power.[181] Its substantive reading of the property protected by the Due Process Clause drew on existing ideas of property rights but it did not implement an extra-textual consensus as had the Contract Clause opinions written by Justices other than Marshall. Also, its authoritative interpretation of the grant of power was not necessary to determine whether a state law was in conflict with a valid national one. After the Civil War, this practice broadened to encompass more regular invalidation of legislation under a wider range of provisions. By the last decades of the nineteenth-century, legalization was complete as the Court "enforced" the Constitution with a regularity approaching that of ordinary law enforcement.

This increased exertion of judicial authority over legislation was accompanied by renewed public debate over its legitimacy. Defense of judicial review drew on *Marbury* which, as Robert Clinton has shown, had barely been invoked in this context until this time.[182] However, by now the *Marbury* of 1803 was totally inaccessible and the defense of judicial authority made in its name was the modern one, linked to an understanding that the Constitution was supreme, ordinary law. Most significantly, by the end of the nineteenth-century, and undoubtedly earlier, this modern conception had become the exclusive one, held even by those who opposed the expansion of judicial power then taking place. This is most clearly visible in the work of James Bradley Thayer,[183] judicial review's most prominent late nineteenth-

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

181. *Id. Dred Scott* declared unconstitutional the Missouri Compromise prohibiting slavery in the northern part of the Louisiana Territory. *Id.* The court held that Congress' authority under Article IV to "make all needful Rules and Regulations respecting the territory or other property belonging to the United States" was not applicable to territory acquired from a foreign power after ratification, and that the Due Process Clause of the Fifth Amendment barred Congress from prohibiting slave owners from holding their slaves in the territories. *Id.* at 432-44, 449-51.

182. CLINTON, *supra* note 19.

183. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

century critic. Even in the course of denigrating the logic of the modern reading of *Marbury* Thayer accepted its core assumption, that the judicial authority over legislation stems from the Constitution's status as supreme, ordinary law.[184]

Thayer's understanding is revealed in his discussion of the consensus of the 1790s, which, in his words, rested "upon the very simple ground that the legislature had only a delegated and limited authority under the constitutions; that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court."[185] The sources whose position Thayer was summarizing, Iredell, Hamilton, Wilson, and Patterson, had linked judicial authority over legislation to a limited constitution, but neither they nor anyone else understood these limits to be "so much law."[186] As we have seen, as explicit fundamental law, the Constitution was supreme, binding law, but it was not "so much law."[187] It was law that the courts could "regard," or "take notice of" and apply against conceded violation and the assertion of legislative omnipotence. It was not the kind of law whose application required or allowed authoritative judicial interpretation, and in making operative constitutional limits the court functioned in an extraordinary political role, not a routine legal one.

Thayer proceeded by identifying the central problem of the legalized constitution, that its authoritative judicial interpretation in all cases results in a judicial policy-making, or value choice, that is legislative in character. He sought to confine this value choice by resurrection of the doubtful case rule that accompanied the framers' judicial review. Thayer's proposal attracted significant support well into the twentieth-century, but by the early 1970s was no longer seriously considered. It failed because it is incompatible with the regular practice that is modern constitutional law and is incoherent for a constitution understood as so much law.

The doubtful case rule is incompatible with a regular practice because no regime could survive regular constitutional violation. Faithfully followed, the rule culminates in the abandonment of judicial review. Conversely, a practice so limited would be a sporadic, irregular one, without the attributes of peaceful conflict resolution associated with law. It would be some version of Gibson's judge jumping into the breach with mandamus and habeas corpus.[188] As we know, in the conflict between the rule and

184. *Id.*
185. *Id.* at 138.
186. *Id.*
187. *Id.*
188. This attribute of genuine constitutional enforcement was visible in the

the practice the rule has lost.

The doubtful case rule is incoherent for a constitution understood as so much law because, as Gibson observed as he witnessed the origins of the modern practice, the systematic deference it requires, applied to the legalized constitution, is an evasion of legal responsibility.[189] That it so operates is clear from Justice Felix Frankfurter's constitutional law. His principled deference to legislative interpretation of the Constitution in the Flag Salute controversy[190] and in *Dennis v. United States*[191] was perceived as an evasion of legal responsibility, and this too contributed to the demise of the rule.

For the founding generation, it is worth repeating here, neither of these problems existed. Abandonment of judicial review implicit in the doubtful case rule was a welcome indication of the acceptance of established limits by republican legislatures. From the adoption of the Constitution of 1787, until judicial review was revived and reshaped by Marshall in the Contract Clause cases, the practice was on the course of atrophy.[192] Also, the doubtful

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difficulties encountered in enforcing *Brown v. Board of Education*, 347 U.S. 483 (1954). In its challenge to the southern system of white supremacy, *Brown* was the closest the Supreme Court has come to the willful, genuine violation. Ending de jure school segregation was a protracted process that ultimately required physical force, and would likely have failed without the support of public opinion outside the South.

189. Eakin v. Raub, 12 Serge. & Rawle 330, 352 (1825) (Gibson, J., dissenting).

190. Minersville School Dist. v. Gobitis, 310 U.S. 586, 597-600 (1940); West Virginia Bd. of Educ. v. Barnette, 319 US 624, 646-47 (1943) (Frankfurter, J., dissenting).

191. 341 US 494, 550-52 (1951) (Frankfurter, J., concurring).

192. *Marbury*, as an instance of concurrent review in which the Court interpreted that part of the Constitution governing its own operation, was not by itself evidence of a revival of the judicial review defended in the consensus of the 1790s. Alfange objected that JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION did not discuss *Marbury's* place in the political controversy of the time, particularly that over repeal of the Judiciary Act of 1801. Alfange, *supra* note 21, at 336. This objection is well taken. I assumed Marshall was using *Marbury's* opportunity for concurrent review to establish a precedent for authoritative textual exposition of the Constitution. However, if this were the only explanation of *Marbury*, it does not account for the unanimity of the opinion, particularly in light of its dubious interpretations of Section 13 of the Judiciary Act of 1789 and of Article III. I had no explanation for the unanimity. Confident in the strength of my overall argument I ignored the issue. O'Fallon has given a highly credible explanation, that the Court, in declaring Section 13 unconstitutional under an excessively restrictive reading of Article III was protecting itself from possible further attack including legislative "additions to the original jurisdiction designed to overwhelm the Court with trivial cases." O'Fallon, *supra,* note 165, at 255. O'Fallon noted, in this connection, that Marshall was likely aware of the conflict over judicial organization between the Virginia legislature and judiciary during the 1780s and 1790s in which judges articulated such fears. *Id.* note 125. O'Fallon did not mention that this controversy ultimately produced Kamper v. Hawkins, 3

case rule that accompanied its initial operation was not an evasion of the judiciary's legal responsibility as the practice was no part of that responsibility to begin with.

VIII. PRINCIPLE AND TEXT IN TWENTIETH-CENTURY CONSTITUTIONAL LAW

As the modern practice unfolded the conflict between the *Marbury* and *McCulloch* constitutions forced itself to the surface. It was manifested first in connection with judicial determinations that the Constitution prohibited extensive governmental regulation of the economy. The *McCulloch* constitution was explicitly invoked in 1934, in the majority opinion in *Home Loan Ass'n v. Blaisdell*[193] upholding a debt moratorium enacted by the Minnesota legislature. In response to the argument made in dissent that the moratorium violated Contract Clause text and intent, Chief Justice Hughes offered Marshall's admonition "[w]e must never forget that it is a constitution we are expounding,...a constitution . . . to be adapted to the various crises of human affairs."[194] Contract Clause precedent, Hughes indicated, had long recognized this necessity and had mitigated the provision's restrictive force by requiring its application to consider public needs. Under modern economic conditions, coupled with the great depression, the clause did not prohibit a debt moratorium.[195]

Within a few years of *Blaisdell* the Court retreated from its position that the Constitution precluded major governmental regulation of the economy. It repudiated the limit of liberty of contract that it had previously held to be part of the due process clause and accepted Congress' adaptation of the grants of power.[196] As was the case for *McCulloch* itself, acceptance of legislative adaptation of constitutional provisions submerged the conflict between text and principle. Hughes' invocation of the *McCulloch* constitution in *Blaisdell* was also at the service of sustaining legislation, with the same consequences. However, *McCulloch* was used in *Blaisdell* to give meaning to a limit on power, and this anticipated a future sharper conflict between the *Marbury* and *McCulloch* constitutions.[197]

This conflict was not to emerge for several decades.

Va. (1 Va. Cas.) 20 (1793), another instance of concurrent review and the only example of judicial invalidation of legislation based in textual exposition in early judicial review. Alfange dismisses O'Fallon's account of *Marbury* without considering this point. Alfange, *supra* note 21, at 379-85.

193. 290 U.S. 398 (1934).

194. *Id.* at 443.

195. *Id.* at 439-43.

196. West Coast Hotel v Parrish, 300 U.S. 379 (1937); NLRB v Jones & Laughlin, 301 U.S. 1 (1937).

197. *Blaisdell*, 290 U.S. at 443-47.

Immediately following acceptance of legislative adaptation of the grants of power, judicial review occupied itself largely with application and interpretation of constitutional limits. It held the Bill of Rights applicable to the states,[198] expanded the restrictive force of key provisions,[199] and made the Equal Protection Clause an operative limit on state power.[200] For a while, these results could be accommodated within the *Marbury* constitution. The self-conscious repudiation of substantive due process allowed Bill of Rights adjudication to be understood as enforcement of constitutional text.[201] However, *Brown v. Board of Education*, the most visible case of this era, could not be so accommodated. Here the Court overruled a sixty year precedent and acknowledged that the meaning it now gave to the Equal Protection Clause could not be located in the traditional legal sources of text and intent. The substantive innovations in decisions nationalizing and reinterpreting the Bill of Rights reinforced this observation that was unavoidable in *Brown*.[202]

This was the setting for the latest and fullest retrieval of the *McCulloch* constitution, begun in 1962 by Alexander Bickel in *The Least Dangerous Branch*. Bickel was motivated immediately to find support for *Brown*,[203] and, more generally, for the practice of

198. *See* cases cited *supra* note 15.

199. *See e.g.*, Schneider v. State, 308 U.S. 147 (1939); Thornhill v. Alabama, 310 U..S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia v. Barnette, 319 US 624 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Marsh v. Alabama, 326 U.S. 501 (1946); Terminiello v. Chicago, 337 US 1 (1949).

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

201. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (defending judicial review in the aftermath of the New Deal court crisis). The main defense was a process one, in which the judicial responsibility was to maintain the openness of the democratic process and to protect "discrete and insular minorities" from majority prejudice. But the key contemporary cases relied more on *Carolene Products'* link between judicial authority over legislation and the "specific prohibitions" in constitutional text, mentioned in its first paragraph. *See* Minersville v. Gobitis, 310 U.S. 586, 602-605 (1940) (Stone, J. dissenting) (arguing against the constitutionality of a mandatory flag salute applied to Jehovah's Witnesses and stressing the "specificity" of the First Amendment, the "explicit guarantees of freedom of speech and religion" and the "very terms" of the Bill of Rights); West Virginia Board of Education v. Barnette, 319 U.S. 624, 639 (1943) (overturning *Gobitis,* and defending judicial responsibility to apply the "specific prohibitions of the First [Amendment]"). Justice Stone did refer to the Jehovah's Witness' status as a "discrete and insular" minority, but Jackson in *Barnette* did not. 310 U.S. at 606.

202. *See* Grey, *supra* note 17.

203. References to *Brown* permeate THE LEAST DANGEROUS BRANCH. See, in particular, identification of the case as "the great judicial event of the century," and racial segregation as the "single most important issue to come before [the Supreme Court], in this century at least." BICKEL, *supra* note 2, at 63, 111.

judicial review, which was institutionalized beyond removal but which lacked satisfactory theoretical support.[204] Bickel opened *The Least Dangerous Branch* with an extended statement of the standard critique of *Marbury*: that its defense of judicial authority over legislation could not sustain the real practice in which judges did not literally enforce the Constitution against violation but overturned legislation in doubtful cases on the basis of judgments that were legislative in character.[205] Bickel offered an alternate conception of judicial review in which the judicial responsibility was the "pronounce[ment] and guardian[ship]" of society's long-term principles and "enduring values."[206] Implementation of principle in particular cases looked to the past, following traditional legal norms, but also required the "evolution of principle in novel circumstances" and the "creative establishment and renewal of a coherent body of principled rules. . . ."[207] Without invoking *McCulloch* explicitly, this formulation brought the limits on power within its conception of constitutional provisions as contentless principles open to adaptation to meet the various crises of human affairs. To ask for more substance from constitutional text and intent, Bickel argued at a later point in *The Least Dangerous Branch*, was to "ask the wrong question" and to guarantee "no answer."[208] Moreover, unlike *Blaisdell*, judicial adaptation of constitutional limits was now defended as the basis for invalidation of legislation.

A year earlier Justice Harlan had made a comparable argument in *Poe v. Ullman* [209] in the course of reviving the Due Process Clause as a substantive limit on legislation. Ignoring *Marbury* and citing *McCulloch*, Harlan characterized the Constitution as "the basic charter of our society" which set out the "principles of government" in "spare but meaningful" terms. This meaning, he continued, was inaccessible through the "literalistic" analysis used for a "tax statute"[210] but was to be drawn instead from constitutional purpose, history, and tradition.[211] As is appropriate for a charter of government, this tradition was a "living thing," which required consideration of those "traditions from which [the country] developed as well as the traditions from which it broke."[212] A century and half of practice had

204. *Id.* at 1-14.
205. *Id.*
206. *Id.* at 24.
207. *Id.* at 25.
208. BICKEL, *supra* note 2, at 102. Bickel here cited *McCulloch* explicitly as well as the exchange between Hughes and Sutherland in *Blaisdell*. *Id.* at 105-06.
209. 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).
210. *Id.* at 540.
211. *Id.* at 542-43.
212. *Id.* at 542.

demonstrated, he indicated, that constitutional substance not so grounded was not likely to endure.[213] This was Harlan's sanction of judicial recourse to contemporary values to fix the meaning of the Constitution in the context of judicial invalidation of legislation.

Retrieval of the *McCulloch* constitution is neither an accident nor a misapplication of its teaching. It is the direct consequence of the inherent superficiality of the legalization of fundamental law achieved by silent application to it of ordinary law technique, and of the incapacity of the modern *Marbury* constitution to give a coherent defense of judicial review or to account for its results. Whatever the self-conception under which constitutional law has been practiced, *McCulloch* provides the only tenable account of constitutional nature and functioning. Its provisions are principles of government whose regular application and interpretation can only be adaptation in terms of contemporary values, whether done by legislatures or courts. Justice Scalia, the *McCulloch* constitution's foremost critic, acknowledged its inescapable force in noting that although it is only recently that judicial reliance on contemporary values has been openly defended, such reliance has long been practiced.[214]

The most serious defect of the *Marbury* constitution is not its suggestion that the meaning of fundamental law can be determined through exposition of text and intent, but its further suggestion that the Constitution is to be enforced against legislative violation as ordinary law is enforced against individuals. As the founding generation understood, its vision not obscured by subsequent legalization of the Constitution, ordinary law's enforcement model is inapplicable to fundamental law. It is not only, as we have seen, that courts lack the force necessary to enforce the Constitution, which they do, but that constitutions are a kind of law that cannot tolerate regular violation. Whereas ordinary law contemplates violation, a constitution contemplates compliance.

Marbury's enforcement model has distorted our understanding of constitutional law in a variety of deeply significant ways. Its identification of Supreme Court decisions

213. *Poe*, 367 U.S. at 542.

214. Scalia, *supra* note 2, at 852. Scalia argued, at this point, that *McCulloch* is improperly invoked to defend a constitution whose meaning changes in light of contemporary values and needs. "The real implication" of *McCulloch*, Scalia argued, is that "the constitution had to be interpreted generously" through a "broad initial interpretation." *Id.* at 853. This is not an incorrect reading of *McCulloch* in its original setting. However, it is also one that contemplated ongoing legislative interpretation, or adaptation, of the grants of power. It does not speak to modern constitutional law in which the judiciary gives authoritative application and interpretation to the entire constitutional text in circumstances short of the genuine violation and outside the arbiter function given in the Supremacy Clause.

overturning legislation as enforcement has blinded us to the real violations in American history that have gone unenforced.[215] It has also led us to see constitutional violation where there is only adaptation. This phenomenon is visible across the political spectrum, among those who genuinely believed that regulation of the economy and the administrative state was a constitutional violation, and among those for whom acknowledgment of governmental interests in cases dealing with individual rights is a violation of those rights. Constitutions can be violated, but when they are it is unmistakable, and under these circumstances their "spare" text has uncontested and serious meaning. Once there is argument we are not in the realm of violation; and the absence of authoritative resolution of the argument does not impair the integrity of constitutional principle, as the absence of finality in ordinary law impairs that law's integrity.

The most pervasive distortion stemming from *Marbury's* enforcement model is of the nature of the ongoing practice of constitutional law. Precisely because no regular application and interpretation can be enforcement, it must be adaptation. In *McCulloch*, *The Least Dangerous Branch*, and *Poe v. Ullman*, adaptation was linked overtly with innovation. However, all choice among contending legitimate interpretation of principle is adaptation, including that made in the name of preservation and original values. Liberty of contract and interpretations of federalism that denied the national government authority to regulate the economy were adaptations of principle. The model was Marshall's extension of the contract clause text to circumstances not immediately in the mind of the framers. These adaptations, we know from hindsight, drew on traditions the country rejected, and when they could no longer be accommodated within the range of values acceptable to existing majorities they moved out of constitutional law. The renewed judicial defense of state sovereignty in the 1990s, made in the name of an original understanding and the Eleventh Amendment,[216] is also one legitimate adaptation of the principle of federalism. Also, it too is unintelligible except as a choice among values acceptable to contemporary public opinion. It is part of the turning away from national and governmental solutions to social and economic problems that began with deregulation in the late 1970s, and of a reassessment, visible in many democratic regimes, of the relationship between national, regional, and local authority. Twenty-five years ago Thomas Grey demonstrated persuasively that decisions nationalizing the Bill of Rights and expanding the

215. SNOWISS, *supra* note 18, at 102-06. *See supra* text accompanying notes 21-23.

216. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999).

reach of the Constitution's individual rights provisions during the middle decades of the twentieth-century were unintelligible as conventional legal interpretation at the service of enforcement.[217] They too were adaptations of principle in terms of contemporary values, as are subsequent decisions that made different assessments of public needs and rights of individuals.

The modern *Marbury* constitution has been under attack from the time it came into being at the end of the nineteenth-century. Continued experience only underscores its inadequacy. Neither ordinary law's enforcement ends nor its means of text and intent can withstand scrutiny as description of, or prescription for, the practice of judicial review. The evidence is now sufficient to have led supporters of the *Marbury* constitution to abandon text as a source of constitutional meaning and to look to original intent as the basis of its enforcement against legislation. But Justice Scalia defends originalism as the "lesser evil," not as an intrinsically appropriate method of constitutional interpretation, and in invoking the Constitution's legal status even he puts "law" in quotation marks.[218] Originalism is the last gasp of the *Marbury* constitution. It can never provide a credible account of judicial invalidation of legislation because constitutional law cannot fulfill a conventional enforcement function. Originalism is coherent only as the basis for judicial refusal to reinterpret principle for the purpose of overturning legislation. It supports the rejection of substantive due process interpreted to embrace a right of privacy, but the test of any standard is to account for overturning not sustaining legislation and for that originalism is totally inadequate.[219]

The *Marbury* constitution stays alive because the *McCulloch* constitution cannot legitimate authoritative judicial adaptation of principle. However, the *Marbury* constitution has an equivalent defect, that it legitimates an enforcement or preservationist

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217. Grey, *supra* note 17, at 710-14.

218. Scalia, *supra* note 2, at 854.

219. See the exchange between Scalia and Laurence H. Tribe in which Scalia conceded Tribe's point that his First Amendment interpretations are reinterpretations of the Amendment in light of contemporary values. Scalia defended this departure from originalism as required by the demands of stare decisis and stability. However, Tribe's point is applicable beyond the First Amendment, and to defend the range of doctrine to which it applies on the grounds of stare decisis is another way of saying that originalism and the *Marbury* constitution cannot account for the practice of constitutional law. ANTONIN SCALIA, A MATTER OF INTERPRETATION 80-81, 138-39 (1997). *See also supra* text accompanying note 210; Robert Post, *Justice for Scalia,* The New York Review of Books (June 11, 1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997)) (noting Scalia's failure to rely on originalist principles in holding unconstitutional affirmative action requirements in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 527 (1989) (Scalia, J. concurring)).

practice that does not and cannot exist. It is time to recognize that judicial participation in constitutional adaptation is a new legal-political institution that requires complete rethinking of its ends and means.

I suggested at the outset that this new institution is a complex mixture of the *Marbury* and *McCulloch* constitutions in which the latter necessarily predominates. What of *Marbury* remains in this mixture? Inescapably, *Marbury* is the precedent for judicial invalidation of legislative and executive action, a practice whose effective validation rests in the unwritten constitution. Second, and more significantly, *Marbury* stands for the proposition that this judicial check is somehow a legal one, rather than a political one whose judicial performance has been historically validated. It is beyond the scope of this paper to defend this proposition fully. Here I would observe that the Constitution has been legalized to the point where it is impossible to think about it in any other terms, and where the judicial relationship to it must reflect this identity if it is to develop workable internal standards and be brought into tolerable reconciliation with democratic norms.

Beyond this *Marbury's* ordinary law model is counterproductive. To the extent constitutional law is a legal institution it can only be a new form of law, related only superficially to common and statutory law. Its ends and means need to be identified and defended in their own terms, in relation to the political and legal forces that govern collective action. The Constitution's legal identity must reflect what two centuries of experience has demonstrated, that the written Constitution is closer to an unwritten one than to a statute. Identification of the ends served by authoritative judicial exposition depends on our capacity to identify the reasons for constitutional law's continued public support. Its means are amenable to self-conscious construction.

The end served by ongoing judicial adaptation of principle, I would suggest, is reinforcement of the core constitutionalist idea that political will, particularly popular will, may legitimately be restrained. The legitimacy of a judicial restraint is tied to the structural characteristics of legal and judicial decision-making. These include its privileging of reason over will, the inherent worth of reason as a check on will, the legal system's openness to changing community values as brought into court by contending parties, its requirement that judges confront and answer contending argument, and the openness of its results to criticism in these terms.[220] I am not arguing that the legal system literally

220. *See generally*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

subordinates will to reason, or that the judiciary cannot become complicit in the abuse of power.[221] Rather, the centrality of reason in legal forms allows for reconsideration of the exercise of popular power without introducing systematic reliance on a partial or group interest or will. The judiciary, as we have seen, is also no match for a sufficiently determined and corrupt popular interest or will[222] and can impose no restraint the majority is not willing to accept. It is, however, precisely the absence of any routine mechanism for restraining ultimate power and of any political authority superior to popular will that makes institutionalization of constitutional law the formidable achievement it is. To abandon it would be to abandon the idea that popular will is subject, legitimately, to restraint. This, no one across the entire political spectrum, is willing to do.

Constitutional law's means, on the most general level, is the adaptation of principle. In its most important respects judicial adaptation is indistinguishable from legislative adaptation.[223] However, there are a variety of ways in which judges can adapt constitutional principles and this provides an opportunity for imparting to it a legal identity. I do not have a list of specific means. The main purpose of this paper is to make the case that whatever they are they need to be consciously constructed and defended as part of a new field of law in which the *McCulloch* constitution is recognized as the only tenable one. However, I will end by suggesting what these means might look like, by comparing the work of three defenders of the *McCulloch* constitution: Alexander Bickel, Ronald Dworkin, and John Marshall Harlan. I will argue that of the three only Harlan was in touch with the extent to which judicial adaptation of principle is a new institution and a new form of law. Although he did not use this language, his practice is the best model we have for how it can achieve a legal

221. The clearest example of such complicity is the *Dred Scott* case. Dred Scott v. Sandford, 60 U.S. 393 (1857).

222. "Corrupt" is Gibson's term, arguing in *Eakin v Raub* that courts are too weak to enforce a constitution against genuine violation. 12 Serge. & Rawle 330, 355 (1825).

223. Herbert Wechsler observed that:

> [I]t has now become a commonplace to grant what many for so long denied: that courts in constitutional determinations face issues that are inescapably 'political' . . . in that they involve a choice among competing values and desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959). Martin Shapiro made the same observation several decades later: "The judge deciding whether a statute is constitutional . . . necessarily replays the same analysis of facts, values, policy alternatives, and predicted outcomes that was earlier undertaken by the statute. . . ." TATE ET AL., THE GLOBAL EXPANSION OF JUDICIAL POWER 43, 61 (C. Neal Tate and Torbjorn Vallinder eds., 1995).

identity. Bickel and Dworkin, in contrast, applied elements of *Marbury's* enforcement model to the adaptation of principle, undermining in opposite ways constitutional law's legal identity, and demonstrating in the process *Marbury's* hold on our thinking.

Bickel's conceptualization of constitutional law as the defense of long-term principle was closely tied to *Brown v. Board of Education*.[224] As the segregation it held unconstitutional was part of a pervasive system of racial injustice and inequality that constituted this country's most serious constitutional violations, *Brown's* repudiation of separate but equal was, simultaneously, a reinterpretation of the principle of equality in light of contemporary values and its enforcement against conceded violation. As the boldness of the Court's action receded, the latter came to the fore in a consensus that *Brown* ended, properly, the wrong of segregation and its national toleration.

The value choices of a regular constitutional law will necessarily lack comparable consensus on their worth, and it soon became evident that Bickel was uncomfortable with allowing judges to make them.[225] This discomfort revealed that the judicial review contemplated in *The Least Dangerous Branch* was not adaptation of principle to meet changing needs and understanding but was its enforcement against genuine violation. As we have repeatedly seen, however, this ordinary law enforcement conception is incompatible with any regular practice of constitutional law. Although he never repudiated the *McCulloch* constitution, Bickel could not find a way for judges to interpret and apply it. In his hands, constitutional law lost its legal identity, as it did for Thayer, by being deprived of the regularity of law.

Dworkin also applied *Marbury's* ordinary law enforcement model to the principles of the *McCulloch* constitution, but adopted that part that assigns to the judiciary responsibility for finality between contending claims. Dworkin focused his discussion on what he called the Constitution's "moral principle[s]," those identifying rights individuals could assert against governmental authority.[226] He recognized that implementation of moral rights against government is not part of the assigned judicial responsibility, and that it is possible to have limited, constitutional government without authoritative judicial application and interpretation of its limits.[227] To this extent he recognized constitutional law to be a new form of law. However,

224. 347 U.S. 483 (1954).

225. *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

226. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

227. *Id.* at 32-34.

having once accepted judicial responsibility for this implementation, as ratified by history,[228] he reasserted *Marbury's* assimilation of constitutional law to ordinary law and applied to the former enforcement concepts derived from the latter. Dworkin expected courts to enforce moral rights against government with the same routine finality with which judges enforce legal rights of individuals against each other.

Appropriation of ordinary law's rights-based enforcement mechanism undermines constitutional law's legal identity by its built-in result orientation that is a derogation of the requirement of openness and that denies to contending parties a genuine day in court. The existence of ordinary legal rights and of their judicial determination in particular cases is an uncontested given of our system of dispute resolution. The existence of constitutional or moral rights, in contrast, is always contested political ground. To assimilate adaptation of the Constitution's principled limits to enforcement of ordinary legal rights is to privilege an individualist conception of the limited, liberal Constitution over others that attach greater value to collective and community claims. Uniform support for individual rights claims, or for particular ones, is not the inevitable result of assimilating constitutional to ordinary legal rights. However, it is its general propensity, and is so for Dworkin, as evident from his identification of Warren Court adjudication as the model for its proper practice.[229]

Harlan's constitutional law avoided both of these difficulties. Unlike Bickel's, his was committed to the regularity of law. It is significant that Harlan defended adaptationist practice in the context of substantive due process, not a particular and atypical case such as *Brown*. Racial segregation, in Harlan's judicial review, was an arbitrary imposition and purposeless restraint reachable by the Constitution,[230] but it was one point on a continuum, not judicial review's defining moment or representative of its operation. By affirming the *McCulloch* constitution in the course of reviving substantive due process, Harlan accepted the full range of judicial value choices required by regular constitutional interpretation.

Unlike Dworkin, Harlan counseled restraint in the judicial adaptation of principle.[231] The term restraint carries unexamined meanings developed under the *Marbury* constitution and it would be better to find another term. However, this is the one Harlan used and some kind of restraint is an appropriate means for the judicial adaptation of principle. Restraint is a substitute for the

228. *Id.* at 34-35.
229. *Id.* at 3.
230. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).
231. Griswold v. Connecticut, 381 U.S. 479, 501-02 (1965) (Harlan, J., concurring).

constraint on judicial will and value choices built into ordinary law by its greater substantive content, and by the legitimatization of such choices by its assigned arbiter function. Restraint counsels respect for the moral worth of contending conceptions of principle and the fallibility of human reason. It is a reminder that attempts to "enforce" principle, short of the genuine violation, with the regularity of ordinary law, lends itself to an insupportable moralizing.

Harlan's restraint was not a tactical compromise between contending legitimate interpretations of principle. Nor was it deference to the political branches for the sake of deference. Harlan's opinions upholding as well as overturning governmental action were thoughtful interpretations of the Constitution that compel those who disagree to meet him on these terms. Equally important, nothing in Harlan's restraint restricted initiative, leadership and statesmanship in the adaptation of principle. These dimensions of judicial authority are inescapable consequences of constitutional law's merger of law and principle. Harlan's most significant act of leadership was revival of substantive due process, a doctrine that is, at once, at the heart of this new form of law and that contains the potential for great abuse. In 1961 the latter predominated and the doctrine was in disrepute. Harlan nevertheless revived it, tying it to the past in a lawyerly way, while defending the expansion of judicial authority it necessarily entails.[232] The ultimate acceptance of substantive due process on the Court[233] and by much of the profession reflects the soundness of Harlan's identification of the *McCulloch* constitution as the centerpiece of modern constitutional law.

CONCLUSION

The legal aspirations of constitutional law will always be harder to meet than those of ordinary law, but Harlan's example indicates they are not unrealistic. He demonstrated that it is possible to maintain the regularity of law, while avoiding a moralizing partisanship. Harlan was a political moderate, which undoubtedly made it easier for him than others to practice restraint in the judicial defense of principle. However, political moderation is not the essence of constitutional law's legal identity or of its proper restraint. That rests in a commitment to the use of judicial authority, sensitivity in the occasions for its use, and the quality of judicial reasoning. It rests in political judgment.

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232. See Harlan's discussion of the precedents for substantive due process in *Poe*, 367 U.S. at 541-44. Few of those cited were direct precedents for substantive due process and it is not surprising that his opinion did not attract additional support in the Court.

233. *See* Roe v. Wade, 410 U.S. 113, 167 (1973) (Stewart, J., concurring); Planned Parenthood v. Casey, 505 U.S. 833, 846-50 (1992).

Harlan's is not the last word on constitutional law, but literally the first. It is the first to identify the commitments of this new institution, freed from the enforcement myths surrounding its origin. It draws its strength from retrieval of the enduring differences in kind between fundamental law and ordinary law as understood by the founding generation. The particular components of this new form of law that Harlan identified, as well as those offered here, are less important than recognition of constitutional law's evolutionary origin and the full novelty of its ends and means.