

## JUDICIAL REVIEW AND NON-ENFORCEMENT AT THE FOUNDING

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### INTRODUCTION

Can the President refuse to enforce a law he deems unconstitutional? Take the Affordable Care Act. The Supreme Court upheld the provision in the Act mandating that individuals purchase health insurance, but leading Republicans continue to press the view that the law is unconstitutional.<sup>1</sup> Suppose one such Republican captures the presidency in 2016. His first act in office is to recommend legislation repealing the Affordable Care Act,<sup>2</sup> but a Democrat-controlled Senate tables the proposal. Can the President instead dispose of the law by refusing to enforce its provisions? Can he abandon enforcement of the individual mandate?<sup>3</sup> Can he decline to enforce federal

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1 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (holding that the individual mandate is constitutional under congressional taxing powers); Tom Howell, Jr., *Ted Cruz Sees Legal Landmines Ahead for Obamacare*, WASH. TIMES (Dec. 9, 2013), <http://www.washingtontimes.com/news/2013/dec/9/ted-cruz-sees-legal-landmines-ahead-obamacare/> (“Sen. Ted Cruz . . . said many aspects of the Affordable Care Act are ‘constitutionally or statutorily suspect’ and that the entire law should be repealed.”).

2 *Cf.* U.S. CONST. art. II, § 3 (giving the President the power to recommend to Congress the “[m]easures as he shall judge necessary and expedient”).

3 The President might direct the Secretary of the Treasury not to demand payment for an individual’s failure to obtain minimum essential coverage. See 42 U.S.C. § 18091 (2012) (providing for the individual mandate for purchasing health insurance); 26 U.S.C. § 5000A(g)(1) (2012) (“The penalty provided by this section shall be paid upon notice and demand by the Secretary . . .”).

regulations of state health-care exchanges?<sup>4</sup> Can he decline to pursue insurers who deny coverage or employ underwriting practices in violation of the Act?<sup>5</sup> Can he decline to pursue covered employers who refuse to provide health insurance for their employees?<sup>6</sup>

Many commentators would say yes, assuming that the President acts on the basis of a constitutional objection to the provision in question.<sup>7</sup> Their principal ground for taking this position is an analogy between executive and judicial power. They argue that the justification for judicial review that prevailed at the time of the founding also justifies the President in refusing to enforce laws he deems unconstitutional.<sup>8</sup> For example, according to Sai Prakash and John Yoo, “the same constitutional reasoning that supports judicial review also militates in favor of a form of executive branch review in the course of executing the laws . . . .”<sup>9</sup> Prakash and Yoo are joined in this view by a

4 See 42 U.S.C. §§ 18031(d)–(e) (2012) (specifying requirements for state exchanges). Candidate Mitt Romney suggested during the presidential election of 2012 that he would issue waivers to states exempting them from various requirements under the Affordable Care Act, including those related to state exchanges. See, e.g., Philip Klein, *Romney and Obamacare Waivers*, WASH. EXAMINER (Dec. 7, 2011), <http://washingtonexaminer.com/article/993076> (“Romney said: ‘as president, I will repeal Obamacare, I’ll grant a waiver on day one to get that started.’”). The position verged on non-enforcement, since the waiver provision in the Affordable Care Act extends only to states that develop coverage mechanisms at least as comprehensive as those mandated by federal law, a requirement Romney aides suggested would not be strictly enforced. See *id.* (“[T]he Romney aide said that under the campaign’s interpretation of the law, the administration would be able to give broad leeway to states, allowing them to opt out of many onerous provisions of Obamacare, including the individual mandate. And, the aide said, there was wiggle room around how the various coverage requirements are defined.”); 42 U.S.C. §§ 18052(b)–(c) (2012) (detailing the restrictions on the granting and scope of state waivers under the Affordable Care Act).

5 See, e.g., 42 U.S.C. § 300gg-1(a) (2012) (addressing the guaranteed availability of health coverage); 42 U.S.C. § 300gg-2 (2012) (addressing the guaranteed renewability of health coverage); 42 U.S.C. § 300gg-3 (2012) (prohibiting exclusion from health coverage based on preexisting conditions).

6 See 26 U.S.C. § 4980H(d) (2012) (“Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary . . . .”).

7 See *infra* notes 9–16. I set aside the question of whether the agency charged with enforcing the Affordable Care Act enjoys the discretion not to enforce the law under the Administrative Procedure Act. See Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 394–95 (2014) (discussing *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985), which held that the APA does not grant judicial review of FDA decisions not to institute enforcement proceedings).

8 See Dawn E. Johnsen, *What’s a President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 405–11 (2008) (identifying the Bush Administration’s use of the constitutional avoidance canon to declare that certain laws should not be enforced).

9 Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 924–25 (2003); see also Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91

remarkable group, including Akhil Amar,<sup>10</sup> Larry Kramer,<sup>11</sup> John Harrison,<sup>12</sup> Gary Lawson,<sup>13</sup> Christopher Eisgruber,<sup>14</sup> Michael Stokes Paulsen,<sup>15</sup> and Judge Frank Easterbrook,<sup>16</sup> among others.<sup>17</sup>

The view is wrong. The analogy these scholars draw between executive and judicial power simply cannot be sustained on a fair reading of Founding-era history. By the time of the Founding, and for the first decade under the Constitution, few were thinking about the President's function in constitutional enforcement in terms comparable to a court of law. The vast majority of those engaged in the tasks of 'political science' and statecraft simply did not express themselves on the issue. When they did speak, what came out was (unsurprisingly) a jumble, much of it at odds with modern views of the presidency. In contrast, by the mid-1790s, thinking about the role courts played in enforcing the Constitution had firmed considerably. This is true across the emerging Federalist-Republican divide. My purpose in this Article is to explain these developments and thus to argue for

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TEX. L. REV. 781, 800–01 (2013); Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 533 (2012); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1645–46 (2008).

<sup>10</sup> See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 179 (2005).

<sup>11</sup> See Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 87 (2001).

<sup>12</sup> See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 336 (1998).

<sup>13</sup> See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1287 (1996).

<sup>14</sup> See Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 350 (1994).

<sup>15</sup> See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267 (1994) (positing that the rationale of *Marbury v. Madison* is applicable to executive review, even in the absence of judicial review of a particular law).

<sup>16</sup> See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919–20 (1989–90).

<sup>17</sup> For example, Judge Nina Pillard endorsed the analogy between judicial and executive power, although she did not expressly conclude on that basis that the President may decline to enforce a law he deems unconstitutional. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005) (analogizing executive power and judicial review). Notably, the last twenty years have seen only one extended effort to rebut the claim that non-enforcement can be defended on originalist grounds. See generally CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE* (1998). For leading textualist arguments against non-enforcement, see, as an example, Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381 (1986) and Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987). There have been significant book-length defenses of departmentalism without any emphasis on non-enforcement, but these mostly date from an earlier period and have had little impact on the contemporary debate within legal scholarship. See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 231–70 (1988); JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 77–95, 139–67 (1984).

an important *disanalogy* in the Founding-era understanding of executive and judicial power. To be clear, I do not argue that the President under no circumstances may be understood to possess a power to decline to enforce laws he thinks unconstitutional. He may have such a power. I argue merely that the analogy between non-enforcement and judicial review is mistaken, and that if there is such a presidential power, its source must lie elsewhere.

The effort to tie presidential non-enforcement to a broadly accepted practice like judicial review has had significant practical consequences. It has played a key role in justifying the expansion of presidential authority. As the nation's chief prosecutor, early Presidents did "direct non-prosecution[s],"<sup>18</sup> and thus blocked the enforcement of criminal law.<sup>19</sup> Today, however, Presidents do not confine their claims of interpretative authority to the discretion traditionally afforded a prosecutor.<sup>20</sup> During the presidency of George H. W. Bush, the Office of Legal Counsel in the Department of Justice ("OLC") advised the White House that "the Constitution provides the President with the authority to refuse to enforce unconstitutional [statutory] provisions," including those administrative or civil in nature, like the provisions of the Affordable Care Act cited above.<sup>21</sup> In defense of this position, OLC drew an analogy between presidential non-enforcement and judicial review, invoking a found-

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18 MICHAEL PAULSEN, STEVEN CALABRESI ET AL., *THE CONSTITUTION OF THE UNITED STATES* 318 (2d ed. 2013).

19 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 49, 60–61 (2008) (identifying examples of non-prosecution during the presidential administrations of George Washington and John Adams). *But see* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 585–90, 637 (1989) (showing that prosecution in the 1790s was highly decentralized); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286–90 (1989) (similar).

20 Notably, the examples cited by Calabresi and Yoo in which Washington or Adams ordered an end to a prosecution did not turn on the President's view of constitutional meaning. *See* CALABRESI & YOO, *supra* note 19, at 60–61. The first President to stop a prosecution on constitutional grounds was apparently Thomas Jefferson. *See infra* notes 42–43 and accompanying text; PAULSEN, CALABRESI ET AL., *supra* note 18, at 318.

21 *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 31 (1992); *see also The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 & n.8 (1993), *in* H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 565–66 (1999) (advising White House counsel that the President may decline to enforce a "clearly unconstitutional law," and citing a statement made by James Wilson to show that the proposition of presidential non-enforcement is "consistent with the views of the Framers").

ing-era justification for judicial review and citing *Marbury v. Madison*.<sup>22</sup> Later, OLC sought to temper its advice; in a subsequent memo, issued in 1994, the Agency suggested that that non-enforcement authority was significantly limited, and should be employed only in cases where the President had reason to believe the Supreme Court would concur in his judgment.<sup>23</sup> Yet the limits proffered by OLC did not reflect, in any transparent way, the logic of the executive analogy to judicial review, on which the non-enforcement power had been rested.<sup>24</sup> Consequently, the 1994 limits have proven illusory. Presi-

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<sup>22</sup> See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C., *supra* note 21, at 31–33 (“Where an act of Congress conflicts with the Constitution, the President is faced with the duty to execute conflicting ‘laws’ – a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed and execute the Constitution, the supreme law of our Nation. . . . Thus, the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all . . .”). *But cf. The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55–56, 58 (1980) (defending a more moderate position, and conceding that “[t]he available evidence concerning the intentions of the Framers lends no specific support” to non-enforcement, and that there is “relatively little direct evidence of what the Framers thought” about a presidential power to decline to enforce “transparently” unconstitutional laws).

<sup>23</sup> See *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (“As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.”); see also David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 61–63 (2000) (describing the evolution in views at OLC, particularly with regard to the Clinton Administration). According to Judge Pillard, the requirement that the President enforce the law unless he believes the Supreme Court will concur in his judgment effectively embraces judicial supremacy. See Pillard, *supra* note 17, at 735 (“Thus, even though the executive also has a ‘special role’ in the interpretation of the Constitution (and OLC in particular is assigned that role as to action not yet taken), the OLC opinion adheres to a judicial-supremacist reading of *Marbury*.”). Another view is that the requirement of judicial concurrence serves to measure the obviousness of the constitutional defect, functioning like a Thayerian doubtful case rule. See James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893).

<sup>24</sup> The executive-judicial analogy is not explicit in the 1993 or 1994 O.L.C. opinions, but it is very much present. For example, the 1994 opinion bottoms the President’s non-enforcement authority on a reading of the Take Care Clause popularized by defenders of the executive-judicial analogy. Compare *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C., *supra* note 23, at 200, with *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C., *supra* note 22, at 32. On another note, it is suggestive that restrictions on *judicial* review like those proposed for non-enforcement in the 1994 opinion—such as limiting judicial review to “defensive” uses or a doubtful case rule—have also proved impossible to sustain. For a discussion of “defen-

dent George W. Bush asserted the authority in signing statements “to disobey more than 750 laws,” a pattern difficult to square with the 1994 opinion.<sup>25</sup> Tellingly, executive branch attorneys defended Bush’s action by invoking Founding-era arguments for judicial review.<sup>26</sup> And just last term, in *United States v. Windsor*, Justice Antonin Scalia’s defense of non-enforcement suggested no clear limitations on the power.<sup>27</sup> According to Scalia, a President who concluded that Section 3 of the Defense of Marriage Act violated the Equal Protection Clause should have simply refused to enforce it. Yet Section 3 was a *definitional* provision; its effects spanned federal law.<sup>28</sup> A non-enforcement power applied across the reach of Section 3 would be broad, deep, and largely insensitive to considerations of institutional competence and political context.<sup>29</sup>

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sive” judicial review, see Robert Lowry Clinton, *Marbury v. Madison, Judicial Review, and Constitutional Supremacy in the Nineteenth Century*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 88–91 (Mark Graber & Michael Perhac eds., 2002); Michael J. Klarman, *How Great were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1121 (2001). For a discussion of the doubtful case rule, see Thayer, *supra* note 23, at 140.

25 See ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, ABA REPORT 2, 14–18 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf> (listing laws); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 323 (2006) (identifying 844 “sections challenged” by signing statement); Johnsen, *supra* note 8, at 410 (“Although the Bush administration has not publicly replaced the 1994 nonenforcement guidelines, its actions have demonstrated unambiguously that it does not believe the President’s non-enforcement authority is so limited.”).

26 Cf. Johnsen, *supra* note 8, at 410–11.

27 See *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting) (“He could have equally chosen . . . neither to enforce nor to defend the statute he believed to be unconstitutional . . .”); accord Devins & Prakash, *supra* note 9, at 509 (presenting the view that the President has neither a duty to enforce nor a duty to defend laws he thinks are unconstitutional).

28 See *Windsor*, 133 S. Ct. at 2683 (discussing the definitional aspect of § 3). In an earlier case, *Freytag v. Commissioner of Internal Revenue*, Justice Scalia suggested that the President had a defensive non-enforcement authority. See *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring). Citing Easterbrook’s article, Justice Scalia wrote that the President had a power to “resist legislative encroachment” by “disregard[ing] [laws] when they are unconstitutional.” *Id.* (citing Easterbrook, *supra* note 16, at 920–924). Easterbrook’s article, however, defends non-enforcement by analogy to judicial review, and consequently does not limit non-enforcement to defensive uses. See Easterbrook, *supra* note 16, at 919–20 (presenting this analogy).

29 In contrast, the 1994 OLC opinion emphasized the non-enforcement was a context-sensitive determination. See *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C., *supra* note 23, at 199–202 (discussing the “circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional”). For examples of non-enforcement in the Obama Administration, see Delahunty & Yoo, *supra* note 9, at 781–84. Consider, as well, efforts by *state* executive officers to justify non-defense or non-enforcement of state law on the basis of an analogy to judicial review.

As I show below, none of this comports with Founding-era history. Somehow the argument for non-enforcement has garnered a reputation for resting on original meaning and practices.<sup>30</sup> Too little effort has been made to limn the boundaries of period concepts. Thus, what is supported by historical evidence is the abstract proposition that each of the branches of the federal government, or “departments,” enjoys a coordinate authority to interpret the Constitution.<sup>31</sup> “Coordinate” means equal.<sup>32</sup> The departments are equals. As James Madison put it in *Federalist 49*, “[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”<sup>33</sup> In other words, being an equal implies being *autonomous*—each department gets to make its own determination of the nature and scope of its authority under the Constitution.

This abstract proposition is called “departmentalism.”<sup>34</sup> Departmentalism was conceived in response to a difficulty that arose as the Framers wrestled with the consequences of judicial review in a system with separated powers and judicial independence.<sup>35</sup> Their concern was that the power of courts to interpret and enforce fundamental law would make an independent judiciary superior to (and not coordinate with) the other departments, by giving courts ‘final say’ in determining the departments’ powers. Put simply, departmentalism is

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See, e.g., *Virginia’s New Attorney General Will Not Defend Gay-Marriage Ban*, NPR MORNING ED. (radio broadcast Jan. 23, 2014), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=265050444>.

<sup>30</sup> See Aziz Z. Huq, *Enforcing (but not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1008–09 (2012) (“[O]ther scholars defend a strong, independent presidential authority to make constitutional judgments without respect to other branches’ views, a position of en staked out on originalist turf.”). Huq’s “strong” departmentalism includes a non-enforcement power. I do not mean to suggest that Huq himself takes the view that non-enforcement can be defended on originalist grounds, or that he has misread any of the relevant sources. For a defense of a duty of non-enforcement on originalist grounds, see Prakash, *supra* note 9, at 1649–59.

<sup>31</sup> See, e.g., Clinton, *supra* note 24, at 92; Gordon S. Wood, *Judicial Review in the Era of the Founding*, in *IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 153, 161–62 (Robert A. Licht ed., 1993) (highlighting Thomas Jefferson and James Madison’s view that “all parts of America’s governments had the authority to interpret the fundamental law of the Constitution”); Paulsen, *supra* note 15, at 228–40 (discussing the equality of the three branches of the federal government since the Founding).

<sup>32</sup> See Matthew Steilen, *Collaborative Departmentalism*, 61 BUFF. L. REV. 345, 355–60 (2013) (discussing the idea of “coordinacy” in early America).

<sup>33</sup> THE FEDERALIST NO. 49, at 273 (James Madison) (J.R. Pole ed., 2005).

<sup>34</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 105–08 (2004) (discussing what is known as the “departmental” theory).

<sup>35</sup> See *id.*

the idea that *courts do not have the final say*. The executive and the legislature have an authority to decide for themselves what the Constitution means.<sup>36</sup> They need not acquiesce in a judicial interpretation—any more than the judiciary is obligated to adopt their view when deciding a case. As Jefferson put it sometime later, “each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question.”<sup>37</sup> It should be easy to see, however, that departmentalism does not entail non-enforcement. The two are very different.<sup>38</sup> Departmentalism is an abstract statement of the relative interpretative authority of the departments; non-enforcement is a specific presidential power. President Thomas Jefferson professed to give effect to his “free & independent judgment” of the Constitution’s meaning—but through “the functions confided to [him].”<sup>39</sup> What functions actually were confided to him was another matter entirely.<sup>40</sup> One could not determine *that* by inference from coordinacy alone.<sup>41</sup>

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<sup>36</sup> This is the basic point defended by Edwin Meese in his famous (or infamous) Tulane speech. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983–86 (1987) (“Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.”). Herbert Wechsler made more or less the same point in *The Courts and the Constitution*. See Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (“Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared.”).

<sup>37</sup> Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 139 (Paul Leicester Ford ed., 1905); see also Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 9 THE WORKS OF THOMAS JEFFERSON, *supra*, at 259 (“I affirm that act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of my functions.”) (emphasis added).

<sup>38</sup> See Stephen M. Griffin, *Executive Power in the U.S. Constitution: An Overview* 17 (Tulane Pub. Law Research Paper No. 14-3, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2422927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422927) (observing that “the relevance of departmentalism to presidential non-enforcement is actually quite limited”).

<sup>39</sup> *The Paragraph Omitted from the Final Draft of Jefferson’s Message to Congress, December 8, 1801*, in 3 ALBERT JEREMIAH BEVERIDGE, THE LIFE OF JOHN MARSHALL 605, 605–06 (1919); see also James Madison, Letters of Helvidius, No. II, in 6 THE WRITINGS OF JAMES MADISON 151, 153 (Galliard Hunt ed., 1906) (arguing that the power to interpret a treaty or determine obligations to go to war “belongs to the department to which those functions belong”).

<sup>40</sup> See Barron, *supra* note 23, at 91 (“[Jefferson] may be understood to be arguing only that the President has the constitutional authority to exercise the pardon power to remit sentences, and that in the exercise of that constitutionally vested power, he is free to make a judgment as to a law’s unconstitutionality.”).

<sup>41</sup> See *infra* Part II.C.1.



Jefferson did decide to “remit . . . execution” of the Sedition Act, and this is sometimes adduced as an example of non-enforcement in the modern sense.<sup>42</sup> Even if it is—a proposition I doubt, but will assume here for purposes of argument<sup>43</sup>—those who seek to analogize non-enforcement to judicial review face a significant problem of *timing*. The problem is obvious, but remarkably unappreciated. While there was a relatively widespread discussion of judicial review in the decade *prior* to Jefferson’s election,<sup>44</sup> there was no discussion of presidential non-enforcement.<sup>45</sup> *None*. This makes little sense if both practices were thought to cure the same defects of government. Why was there no discussion of presidential non-enforcement during the Federalist period? What accounts for the discrepancy in timing?

To answer this question, I begin from a premise advanced by a number of leading historical studies of judicial authority and judicial review.<sup>46</sup> According to Gordon Wood, Sylvia Snowiss, and Larry Kra-

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<sup>42</sup> See, e.g., SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 3–4 (1992).

<sup>43</sup> Jefferson defended his conduct by citing his powers of pardon and control over federal prosecutions. See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), *supra* note 37, at 259 (“The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into legal train.”); Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *supra* note 37, at 138 (“A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion . . . .”); Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 22, 23 (Thomas Jefferson Randolph ed., 1829) (“I discharged every person under punishment or prosecution under the sedition law . . . .”); cf. ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 33–35 (1971) (observing that Jefferson never publicly proclaimed an authority to refuse to enforce laws he thought unconstitutional).

<sup>44</sup> This discussion took place in multiple forums, including the press and litigated cases. William Treanor and Philip Hamburger have recently shown that judicial review was exercised, and often discussed, in many more cases than was traditionally appreciated. See PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 358–503 (2008) (showing widespread discussion of judicial review in the founding period); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457–58 (2005) (arguing that a much greater number of statutes were invalidated than previously thought).

<sup>45</sup> On the lack of evidence, see *infra* Part II.A (detailing the Framers’ overwhelming support for presidential non-enforcement).

<sup>46</sup> See KRAMER, *supra* note 34, at 107–08 (recognizing a distinction between ordinary law and “popular constitutionalism”); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 1–2 (1990) (similar); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 291–305 (2d ed. 1998) (similar). Sylvia Snowiss’s account of the origins of judicial review has been particularly influential. See Treanor, *supra* note 44, at 461 (describing Snowiss’s account as “the leading historical study of early judicial review”). To be sure, Snowiss’s account is now somewhat dated, and has certainly come in for its fair share of criticism, in part for insisting on an artificial reading of key sources.

mer, the founding generation distinguished the *fundamental* law set out in written constitutions from *ordinary* law, and believed fundamental law would ultimately be enforced by the people themselves acting ‘out of doors,’ through petitions, voting, and protest.<sup>47</sup> If this is correct, as I shall assume it is, then we should think of the movement to establish judicial review in the 1780s as being centrally concerned with showing why violations of fundamental law should be determined and remedied *in court*, as well as outside it, as was the traditional practice. The evidence examined here suggests that the answer lies in the distinctive procedures utilized by courts of law.

Much more than we, the Framers had a special regard for courtroom proceedings, or what some in that period called “forensic litigation.”<sup>48</sup> Forensic litigation, they thought, could give shape to a dispute in a way that made it possible for a judge or jury to resolve the matter in a non-partisan fashion, according to the law of the community.<sup>49</sup> This was a valuable institutional asset in the decades after the Revolution. It was during that period that state popular assemblies became active *law-making* bodies—i.e., functional legislatures—occupied largely by settling contests between constituent groups over the goods generated by public policy.<sup>50</sup> Courts were an anodyne for this development. By curbing fits of legislative excess, courts could promote the rule of the public’s *reason*—what that generation called

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See Dean Alfange, Jr., *Marbury v Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 333–49 (1993) (critically discussing Snowiss’s arguments); Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss’s History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 867–73 (2006) (arguing that Snowiss misread Iredell). Nevertheless, Snowiss’s claims about fundamental law are quite close to those made by Wood and Kramer. Moreover, the Snowiss study remains particularly important for my purposes, given its influence on those who have advocated the analogy between judicial and executive power. See, e.g., Easterbrook, *supra* note 16, at 922 n.50 (citing Snowiss); Kramer, *supra* note 11, at 33 n.114 (acknowledging Snowiss’s influence); Paulsen, *supra* note 15, at 241 n.78 (citing Snowiss).

47 KRAMER, *supra* note 34, at 29–30 (explaining the idea of fundamental law and its operation); SNOWISS, *supra* note 46, at 1–2, 90–91 (highlighting the Founders’ view that revolution was the enforcement mechanism for fundamental law); WOOD, *supra* note 46, at 291–92 (explaining fundamental law’s historic English roots). For an important older study that casts doubt on the separation of fundamental law and ordinary law, see Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) (suggesting a separation between fundamental and ordinary law).

48 4 THE PAPERS OF JOHN MARSHALL 95–96 (Charles T. Cullen & Leslie Tobias eds., 1984).

49 See *infra* Part III.A.

50 See, e.g., WILLIAM NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 30–34 (2000).

“public opinion”—rather than the “passion” or raw interests that animated the assembly.<sup>51</sup>

Yet courts could play this institutional role only if they conducted themselves in the right way. *Procedure* thus became the core of a multistate reform movement aimed at reshaping state and local courts at the turn of the nineteenth century.<sup>52</sup> At the center of that movement, I argue, were two key ideas, which reformers used both to describe practice ideals and to justify proposed changes. First was the idea of a *case*, which was the sort of dispute suited for resolution in a court of law. Second was the idea of *expounding* the law, which was the form legal explanation took in deciding a case. Philip Hamburger’s study of judicial duty devotes attention to both ideas,<sup>53</sup> but, as others have noted, leaves the notion of expounding largely undeveloped.<sup>54</sup> I try to fill in this idea as it was used in the United States in the 1780s and 1790s. In this context, expounding the law often meant more than simply making sense of it; it involved something like deducing an outcome from a systematic formulation of the community’s basic legal principles.<sup>55</sup> While all departments had to make sense of the law to exercise their functions, only courts expounded it, because expounding enabled courts to resolve cases non-politically.<sup>56</sup> Sources from this period often describe judicial review as a kind of by-product of expounding, which occurred when a systematic account of potentially relevant community law included the Constitution.<sup>57</sup> Reform thus brought an end to the pre-revolutionary American paradigm, in which judicial “magistrates” exercised multiple governmental func-

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51 See, e.g., James Kent, *Introductory Lecture to a Course of Law Lectures* (1794), in 2 AMERICAN POLITICAL WRITING IN THE FOUNDING ERA 1760–1805, at 941, 941–42 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (“[I]n this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary Legislature, and this precaution is considered in general as essential to perfect security, and to guard against the occasional violence and momentary triumphs of party. . . . The Courts of Justice which are organized with peculiar advantages to exempt them from the . . . baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution.”); see also *infra* Part I.A.

52 See *infra* Parts III.A–B.

53 See HAMBURGER, *supra* note 44, at 536–48 (distinguishing a “case” as a form of judicial authority and discussing the idea of “expounding”).

54 See Mary Sarah Bilder, *Expounding the Law*, 78 GEO. WASH. L.R. 1129, 1140–42 (2010) (reviewing Hamburger and noting the arguing that he gave light attention to the notion of expounding).

55 See *infra* Part III.C.

56 This was the majority view, but it was not a universal one. See *infra* Parts III.C–D.

57 See *infra* Part III.C.

tions and led the process of law-enforcement and even policy-making at the local level.<sup>58</sup> By the time of ratification, then, most would describe courts as specially tasked with deciding cases and expounding the law. While thinking about executives was less developed, they generally were not said to do either of these things. And since executives did not expound, they had no power of review.<sup>59</sup> The justification for enforcing the Constitution *in court* thus did not extend to the executive—at least with respect to its office of enforcing the law.

My aim in what follows is to substantiate these claims. My argument will have three parts. In Part I, I analyze a leading Founding-era justification for judicial review, and show how it can be adapted to support presidential non-enforcement. In Part II, I describe historical evidence that the Framers would have rejected the argument for non-enforcement set forth in Part I. This evidence falls into two categories: first, the lack of almost any express support, in the period under examination, for the proposition that the President could refuse to enforce the law; second, the large body of ‘negative evidence’ that implies the President was obligated to enforce the law. In Part III, I turn back to the argument for judicial review, with an eye to showing why the Framers regarded courts alone as authorized to refuse to enforce unconstitutional law. As explained above, my argument turns on an examination of the ideas of a “case” and “expounding” the law, which played a key role in justifying the court-reform movements in the last decades of the eighteenth century.

## I. THE NON-ENFORCEMENT ARGUMENT

I want to begin with judicial review, and with what has become, perhaps, the dominant account of its origin. In a sentence, this account tells us that judicial review emerged in response to the politics of debt and paper money that gripped state assemblies after the Revolutionary War. Proponents of review sought to slow down the legislative process in order to protect the rights of creditors and loyalists. Below, I sketch these developments and then examine a period text defending judicial review. The text is James Iredell’s well known essay, “To the Public.” My discussion of Iredell’s essay and its relation-

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58 Reform took decades in some jurisdictions, stretching into the nineteenth century. See, e.g., JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 3–17 (2009) (describing legislative interference with judicial proceedings in a number of states).

59 See HAMBURGER, *supra* note 44, at 545 (showing that the executive’s office did not include a power to explain the law).

ship to the politics of the time will be familiar to many readers. To make the comparison between judicial review and non-enforcement as precise as possible, I lay out Iredell's argument 'formally.'<sup>60</sup> I call the formal version of the argument the *Standard Justification*. This formal argument is a creature of my own making and new to the literature, but the analysis is meant to track conventional wisdom, so that we can figure out later where that wisdom goes wrong. By formalizing Iredell's argument I am also able to show exactly how the Standard Justification might be adapted to support a presidential non-enforcement power, as a number of commentators have claimed. To help us keep our various arguments straight, I call this adaptation the *Non-Enforcement Argument*. Thus, the Standard Justification justifies judicial review; the Non-Enforcement Argument justifies presidential non-enforcement. As we will see, the Non-Enforcement Argument springs from the same political logic as judicial review, but recruits the executive (rather than just the judiciary) to resist the popular assembly.

#### A. *State Politics and Judicial Review*

The American Revolution was followed by a period of deep-felt anxiety.<sup>61</sup> Concern centered on the economy. At the national level, the Confederation emerged from the war with a massive debt and few fiscal tools to discharge it.<sup>62</sup> At the state level, there was a widespread perception that commercial trade was depressed. Markets had disappeared; Britain closed the lucrative ports of the West Indies to American ships, forcing exporting states to locate new overseas markets.<sup>63</sup> Inland markets dried up as customers struggled to repay wartime

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<sup>60</sup> Here, by "formally" I do not mean that I abbreviate Iredell's argument by use of a formal language, as in the study of formal logic. Rather, I rephrase Iredell's key assertions in natural language so that the argument is formally valid.

<sup>61</sup> See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789*, at 611–12 (2d ed. 2005) (detailing the various anxieties of Congress and the people after the Revolution).

<sup>62</sup> See Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 128, 130–33 (Richard Beeman, Stephen Botein, & Edward C. Carter II eds., 1987) (detailing the size of the national debt and the difficulties in repaying it). For a discussion of the Confederation's fiscal difficulties, see MIDDLEKAUFF, *supra* note 61, at 616–19 (explaining the Confederation's struggles to repay interest and principle on its outstanding debts).

<sup>63</sup> See MIDDLEKAUFF, *supra* note 61, at 613 (describing the British exclusion of Americans from the West Indies).

debt.<sup>64</sup> At the same time, states sought to discharge their own public debt through taxation.<sup>65</sup> Governments wanted to collect “specie,” or hard money, but it was scarce, and a number of states resorted to printing paper currency so taxes could be paid.<sup>66</sup> Inflation followed.

It was perhaps natural that Americans would blame the Confederation Congress and the state assemblies for these events. They did. What is remarkable, however, is the constitutional register in which their discontent was voiced.<sup>67</sup> Americans drew ready inferences about their own character as a people. They lacked “virtue” and had succumbed to a “licentious” addiction to “luxury.”<sup>68</sup> “Having won independence at great cost,” writes Jack Rakove, “Americans seemed unprepared or unable to manage their affairs wisely or peacefully.”<sup>69</sup> The people now held power in the state assemblies, but majority factions in the assembly used this power to pursue economic and social policies that advanced their private interests at the expense of others.<sup>70</sup> Thus, assemblies dominated by merchant interests sought to require full repayment of private debt in inflation-resistant specie, at the expense of farmers unable to repay notes at face value.<sup>71</sup> In some states, and at other times, the opposite policy prevailed.<sup>72</sup> Assemblies also made quick work distributing the landholdings of loyalists, confiscating their property and creating ‘efficient’ mechanisms for quiet-

64 See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 248–49 (1991) (explaining how overleveraged consumers and the shrinking of credit contributed to the struggles of inland markets).

65 See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 29–30 (1996) (explaining that many states taxed their citizens to repay debts).

66 Printing notes to be removed from circulation through taxation was known as “currency theory.” See Riesman, *supra* note 62, at 130 (claiming that printing money was the only solution to the debt problem); see also MIDDLEKAUFF, *supra* note 61, at 617 (explaining that several states began printing money to repay their debts).

67 Cf. WOOD, *supra* note 46, at 393–96 (describing the 1780s as a period of deep discontent and prevalent criticism of the Revolution).

68 See WOOD, *supra* note 46, at 403–04, 419–21.

69 RAKOVE, *supra* note 65, at 29.

70 See WOOD, *supra* note 64, at 229 (discussing the fact that early Americans were too involved in their own affairs to think about their neighbors).

71 NELSON, *supra* note 50, at 31.

72 WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 92 (1975) (referencing “the act of 1782 that deprived judgment creditors of their common law right to obtain satisfaction out of the proceeds of their debtors’ goods sold at auction” to demonstrate “the arbitrary power of a majoritarian legislature . . . to change the law”); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *AM. HIST. REV.* 511, 519 (1925) (discussing the “class of farmer-debtors” that “now began to align itself with the demagogues in the state legislatures, in opposition to the mercantile-creditor class”).

ing title that dispensed with protective procedures traditionally available at common law.<sup>73</sup> But most importantly, and most disquietingly, this style of politics—the politics of self-interest—was inherently contentious.<sup>74</sup> In place of the pre-war “consensus style of government” there was an openly hostile battle for state favor and public resources.<sup>75</sup>

The experience of state politics in the 1780s drove the development of judicial review.<sup>76</sup> According to the dominant account, the pivot point was a revision in the understanding of separation of powers.<sup>77</sup> As alienation from state assemblies grew, the American people began to conceptualize themselves not as *part of* the government, present in a popular law-making body, but as standing *outside* government entirely. The state assembly, such as it was, and such as it had conducted itself, was no longer the people’s presence within government. It became simply another form of governmental magistracy,

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73 The seizure and distribution of real property is only one example of state laws targeting loyalists. Other acts seized personal property, cancelled debts, and stripped loyalists of basic civil and political rights. See Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI-KENT L. REV. 825, 835–38 (2006) (discussing “[s]tate [a]ntiloyalist [l]egislation”); see generally Alison Reppy, *The Spectre of Attainder in New York (Part I)*, 23 ST. JOHN’S L. REV. 1, 1 (1948); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution (Part I)*, 3 ILL. L. REV. 81 (1908); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution (Part II)*, 3 ILL. L. REV. 147, 151 (1908).

74 See RAKOVE, *supra* note 65, at 30 (noting that the “contentiousness of state politics in general” was “worrisome”); WOOD, *supra* note 46, at 399–403 (describing “party strife” in the states as “bitter”).

75 The expression comes from NELSON, *supra* note 50, at 27; see also WOOD, *supra* note 63, at 245–47 (discussing the push for “interest-group politics”). Nelson argues that this development followed a transformation in the understanding of the authority of law: after the Revolution, law was an instrument that could be used to advance one’s interests. See NELSON, *supra* note 50, at 32–33; see also NELSON, *supra* note 72, at 3–5.

76 KRAMER, *supra* note 34, at 54 (discussing the role of state governments in the 1780s in the development of judicial review); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 65–67 (2003) (describing the judiciary’s role in curbing legislative overreaching); Prakash & Yoo, *supra* note 9, at 930; Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 CONST. COMMENT. 231, 233 (2003); Wood, *supra* note 31, at 156–57 (discussing that Americans in the 1780s began to have “second thoughts about their earlier confidence in their popularly elected legislatures” and thus reevaluated “their former hostility to judicial power and discretion”).

77 The claims in this paragraph derive from Gordon Wood’s seminal study in *The Creation of the American Republic*. WOOD, *supra* note 46, at 446–53 (discussing the “[r]evision of [s]eparation of [p]owers”); see also GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 450–52 (2009) [hereinafter WOOD, *EMPIRE*] (arguing that “separation of law from politics” was needed to popularize judicial review); Wood, *supra* note 31, at 159 (discussing the tension between judges and legislatures). For a criticism of the separation of powers explanation, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 509 (2006).

answerable to the sovereign people through elections. This shift in understanding was evidenced in a period of constitutional reform at the state level, where the people's delegates sought to design the institutions of government in ways that would inhibit a politics of self-interest and the concomitant risk to individual rights.<sup>78</sup> Adjustments were made throughout the system—to apportionment in the assembly, to its form and powers, to qualifications for membership in the upper house, and to the term and powers of the governor.<sup>79</sup> Some proposed expanding government with a system of public schools to promote virtue among the people themselves.<sup>80</sup> But courts of law underwent perhaps the most striking change. They emerged as a separate and independent branch of government: the judiciary.<sup>81</sup>

As agents of the people, equal in status to the other great departments, the judiciary could play a role in safeguarding individual rights and preserving constitutional limits.<sup>82</sup> Its role, to be sure, would not be unique.<sup>83</sup> The judiciary would not be the “appointed arbiters” of the legislature’s constitutional boundaries.<sup>84</sup> The primary mechanisms for determining and enforcing constitutional limits

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78 The same concern guided constitutional design at the national level. See RAKOVE, *supra* note 65, at 48–55 (discussing the temptation of legislators to act in their own self-interest).

79 See WOOD, *supra* note 46, at 433–46 (describing the new role for courts of law). Notably, no state gave its governor an express power of non-enforcement. See *infra* Part II.A.

80 See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 88–89 (1990) (discussing Jefferson’s promotion of education); DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 14–15 (1987) (discussing Congress’s efforts to promote a republican government through public education). Outside government, the “public sphere” of voluntary societies and print media would filter and shape public opinion. See John L. Brooke, *Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic*, in *LAUNCHING THE EXTENDED REPUBLIC: THE FEDERALIST ERA* 277, 296–309 (Ronald Hoffman & Peter J. Albert eds., 1996).

81 See REID, *supra* note 58, at 114; WOOD, *EMPIRE*, *supra* note 77, at 407 (describing the rise of the judiciary by the 1780s). For examples of state constitutions establishing independent judiciaries, see MASS. CONST. of 1780 ch. III; N.H. CONST. of 1784 art. XXXV; S.C. CONST. of 1790 art. III; PA. CONST. of 1790 art. V.

82 See W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 125 (1965); KRAMER, *supra* note 34, at 60 (describing courts’ duty as agents of the people not to enforce unconstitutional laws); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 174 (2d ed. 1998) (explaining the viewpoint that the judiciary was needed to limit the power of the legislature).

83 See SNOWISS, *supra* note 46, at 55 (noting that all three branches of government were equal under the law); Prakash & Yoo, *supra* note 9, at 917 (“[J]udicial review is nothing special.”).

84 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 178 (1858).



would be the structural features established to check the legislative power.<sup>85</sup> Yet courts would be duty-bound to contribute to this effort. Now, just like members of the state assembly, judicial officers were agents of the people, and as such were themselves bound by the limits of the Constitution.<sup>86</sup> A judiciary co-equal (or “co-ordinate,” as that generation put it) with the legislature, whose principal was the people, should refuse to give effect to a legislative act that violated constitutional limits. So conceived, judicial review was an “extraordinary political act” of resistance to a usurping popular assembly, not an exercise of “conventional legal responsibility.”<sup>87</sup>

It is with these aims, according to our narrative, that judicial review took its first, halting steps in state courts in the 1780s.<sup>88</sup> The leading state cases in this period are familiar: *Commonwealth v. Caton*,<sup>89</sup> *Rutgers v. Waddington*,<sup>90</sup> *Trevett v. Weeden*,<sup>91</sup> and *Bayard v. Singleton*<sup>92</sup> are perhaps the best known.<sup>93</sup> Though students of judicial review have long known of the cases, there remains disagreement about the

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<sup>85</sup> See SNOWISS, *supra* note 46, at 92–94.

<sup>86</sup> Wood, *supra* note 31, at 159–60 (characterizing the judiciary as representatives of the people).

<sup>87</sup> SNOWISS, *supra* note 46, at 2; see also KRAMER, *supra* note 34, at 63 (“Judicial review, in other words, was not an act of ordinary legal interpretation.”). For a different approach, see 1 JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 50–142 (1971) (arguing that American practices were largely derived from English traditions); HAMBURGER, *supra* note 44, at 4, 17–18.

<sup>88</sup> See KRAMER, *supra* note 34, at 63–64 (describing judges’ early rationales for judicial review).

<sup>89</sup> 8 Va. (4 Call) 5, 12 (Va. 1782) (holding the court can declare a state law unconstitutional where the house of delegates would have pardon power on its own); See 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 416–27 (David John Mays ed., 1967) (outlining the views of the judges who decided *Commonwealth v. Caton*); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 529–38 (1994) (discussing *Caton*).

<sup>90</sup> See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 392–419 (Julius Goebel, Jr. ed., 1964).

<sup>91</sup> See 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417–29 (1971) (reprinting the case).

<sup>92</sup> 1 N.C. (Mart., 48) 5 (1787).

<sup>93</sup> These are probably the most commonly discussed cases, but there are other important early state authorities, including *Holmes & Ketcham v. Walton* and the *Ten Pound Act Cases*. See HAMBURGER, *supra* note 44, at 407–35 (providing context on the two cases). The list of precedents for judicial review has, naturally, been the subject of intense historical debate. For recent lists of state authorities, up through the early 1790s, see *id.* at 655–58 (listing state court decisions); Scott Douglas Graber, *The Myth of Marbury v. Madison and the Origins of Judicial Review*, in MARBURY VERSUS MADISON, *supra* note 24, at 7–11; Treanor, *supra* note 44, at 473–517 (“[I]n seven cases . . . judicial review was exercised to prevent application of the statute.”). An older example is CHARLES GROVES HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 88–159 (1914).

public's reception of them.<sup>94</sup> Popular constitutionalists would describe the reaction as an "outcry," as courts took it upon themselves, for the first time, to exercise powers long thought to be held by the people themselves.<sup>95</sup> The account may be overdrawn.<sup>96</sup> Still, it is undisputed that several of the early cases of judicial review met with severe criticism.<sup>97</sup> Nor can the reaction be understood wholly as 'sour grapes,' since, as we will see, opponents triggered a dialogue about the power of judicial review itself.<sup>98</sup>

### B. The "Standard Justification" for Judicial Review

One of the best-known examples of this dialogue arose out of the litigation in *Bayard v. Singleton*.<sup>99</sup> *Bayard* was a suit for ejectment brought by Elizabeth Bayard and her husband against Spyers Singleton. The Bayards' claim on the property in question derived from a deed of transfer executed by Elizabeth's father, Samuel Cornell. Cornell was a loyalist and had fled for Great Britain at the start of the war. Shortly after he deeded his estate to Elizabeth, the state confiscated it and then sold the property to Singleton.<sup>100</sup> The constitutional issue posed in *Bayard* concerned the summary process for quieting title adopted by the state assembly during the pendency of the litigation. After Elizabeth Bayard and her husband first brought suit in late 1784, Singleton secured passage of an act requiring courts to dismiss suits against purchasers who filed an affidavit the the property had been acquired from the commissioner of forfeited estates.<sup>101</sup>

94 Compare KRAMER, *supra* note 34, at 65–69 (“[E]arly efforts to exercise judicial review drew stinging rebukes.”), with HAMBURGER, *supra* note 44, at 463–75 (“[T]here is little surviving evidence of public discussion, other than a few newspaper reports, which glowingly approved of the decision . . .”).

95 KRAMER, *supra* note 34, at 63–65 (“Judges might be justified in acting as the people’s proxy. . . .”); see also 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 950, 964, 966–68, 971–72 (1953) (describing public reaction to *Holmes, Rutgers, Trevett, and Bayard*).

96 See HAMBURGER, *supra* note 44, at 407; Prakash & Yoo, *supra* note 9, at 936–39.

97 The outstanding example is *Trevett v. Weeden*. See CROSSKEY, *supra* note 95, at 968 (explaining that judges on *Trevett v. Weeden* faced legislative threats and lost their seats in reelection).

98 See, e.g., Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), in 2 *LIFE AND CORRESPONDENCE OF JAMES IREDELL*, *supra* note 84, at 169.

99 See HAMBURGER, *supra* note 44, at 463 (discussing how Iredell tried to influence the judges in *Bayard*).

100 See HAMBURGER, *supra* note 44, at 450 (providing the facts of *Bayard v. Singleton*).

101 *Bayard v. Singleton*, 1. N.C. (Mart. 48) 5, 5 (1787); see also HAMBURGER, *supra* note 44, at 451–52 (“The act provided that purchars of confiscated estates and those claiming under their title ‘shall be deemed not liable to answer any suit or suits in law or equity’ commenced by anyone described in the confiscation statutes ‘as inimical to the states’ . . .”).

When Singleton moved for dismissal on the grounds of the act, William Davie, representing the Bayards, argued “warmly” that the act was “unconstitutional and therefore no law.”<sup>102</sup> The court made some brief remarks and took the matter under advisement.<sup>103</sup> A year passed with no decision. Finally, at May term 1787, the court reconvened and held the summary process statute unconstitutional.<sup>104</sup>

Nine months before the decision, in the summer of 1786, an anonymous letter entitled “To the Public” appeared in the *North Carolina Gazette*.<sup>105</sup> The author was James Iredell, and it seems likely that Iredell wrote the letter in an effort to persuade the North Carolina Superior Court to resume the *Bayard* matter and find for the plaintiffs on constitutional grounds.<sup>106</sup> As others have recognized, the letter contains one of the most important defenses of judicial review in the period.<sup>107</sup> Iredell began by recalling the recent experience in North Carolina of drafting a constitution. That process, he said, left “no doubt, but that the power of the Assembly is limited and defined by the constitution.”<sup>108</sup> The assembly was clearly subject to constitutional limits; the question was what remedies there were when the assembly exceeded those limits. Were the people confined to petitioning their government or to popular resistance?

Iredell argued no. There was a third remedy for unconstitutional acts of the assembly. He wrote:

These two remedies being rejected [i.e., petition and resistance], it remains to be inquired whether the judicial power hath any authority to in-

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<sup>102</sup> HAMBURGER, *supra* note 44, at 453 n.153 (citation omitted).

<sup>103</sup> *See Bayard*, 1 N.C. (Mart. 48) at 5–6.

<sup>104</sup> *See id.* at 7. Nevertheless, at trial, the court determined that because Cornell was an alien he could not hold lands in the state, and the jury returned a verdict for defendant Singleton.

<sup>105</sup> *See* HAMBURGER, *supra* note 44, at 463; *see also* James Iredell, *To the Public*, in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 84, at 145–49.

<sup>106</sup> HAMBURGER, *supra* note 44, at 463 (“Iredell wrote for the public because he could not speak before the judges.”). Hamburger shows that Iredell did not represent the Bayards, as is often suggested. *See, e.g.*, 2 CROSSKEY, *supra* note 95, at 971–72 (stating that Iredell was “of counsel for the plaintiff”). Instead, he was conflicted out because of involvement in a related matter. The conflict, which had been artfully arranged by Singleton, angered Iredell and his friends Archibald Maclain and William Hooper, who were interested in protecting loyalists from having their property confiscated. *See* HAMBURGER, *supra* note 44, at 463 (“When Maclaine learned of how he and his friend had been ‘silenced,’ he was furious . . .”); *see also* Hulsebosch, *supra* note 73, at 829, 851 (supporting the idea that attorneys in *Bayard* and other early judicial review cases were targeting antiloyalist legislation).

<sup>107</sup> *See, e.g.*, Leonard, *supra* note 46, at 868 (supporting the idea that Iredell, and by association “To the Public,” was very influential in the area of judicial review); *see also* Corwin, *supra* note 72, at 526.

<sup>108</sup> Iredell, *supra* note 105, at 146.

terfere in such a case [i.e., a case where the assembly violates the constitution]. The duty of that power, I conceive, in all cases, is to decide according to the *laws of the State*. It will not be denied, I suppose, that the constitution is a *law of the State*, as well as an act of Assembly, with this difference only, that it is the *fundamental* law, and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people*, not *mere servants of the Assembly*.<sup>109</sup>

Iredell is impressively clear in this passage, but for my purposes, it is important to lay out the argument formally. Iredell begins with what we can call Premise 1, namely, the proposition that “the duty of [the judicial] power . . . in all cases, is to decide according to the *laws of the State*.” Premise 2 is the next sentence: “[T]he [c]onstitution is a *law of the State*.” If we substitute Premise 2 into Premise 1, as the italicized language suggests, it gives us (what we might call) Conclusion 1—namely, that the duty of the judicial power in all cases is to decide according to the constitution. But this is not yet judicial review. The problem, of course, is that an act of the assembly is *also* a law of the state, as Iredell acknowledges. If we substitute *this* proposition into Premise 1, it gives us Conclusion 2—namely, that it is the duty of the judicial power in all cases to decide according to an act of assembly. Conclusion 1 and Conclusion 2 describe two different duties. Those duties may coincide, but they may not. Where an act of assembly and the constitution are “inconsistent,” it will be impossible to satisfy both Conclusion 1 and Conclusion 2; the court will be unable to discharge both duties. What is required, it would seem, is a judicial rule for privileging either the constitution or the unconstitutional act. Iredell proposes such a rule by drawing a simple comparison to legislative repeal. An assembly can repeal any previous act it has passed. When it does, he says, copying Blackstone, the “latter act” (in time) be-

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<sup>109</sup> Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *supra* note 84, at 148.

comes the law of the state for purposes of deciding a case.<sup>110</sup> Yet the Assembly cannot repeal the constitution, since the constitution is “*fundamental law*,” and thus the source of the Assembly’s power. An act inconsistent with the constitution must be void—i.e., not a law at all.<sup>111</sup> Call this Premise 3. It follows, says Iredell, that for the court to decide a case according to an unconstitutional law would be to violate the judicial duty to decide in all cases according to the laws of the state. This proposition, which we can call Conclusion 3 (abbreviated “C”), is judicial review.

Paraphrasing where appropriate, this gives us the following argument.

### The Standard Justification<sup>112</sup>

- P1. The duty of the judicial power in all cases is to decide according to (and only to) the laws of the state.
- P2. The constitution is a law of the state.
- P3. An unconstitutional act of the assembly is void, and thus not a law of the state.
- C. If the judicial power decides according to an unconstitutional act of the assembly, rather than the constitution, it does not decide according to the laws of the state, and thus it violates its duty.

To understand this argument, one has to keep in mind that Premise 3 is not equivalent to judicial review. Premise 3 says that an unconstitutional act of assembly is void. But “void” does not mean “of no effect in a court of law.” As Snowiss and others have shown, one cannot assume in this period that a constitution can be enforced in legal proceedings within a court of law.<sup>113</sup> The constitution was fun-

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110 WILLIAM BLACKSTONE, 1 COMMENTARIES \*53 (discussing the nature of law); see 1 THE COLLECTED WORKS OF JAMES WILSON 741 (Kermit L. Hall & Mark David Hall eds., 2007) (asserting that the later of two inconsistent laws “is the only existing law”).

111 For this usage of “not a law” or “no law at all,” see, as an example, Prakash, *supra* note 9, at 1665.

112 This expression “Standard Justification” comes from Charles Hobson. See CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 60–61 (1996).

113 See, e.g., SNOWISS, *supra* note 46, at 42 (“The convention debates . . . indicate that in 1787 fundamental law was understood to bind morally and politically, not legally.”); Wood, *supra* note 31, at 161–65 (“The courts might on occasion set aside legislation that violated fundamental law, but such an act could not be part of routine judicial business; it necessarily had to be an extraordinary expression of public authority, the kind of extreme and remarkable action the people themselves would take if they could. This kind of judicial review was, as it had been aptly described, a ‘substitute for revolution.’” (citation omitted)).

damental law; it regulated the government, not the people.<sup>114</sup> Courts promulgated and applied ordinary law, which regulated the people. Thus Premise 3 is not sufficient for judicial review. Its role in the Standard Justification is, rather, to show why courts should privilege the constitution over an inconsistent act of the assembly. Other premises have to get us into court in the first place. With this point in mind, we can think of the propositions of the Standard Justification as playing four basic roles, here in order: (1) describe the judicial office; (2) show that the constitution naturally figures into that office; (3) provide a reason to privilege the constitution; and (4) conclude that a court is duty-bound to give the constitution effect.

The most significant premise in Iredell's argument is, therefore, the first one: that there is a judicial duty to decide cases according to the laws of the state. The burden of the argument really rests here, and, indeed, Premises 2 and 3 were relatively well accepted at the time "To the Public" was written.<sup>115</sup> Yet Premise 1 is far from obvious, and, after pausing to examine it, we may wonder whether Iredell has simply begged the question. Why is it the duty of the judiciary, after all, to decide cases according to *all* the laws of the state? Why consider the constitution, even if it is a law? The constitution is obviously different in kind from ordinary law; and it is easy to describe a system in which courts ignore fundamental law. A court might be obligated merely to decide cases in conformance with those laws *duly enacted* by the state legislature, regardless of whether the laws violate substantive

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114 See, e.g., KRAMER, *supra* note 34, at 29 ("Fundamental law was different from ordinary law, or what we typically think of today as ordinary law, both in its conceptual underpinnings and in actual operation. It was law created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government and restrain the people."); SNOWISS, *supra* note 46, at 90–91 (discussing the difference between fundamental and ordinary law).

115 For Premise 2, see HAMBURGER, *supra* note 44, at 293 (highlighting that Americans believed "constitutions were laws"). In assessing Premise 2, it is important to understand that it does not entail that a constitution is cognizable in a court of law. See SNOWISS, *supra* note 46, at 49 (discussing Iredell's view of the cognizability of constitutions in court). In other words, to deny judicial review, one need not maintain that a constitution is *purely* a social compact, and not a law; one can argue that it is a fundamental law, and that fundamental laws are not cognizable in court. For Premise 3, see Prakash, *supra* note 9, at 1658 (providing examples of early American leaders who espoused this view). See also SNOWISS, *supra* note 46, at 49 ("The judicial duty to decide according to the laws of the state meant that the judiciary was precluded from enforcing legislation that by violating the constitution was void or not law.").

constitutional limitations.<sup>116</sup> Or the constitution might function hortatively, as it does in a number of regimes.<sup>117</sup>

Premise 1, it would seem, is in need of its own justification. A number of different justifications are possible, but I want to focus on two suggested by the text of “To the Public” and present in other leading period defenses of judicial review. The first justification is based on the idea of *constitutional agency*. Roughly, constitutional agency is the idea that judges are the agents of the people. Iredell closes his argument in the passage above by gently admonishing North Carolina judges that they hold their office “*for the benefit of the whole people*.” They are not, he reminds them, “mere servants of the Assembly.”<sup>118</sup> Because judges are agents of the people, and not the assembly, they “must take care at their peril” to enforce only laws that comply with their principal’s constitution.<sup>119</sup> To do otherwise would be, in effect, to *disobey* the principal. As Iredell put the matter in a subsequent letter to Richard Dobbs Spaight, then a delegate at the federal convention in Philadelphia, “either . . . the fundamental un-repealable law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people . . . .”<sup>120</sup> Since one disobeys what one does not obey, Iredell’s implication is clear: judges who gave effect to unconstitutional laws “themselves would be lawbreakers, acting without lawful authority.”<sup>121</sup> To remain within the bounds of their authority, judges must decide cases in conformance with the constitution.

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116 See *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting) (“[I]t is by no means clear, that to declare a law void that has been enacted according to the forms prescribed in the constitution, is not a usurpation of legislative power.”).

117 See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 18–20 (1969) (“[A] variety of excellent purposes are felt to be served in other countries with similar constitutional provisions without detracting from the positive law effect of all legislative acts.”); see also HAINES, *supra* note 93, at 201 (discussing opinions about the result in *Rutgers v. Waddington*).

118 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *supra* note 84, at 148. See also *supra* Part I.A (discussing the separation of powers doctrine). Iredell’s whole line of reasoning presupposes the shift in thinking Wood describes, in which the people conceived of themselves as standing outside government entirely. Were the people understood as *part* of the government in the state assembly, it would follow from popular sovereignty that the courts of law *were* servants of the assembly.

119 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *supra* note 84, at 148.

120 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *supra* note 84, at 173.

121 KRAMER, *supra* note 34, at 63 (internal quotations omitted).

This concept of constitutional agency lay at the center of a cluster of interrelated ideas, whose distinctions were not always made explicit. Thus, it was said that agency implied a *duty*: a duty not to act without constitutional authority,<sup>122</sup> or a duty to resist unlawful power,<sup>123</sup> or perhaps a duty not to ‘aid and abet’ another in violating the constitution.<sup>124</sup> There were a number of suggestions. To be sure, none was entirely without difficulty. Where law imposes any kind of duty, failure to satisfy that duty is a violation; and the conclusion that a judge “violates” the constitution by giving effect to an unconstitutional law has seemed to some too strong.<sup>125</sup> Another common suggestion was that the legislature’s violation justified others in resisting the unconstitutional act.<sup>126</sup> A judge *could* resist, even if he did not *have to*. This, too, might be connected to judicial review. In his *Lectures in Law*, delivered in the early 1790s, James Wilson argued that “whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that,

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122 Several theories are possible here. An unconstitutional law might rob a court of jurisdiction. See 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA* 553 (2d ed. 1836) (quoting John Marshall as saying, “[i]f they were to make a law not warranted by any of the powers enumerated, . . . [the judges] would not consider such a law as coming under their jurisdiction. They would declare it void.”). Alternatively, enforcing an unconstitutional law might violate a judge’s oath of office. See SCHWARTZ, *supra* note 91, at 423.

123 See, e.g., WILLOUGHBY BERTLE ABINGDON, *THOUGHTS ON THE LETTER OF EDMUND BURKE TO THE SHERIFFS OF BRISTOL, ON THE AFFAIRS OF AMERICA* 17 (1777), available at <http://archive.org/details/thoughtsonletter00abinuoft> (“Obedience is due to the Laws, when founded on the Constitution; but when they are subversive of the Constitution, then disobedience instead of obedience is due.”); see also 1 GOEBEL, *supra* note 87, at 127 (noting the popularity of the Abingdon pamphlet in the states); KRAMER, *supra* note 34, at 98 (“[Courts] justified their refusal to enforce laws as a ‘political-legal’ act on behalf of the people, a responsibility required by their position as the people’s faithful agents.”).

124 See *Kamper v. Hawkins*, 1 Va. Cas. 20, 59 (Va. 1793) (Opinion of Tyler, J.) (“[C]an one branch of the government call upon another to aid in the violation of this sacred letter? The answer to these questions must be in the negative.”).

125 See *Eakin v. Raub*, 12 Serg. & Rawle, 330, 357 (Pa. 1825) (Gibson, J., dissenting) (“I grant, however, that the state judiciary ought not to exercise the power [to deem a law unconstitutional], except in cases free from all doubt, because, as a writ of error to the supreme court of the United States lies to correct an error only in favor of the constitutionality of the state law, an error in deciding against it would be irremediable.”); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1398 (2003) (“[Chief Justice] Marshall pointed out that for judges to fail to enforce the Constitution, when they have adjudged legislation to be in violation of it, would be for them to *violate the Constitution themselves*. Although the term, ‘violate,’ may express his point a shade too emphatically for our taste, there is no escape from his point.” (internal quotations omitted)).

126 See, e.g., 2 ELLIOT, *supra* note 122, at 111 (quoting Theophilus Parsons as saying “[a]n act of usurpation is not obligatory, it is not law, and any man may be *justified in his resistance*.”) (emphasis added).



when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge . . . .”<sup>127</sup> The judiciary would thus be justified in resisting the legislature by refusing to enforce the law.<sup>128</sup> This idea, too, was somewhat of an imperfect fit. To invoke Wilson’s reasoning, one must conceive of the judiciary as being “obliged to obey” *all* legislative acts—not just those that expressly command courts or judicial officers to do something.<sup>129</sup> Yet the notion was a common one.

A second justification for Premise 1 focuses on the duty to *apply the law*.<sup>130</sup> The particular duty of the judicial power, says Iredell, is to decide “cases” according to the laws of the state.<sup>131</sup> This duty entails a set of further tasks. The tasks are familiar—they are the workaday norms of decision-making in courts of law. Thus, to decide a case according to the laws of the state, a judge must first determine what the laws of the state are; and to determine what the laws of the state are, the judge must make sense of how different laws that are potentially relevant fit together. The constitution is one such law. It is, Iredell tells us, “*fundamental law*.” It follows that the judge must determine how ordinary acts of the assembly fit together with the Constitution. If they are inconsistent, the judge must give effect to the constitution, since it is “superior law.” In this way, reasons Iredell, judicial review “is not a usurped or discretionary power, but one *inevitably resulting from the constitution of their office*.”<sup>132</sup> The judge’s office requires him to consider the constitution, in addition to ordinary law.<sup>133</sup>

127 1 THE COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 572.

128 See KRAMER, *supra* note 34, at 63 (“In refusing to enforce unconstitutional laws, judges were exercising the people’s authority to resist, providing a supplemental remedy for ultra vires legislative acts . . . .”); Treanor, *supra* note 44, at 534 (making a similar point); cf. HAMBURGER, *supra* note 44, at 276–77 (discussing judicial refusal to use stamped paper during the 1765 Stamp Act controversy); HAMBURGER, *supra* note 44, at 559–74 (discussing *Cases of the Judges*).

129 Alternatively, one could infer that judicial review is limited to acts that do expressly require the judiciary to do something. See Clinton, *supra* note 24, at 88–89.

130 See HOBSON, *supra* note 112, at 64 (discussing judges’ duties to enforce law); SNOWISS, *supra* note 46, at 49 (discussing that the Constitution is subject to judicial application).

131 See HAMBURGER, *supra* note 44, at 464 (noting Iredell’s conception of judicial duty). Hamburger’s treatment of “To the Public” focuses on this aspect of Iredell’s argument.

132 Iredell, *supra* note 84, at 148 (emphasis added).

133 See Treanor, *supra* note 44, at 523 (describing this argument made by Tucker in *Commonwealth v. Caton*). Even Sylvia Snowiss, who has contended that American judges of the late eighteenth century lacked the authority to expound fundamental law, agrees that these judges could “consider” the Constitution in the course of expounding ordinary law. See SNOWISS, *supra* note 46, at 48–55 (observing that “[t]he judiciary could legitimately take notice of the constitution”); Snowiss, *supra* note 76, at 236 (“The judiciary must resort to or take notice of the constitution in order to fulfill its assigned responsibility to expound ordinary law . . .”).

If we want, we can think of these two justifications as supporting two different ‘versions’ of the Standard Justification. One version is based, ultimately, on the idea of constitutional agency, the other on a duty to apply the law. Both ideas were widely employed in the period.<sup>134</sup> And both ideas can be made to support an executive power of non-enforcement.

*C. From the Standard Justification to the Non-Enforcement Argument*

Nothing in either version of the Standard Justification appears to turn on the unique features of the judicial office. Take the first version, based on the idea of constitutional agency. If the judge is a constitutional agent of the people, then he ought to resist, or refuse to “aid and abet,” legislative violations of the Constitution. In the very least he is authorized to resist such violations.<sup>135</sup> Yet the judge is not distinguished from the executive insofar as he is a constitutional agent of the people. The President is also the people’s agent; so if agency itself implies a duty, or an authority, to resist another agent’s unconstitutional action, then it implies such a duty in both the judiciary and the executive.<sup>136</sup>

We can make a similar argument using the second version of the Standard Justification, based on the duty to apply the law. Adjudicating a case by the law of the land requires the judge to determine what that law is, and that process requires ironing out conflicts of law. This includes the Constitution, since the Constitution is law. But it is easy to see that this does not distinguish the judiciary from the executive. The executive also applies the law, in the sense that he enforces it or executes it.<sup>137</sup> Since he applies the law, he must interpret the law.

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<sup>134</sup> See HAMBURGER, *supra* note 44, at 395–461 (examining the role of judicial duty to apply the law in the justification of judicial review); KRAMER, *supra* note 34, at 57–72 (examining the role of constitutional agency).

<sup>135</sup> See *supra* notes 122–29 and accompanying text.

<sup>136</sup> See Paulsen, *supra* note 15, at 244–45, 252–55 (discussing the idea of constitutional interpretation and how it is affected by the separation of powers in the opinions of Marshall and Wilson); cf. Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373–74 (1994) (arguing that all “institutional officials need concern themselves with questions of constitutional interpretation by monitoring their own decisions and, just as important, by monitoring other institutional actors to ensure that they, too, comply with constitutional norms”).

<sup>137</sup> See Kramer, *supra* note 11, at 83 (“[J]udges, no less than any other citizen or government official, were bound to take notice of the Constitution if and when it became relevant in the ordinary course of business.”) (emphasis added); Prakash & Yoo, *supra* note 9, at 924–25 (“[T]he President must be able to determine whether a federal statute is a valid one; in other words, whether it conforms to the paramount law of the Constitution.”).

Since the Constitution is law, he must interpret the Constitution; and since the Constitution is supreme law, he must privilege the Constitution in his interpretation.<sup>138</sup> It is worth noting that the Constitution's text provides an additional footing for this argument. The Take Care Clause commands the President to "take Care that the Laws be faithfully executed."<sup>139</sup> The Constitution is law, so the President must take care it is executed; and it is supreme law, so he must take care to privilege it above inconsistent ordinary law.<sup>140</sup> This is the power of non-enforcement.

We can highlight the parallel between the judiciary and the executive by modifying our formulation of Iredell's argument in "To the Public." That formulation, recall, was the following:

- P1. The duty of the judicial power in all cases is to decide according to (and only to) the laws of the state.
- P2. The Constitution is a law of the state.
- P3. An unconstitutional act of the assembly is void, and thus not a law of the state.
- C. If the judicial power decides according to an unconstitutional act of the assembly, rather than the Constitution, it does not decide according to the laws of the state, and thus it violates its duty.

It takes relatively little imagination to see how the argument would go in the case of the President.

#### The Non-Enforcement Argument

- P1'. The duty of the executive power is to execute the laws of the state.
- P2. The Constitution is a law of the state.
- P3. An unconstitutional act of the assembly is void, and thus not a law of the state.

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<sup>138</sup> See Easterbrook, *supra* note 16, at 919 (comparing how judges and the President must treat the Constitution).

<sup>139</sup> U.S. CONST. art. II, § 3.

<sup>140</sup> See Delahunty & Yoo, *supra* note 9, at 798–801 (discussing [t]he President's [d]uty to [e]nforce the [l]aw"); Easterbrook, *supra* note 16, at 919 (discussing the implication of the Take Care Clause on the President); Prakash, *supra* note 9, at 1631–33 (discussing the potential limits of the Faithful Execution Clause on the President). *But see* Miller, *supra* note 17, at 397 (arguing that giving the President power to easily strike down laws would give the "United States . . . a king for president"). Similar arguments can be developed from the Article II Oath Clause and the Article II Vesting Clause. See Lawson & Moore, *supra* note 13, at 1281–82 (discussing the Vesting Clause); Paulsen, *supra* note 15, at 257–62 (discussing the Oath Clause).

C'. If the executive power executes an unconstitutional act of the assembly, rather than the Constitution, it does not execute the laws of the state, and thus it violates its duty.

If the Standard Justification is valid, then the modified argument below it is also valid, since its formal validity does not turn on the substantive difference between the judiciary and the executive. Thus, if the modified premise, P1', is true, then the President has a power of non-enforcement. I will assume that the modified premise is true.

This is what I call the "Non-Enforcement Argument." There is something to recommend it, as I have tried to show. Nevertheless, I think the Framers almost certainly would have rejected the argument. More precisely, I think they would have rejected it *even though* (1) they accepted the power of each department to interpret the Constitution, and (2) they accepted judicial review (most of them, anyway). But how could the Framers have held these three views consistently? My aim in the next two Parts is to show how, beginning with the rejection of non-enforcement.

## II. TWO PROBLEMS WITH THE NON-ENFORCEMENT ARGUMENT

There are two principal problems with the Non-Enforcement Argument. First, no one drew the conclusion. Prior to ratification, there is only one known instance of an explicit defense of a presidential power of non-enforcement. Yet the premises of the argument were widely accepted;<sup>141</sup> and the parallel inference—from the Standard Justification to a putative power of judicial review—was widespread, if not common.<sup>142</sup> In the first decade after ratification, as the Standard Justification achieved greater acceptance,<sup>143</sup> defenses of non-enforcement remain absent from the historical record. This needs explaining. Whatever else they were, the Framers were ready practitioners of the constitutional syllogism. They had reasons to defend non-enforcement. So if the Non-Enforcement Argument is simply a corollary of the Standard Justification, we should expect the Framers, or at least some of them, to have drawn its conclusion.<sup>144</sup>

141 See *supra* Parts I.B–C.

142 Prakash, *supra* note 9, at 1659 ("It certainly is true that references to judicial review during the Constitution's creation substantially outnumber references to a President's duty to disregard unconstitutional statutes.").

143 See, e.g., KRAMER, *supra* note 34, at 98 ("What achieved acceptance in the 1790s was the theory of review formulated by men like James Iredell in the 1780s."); Treanor, *supra* note 44, at 519 ("[J]udicial review early won surprisingly broad acceptance in Virginia.").

144 I am not assuming that the Framers drew all conclusions logically implied by other views they held. The point is that they had *reason* to conclude that executives had a non-

Yet, second, a number of leading Framers actually advanced positions *inconsistent* with the conclusion of the Non-Enforcement Argument. Generally, thinking about the role of executives in constitutional enforcement remained relatively unfocused in the 1780s and early 1790s. Yet where the course of argument would have made it natural to cite a presidential power to decline to enforce the law on constitutional grounds, discussants remained silent, or made concessions at odds with such a power. Even as the party conflict of the 1790s crystalized around questions of executive power, Federalists and Republicans continued to express views of the President inconsistent with non-enforcement. This is particularly true of Republicans, who professed horror at the abuse of executive authority they saw in the Adams administration.<sup>145</sup>

Taken together, these points suggest that something is amiss with the Non-Enforcement Argument. By extension, they also suggest a problem with our formulation of Iredell's Standard Justification for judicial review. Indeed, when we take a closer look at the Standard Justification with these points in mind, it becomes apparent that something more is necessary—something that shows why it is appropriate to hear and determine questions of constitutional meaning in the institutional setting of a court of law.

#### A. *A Lack of Evidence*

The delegates at Philadelphia who most influenced the federal presidency were agreed that executive power under the state constitutions had proven defective.<sup>146</sup> With the exception of New York, the first state constitutions had bound their chief magistrates to councils and to the legislature itself, and deprived them of traditional royal 'executive' powers, like pardon and appointment. In some cases, the

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enforcement power, and that these very reasons account for the development of judicial review. See Corwin, *supra* note 72, at 521 (describing the veto and judicial review as the two principal constitutional solutions to "the legislative vortex" of the 1780s).

145 LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 249–50 (1978).

146 See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 22, 52–54 (1923) ("State experieeces thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature . . ."). The exception here is Roger Sherman of Connecticut, but Sherman's influence on the ultimate form of Article II is questionable. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, 10–11 (Randall W. Bland et al. eds., 5th ed. 1984) (quoting Madison as stating that Sherman regarded the "Executive magistracy as nothing more than an institution for carrying the will of the legislature into effect . . ." (citation omitted)); THACH, *supra*, at 89 (explaining that the Convention rejected the "complete subordination of the executive" and Sherman's conception of the Executive magistracy).

state governor or president (as the office might be called) was essentially the presiding officer of an executive council, elected by and responsible to the popular assembly—which, in turn, proceeded to divest him of power when it thought wise.<sup>147</sup> These deficiencies were addressed in the wave of state constitutional reform described above, in particular in Massachusetts and New Hampshire.<sup>148</sup> Yet, in a number of ways, these reforms did not rest on a substantial, fully republican conception of the office. That remained elusive, and would through much of the Philadelphia Convention. While Madison focused on the design of a national legislature and its relationship to the states, he confessed in the spring of 1787 to having few concrete ideas about the form a national executive should take.<sup>149</sup>

Few in the states associated the office of chief magistrate with the protective function of constitutional exposition or interpretation.<sup>150</sup> Only two states granted their executives vetoes.<sup>151</sup> In New York, where the veto was used with some success in policing constitutional boundaries, it was lodged *not* in the state executive, but in a judicially enforced Council of Revision;<sup>152</sup> and when New York's Council wanted to authoritatively pronounce on the meaning of the state's Constitution, its veto message was composed in the style and tone of a judicial opinion.<sup>153</sup> Nor did the mimicry fully convince, given the procedural

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147 See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 270–71 (2001); THACH, *supra* note 146, at 28–29 (discussing the limitations on the power of state executives).

148 See WOOD, *EMPIRE*, *supra* note 77, at 434–35 (“Reformers sought to center magisterial responsibility in the governors by making the executive councils more advisory than they were in the early Revolutionary constitutions. They also sought to make governors less dependent on legislature, especially in election.”).

149 See THACH, *supra* note 146, at 81 (“The truth is that Madison’s views on executive power were extremely vague when he came to Philadelphia in 1787.”); THACH, *supra* note 146, at 83 (quoting Letter of James Madison to George Washington, April 16, 1787, expressing this uncertainty).

150 In the Philadelphia Convention, Gouverneur Morris described the executive as “the great protector of the Mass of the people.” See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 52 (Max Farrand ed., 1911).

151 Massachusetts is the other state that had a gubernatorial veto before 1787. See MASS. CONST. of 1780 ch. I, § I, art. II.

152 See ADAMS, *supra* note 147, at 271; see also THACH, *supra* note 146, at 40–54 (comparing the constitutional supremacy in New York through the council with other states and the tension created with the state legislature). South Carolina’s Constitution of 1776 also included a veto, but this constitution was never submitted to the voters for ratification. S.C. CONST. OF 1776 art. VII.

153 See Jeff Roedel, *Stoking the Doctrinal Furnace: Judicial Review and the New York Council of Revision*, 69 N.Y. HIST. 261, 270 (1988) (articulating that when the Council of Revision vetoed a law on constitutional grounds, it “clearly sounded like a court”); see also *id.* at 272 (“The Council demonstrated its judicial character most clearly when its language carried a de-

differences between the Council and a court. In *Rutgers*, Chief Judge Duane would draw a distinction in *Rutgers* between a decision of the Council and adjudication in a court of law on these grounds.<sup>154</sup> In no case did a state give its governor or president a power to refuse to enforce duly enacted law. As a general matter, state executives gave force to valid judgments entered by state courts and did not claim a power to expound the law themselves, although one can find isolated counterexamples.<sup>155</sup> During the Revolutionary War, in which Pennsylvania Executive Council President John Dickinson refused to carry out a warrant of execution issued by the state supreme court against Aaron Doan on a bill of attainder.<sup>156</sup> Apparently, the power claimed by President Dickinson did not set an example. As for Dickinson himself, his comments in Philadelphia on the proposed national executive bear no visible traces of the Doan confrontation.<sup>157</sup>

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liberative tone. . . . In its deliberative character, the Council offered commentary on the law . . . . Particularly significant, then, are Council vetoes that rested on the superior law of the state constitution. There the Council adopted a judicial tenor of language and analysis that clearly foreshadowed judicial review.”); cf. STIMSON, *supra* note 80, at 116 (arguing that the Council of Revision was not a precedent for judicial review).

154 See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 90, at 416 (“[S]urely the respect, which we owe to this honorable Council, ought not to carry us to such lengths; it is not to be supposed that their assent or objection to a bill, can have the force of an *adjudication*: for what, in such a case, would be the fate of a law that prevailed against their sentiments? Besides in the hurry of a session, and especially flagrento bello, they have neither leisure nor means to weigh the extent and consequences of a law, whose provisions are general, at least not with that accuracy and solemnity, which must be necessary to render their reasons incontrovertible, and their opinions absolute.”).

155 See HAMBURGER, *supra* note 44, at 544 (“Among those who accepted the force of judgments were the executive officers of the states.”).

156 See *Respublica v. Doan*, 1 Dall. 86, 93 (Pa. 1784) (holding that the execution of Doan was legal and upholding the warrant for execution); see also G. S. Rowe, *Outlawry in Pennsylvania, 1782–1788 and the Achievement of an Independent State Judiciary*, 20 AM. J. LEGAL HIST. 227, 230–33 (1976) (illustrating the Supreme Executive Council’s refusal to execute the warrant for Doan); LEONARD W. LEVY, *ORIGINS OF THE BILLS OF RIGHTS 77–78* (2001); cf. *The Constitutionalist*, No. 11, THE FREEMAN’S JOURNAL, Dec. 31, 1783, at 1 (describing the refusal by the Georgia governor to give effect to a resolution by the state legislature reversing an act of attainder and banishment).

157 See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 85–87 (noting Dickinson’s remarks at the Federal Convention of 1787); see also, e.g., *id.* at 108–09 (“[Y]ou propose to give the Executive a share in Legislation—why not the Judicial—There is a Difference—the Judges must interpret the Laws they ought not to be Legislators. The Executive is merely ministerial . . . .”); Rufus King, Notes in Federal Convention of 1787 (unpublished manuscript) available at [http://avalon.law.yale.edu/18th\\_century/king.asp](http://avalon.law.yale.edu/18th_century/king.asp) (“Dickinson opposed—you shd. separate the Departments—you have given the Executive a share in Legislation; and it is asked why not give a share to the judicial power. Because the Judges are to interpret the Laws, and therefore shd. have no share in making them—not so with the executive whose causing the Laws to be executed is a ministerial office only.”).

At the national level, there is little support for the view that anyone, prior to 1789, thought the Constitution conferred a presidential power of non-enforcement.<sup>158</sup> Only one explicit endorsement is known. It came from James Wilson in the second week of the Pennsylvania ratifying convention. The convention had gotten off to a rocky start. Following a heated dispute over rules of procedure, delegates turned to an examination of Article I, in hope, said Thomas McKean, that “a spirit of conciliation and coolness may prevail.”<sup>159</sup> As Pauline Maier has shown, what actually did prevail was “pandemonium,” punctuated by lengthy orations that did little to persuade opponents.<sup>160</sup> The chief concerns about Article I voiced by those in opposition to ratification were real. On November 28, John Smilie pointed to the absence of any bill of rights; McKean and Wilson responded that no bill of rights was necessary because Congress was limited to enumerated powers.<sup>161</sup> After a dispute over whether Virginia’s Constitution contained a bill of rights (Wilson erroneously claimed it did not), Robert Whitehill made an important point in rejoinder: “If indeed the Constitution itself so well defined the powers of the government that no mistake could arise . . . then we might be satisfied without an explicit reservation of those rights.”<sup>162</sup> But, he said, the powers were not well defined; they were “unlimited” and “undefined.”<sup>163</sup> In fact, observed John Smilie, the language of Article I, section 8, was so broad that it would support a “complete system of government” and thereby effect a *consolidation of the states*.<sup>164</sup>

Consolidation became the leading issue over the next few days. Delegates returned to it repeatedly. On December 1, after several failed attempts to quiet the concern, Wilson again took up the issue.<sup>165</sup> His strategy that day proved well-conceived. He began by

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<sup>158</sup> The most extensive discussion of this point can be found in MAY, *supra* note 17, at 867.

<sup>159</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 380 (Merrill Jensen ed., 2001).

<sup>160</sup> PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 106–11 (2010) (discussing debates that “stretched out over twenty-two increasingly tense and exhausting days”).

<sup>161</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 384–88 (reprinting these statements).

<sup>162</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 393.

<sup>163</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 428.

<sup>164</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 408; *see* MAIER, *supra* note 160, at 110 (providing a report by a Pennsylvania newspaper that characterized the federal government as a “consolidation”).

<sup>165</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 445–46.



denying the premise of the argument. The states did not possess sovereign power, he argued, and thus could not be deprived of it by consolidation. The *people* were sovereign, and the people could choose to distribute authority among different governments as they thought most conducive.<sup>166</sup> Under the proposed Constitution, the people would distribute only a portion of the legislative power to the national government. The national legislature, in turn, would be kept to these limits by a variety of devices, including “a division of power in the legislative body itself,” “the PEOPLE themselves,” and—most important for our purposes—by “the interference of those officers, who will be introduced into the executive and judicial departments.”<sup>167</sup> Wilson then elaborated:

[I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it . . . but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. And [independent] judges . . . will behave with intrepidity and refuse to the act the sanction of judicial authority. In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.<sup>168</sup>

Non-enforcement would thus preserve a measure of legislative authority for the states.

It is clear that Wilson is endorsing the non-enforcement power. He is not referring to the qualified veto, since he describes the President as refusing to carry into effect “an act,” rather than a bill, and he addresses the veto power expressly a short time later.<sup>169</sup> Nor is he referring to the pardon or to the President’s prosecutorial discretion, since he says nothing of remitting or dispensing with the prosecution of a crime.<sup>170</sup> Wilson’s language does leave the scope of non-enforcement somewhat unclear. He describes the President as using the power to “shield himself,” which could mean he thought non-enforcement was limited to preventing other departments from

166 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 448 ([M]y position is that the sovereignty resides with the people . . .); see MAIER, *supra* note 160, at 109 (highlighting Wilson’s view that the people are the sovereign).

167 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 450.

168 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 450–451.

169 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 452–53 (describing the process of how the President may exercise the veto power).

170 See Wilson’s discussion of the pardon in *Lectures on Law*. 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 879–84.

usurping executive authority.<sup>171</sup> In contrast, some have suggested that Wilson's language reflects the idea, common at the time, that an officer who gave effect to an unconstitutional law would himself violate the Constitution.<sup>172</sup> Of course, as we have seen, there were other versions of the Standard Justification, also in circulation, that carried no such implication.<sup>173</sup> Wilson himself advanced such a version several years later in his *Lectures on Law*.<sup>174</sup> Moreover, Wilson's language at the convention suggests a contrast between the judicial *duty* to pronounce the law void and the President's *authority* to do so ("the President . . . *could* shield himself")—implying that the President would not violate his constitutional duty by executing an unconstitutional law. Still, there would be little point, in the context of a discussion about consolidation, to adduce a non-enforcement power limited to interbranch defense, for such a power would be of little use in preventing the national legislature from encroaching on the states. The scope of a non-enforcement/anti-consolidation power would have to be broader than presidential self-defense, whether or not the President violated the Constitution by giving effect to an unconstitutional law.

Wilson's endorsement is clear, but it was also isolated.<sup>175</sup> It was a brief remark in the midst of what was supposed to be a discussion of the merits of Article I. Apparently, the remark fell on deaf ears. As far as we know, it drew no response from the vocal opposition led by Smilie, Whitehill, and William Findley. Wilson's principal ally, McKean, did not pick up on the point. There was no response in the gallery, or in the press. Perhaps his audience missed the comment entirely. They could be forgiven; Wilson was prone to long lectures at the convention, and it is unclear how many delegates paid atten-

171 As has been often noted, a number of delegates at the Philadelphia Convention described judicial review as a defensive power. Wilson was among them. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 73 (noting that Wilson viewed the judiciary would strike down laws in order to defend constitutional rights).

172 See, e.g., Paulsen, *supra* note 15, at 253 (interpreting Wilson's statement this way).

173 See *supra* Part I.B. Notably, John Smilie advanced a contrary view at the convention. He argued that federal judges would refuse to hold a law invalid out of a fear that Congress would impeach them for "disobeying a law." In the case of non-enforcement, Smilie's view implies that the President would *expose* himself to liability, not shield himself, by refusing to enforce an unconstitutional law. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 466.

174 See 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 572 ("[W]hoever would be obliged to obey a constitutional law, is *justified in refusing* to obey an unconstitutional act of the legislature . . ." (emphasis added)).

175 In the memorable malaprop of the ABA Task Force on Presidential Signing Statements, it was a "vagrant remark." Prakash, *supra* note 9, at 1659 n.182 (citing ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE).

tion to the details.<sup>176</sup> Wilson himself did not return to the point, although the issues that led him to broach it on December 1 did reappear.<sup>177</sup> He brought up judicial review again on December 7, and his comments were reported in the press.<sup>178</sup> No mention was made of presidential non-enforcement. He thus gave the matter a grand total of one sentence in the convention. Nor did Wilson offer a defense of non-enforcement in his ambitious and systematic *Lectures on Law*.<sup>179</sup> There he adopted the Standard Justification for judicial review,<sup>180</sup> but focused his discussion of presidential authority almost entirely on the pardon power.<sup>181</sup> Courts, said Wilson, were the “noble guard against legislative despotism,” before the “great and last resort” of the people.<sup>182</sup>

While Wilson’s is the only known explicit endorsement of non-enforcement prior to ratification, there were a number of near misses. In the Massachusetts convention, the eminent Theophilus Parsons argued that if Congress were to enact a law that infringed individual rights, “the act would be a nullity, and could not be enforced.”<sup>183</sup> Parsons’s comment is obviously equivocal as between judicial review and presidential non-enforcement.<sup>184</sup> Before the convention, delegate William Symmes had expressed anxiety that the President’s obligation under the Take Care Clause might be insuffi-

176 See MAIER, *supra* note 160, at 114 (describing a speech delivered by Wilson and remarking, “[i]ts printed version remains powerful, but how closely did his fellow delegates listen to it?”).

177 See MAIER, *supra* note 160, at 111–20 (describing the chaotic nature of the remainder of the convention).

178 See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 517, 524–25 (providing the comments by Wilson and the newspaper reports).

179 See KRAMER, *supra* note 34, at 99 (“Wilson wanted nothing less than to produce a complete philosophy of American law . . .”).

180 See SNOWISS, *supra* note 46, at 76 (quoting Wilson when he asserted that the judicial branch should act as a check against the legislative department’s constitutional violations).

181 See 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 879–84 (discussing the pardon power). Wilson suggests that the “executive” can “prevent[]” legislative excess, and that he has a “right to judge” whether an act of the legislature is constitutional. The point is that Wilson does not argue that this “right to judge” implies a presidential power of non-enforcement. 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 572.

182 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 743, 203.

183 2 ELLIOT, *supra* note 122, at 162.

184 Unfortunately, nothing about the context—a discussion of whether the Constitution should have a bill of rights—shows whether Parsons had presidential non-enforcement in mind. Some have read Parsons to support jury review. See RAOUL BERGER, CONGRESS V. THE SUPREME COURT 55, 177 (1969) (noting “[Parsons] stated that if in consequence of resistance the government brought a criminal prosecution, a jury of [his] ‘own fellow citizens w[ould] pronounce him innocent’”) (citation omitted).

cient to prevent him from ignoring congressional directives as to how federal law should be enforced.<sup>185</sup> Symmes, an anti-federalist, did not think the executive should have such a power. Apparently his concern was answered, or forgotten, because he did not raise it at the convention.<sup>186</sup>

Also suggestive are Madison's comments in October 1788, shortly after the Constitution had taken effect. In his "Observations on the Draught of a Constitution for Virginia," Madison observed that courts, "by refusing or not refusing to execute a law," had been able "to stamp it with its final character," a result that made the judicial department "paramount in fact to the Legislature, which was never intended, and can never be proper."<sup>187</sup> The language clearly suggests doubts about judicial review in a constitutional system that made courts independent of the legislature. Yet the point does not support non-enforcement. Were the President to have a power of non-enforcement, it would, by Madison's reasoning, fall to *the President* to "stamp [the law] with its final character," making *him* superior to the legislature—a result also inconsistent with departmental coordinacy and republicanism.<sup>188</sup> A more republican solution to Madison's concern was described by the anti-federalist Brutus. Six months before "Observations," in the spring of 1788, Brutus had observed precisely the same problem, arguing that it arose because the national legislature could not hear appeals from the Supreme Court.<sup>189</sup> Publius, of course, rejected the idea.<sup>190</sup> Much later, in the midst of the controversy over the Virginia Resolution, Madison conceded that "the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort . . . in relation to the authorities of the other departments."<sup>191</sup>

185 See MAY, *supra* note 17, at 27 (noting Symmes' concern).

186 See *id.* ("These fears were apparently put to rest.").

187 5 THE WRITINGS OF JAMES MADISON, *supra* note 39, at 284, 294 (Galliard Hunt ed., 1904).

188 See *infra* notes 237–51 and accompanying text.

189 See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 295, 306–07 (Ralph Ketcham ed., 2003) (expressing concern over the Supreme Court's power).

190 See THE FEDERALIST NO. 78 (Alexander Hamilton) (addressing Brutus's argument).

191 See James Madison, *The Report of 1800*, in 17 PAPERS OF JAMES MADISON 311 (Robert A. Rutland et al. eds., 1977). Madison argued that the Virginia Resolution had not usurped judicial power because it had merely "express[ed an] opinion, unaccompanied with any other effect than what [it] may produce on opinion, by exciting reflection." *Id.* at 259. In contrast, he said, "[t]he expositions of the judiciary . . . are carried into immediate effect [and] enforce[] the general will." *Id.* This reflects the distinction between merely interpreting the Constitution and refusing to enforce an unconstitutional law. Cf. H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C.L. REV. 949, 983–84 (1993) (observing that "Madison firmly believed in an active interpretive role for both the

To be sure, there is no need to insist on a delicate reading of Madison's language in "Observations." The point does not depend on "Observations," or any other statement in the rather tangled body of commentary Madison left us on this topic.<sup>192</sup> We may assume that a number of endorsements of non-enforcement escaped the historical record, and that there are others preserved somewhere, but presently unknown. The existence of these endorsements does not change the analysis. In one study, Sai Prakash and John Yoo found a total of 109 discussions of judicial review of federal law during the ratification process, either in a convention or in pamphlets or essays published during the pendency of a convention.<sup>193</sup> It is impossible that a comparable number of discussions of presidential non-enforcement have escaped notice.<sup>194</sup> There was simply no sustained, public discussion of such a power, and *a fortiori* no such defense of it.

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executive and legislative branches," but distinguished departmental expressions of opinion about constitutional meaning from "the enforceable 'expositions of the judiciary'" (quoting James Madison, *The Report of 1800*, in 17 PAPERS OF JAMES MADISON, *supra*, at 348)); *see also infra* notes 423–430 and accompanying text.

- 192 On the difficulty of reconciling Madison's various claims about constitutional enforcement, *see* KRAMER, *supra* note 34, at 146; *see also* BERGER, *supra* note 184, at 70–71 ("Undeniably Madison was inconsistent over the years . . ."). There are other snippets from Madison's writings that could be adduced to support non-enforcement, but the result is largely the same. Madison argued in "Observations" that where a Constitution provides for the submission of bills to the executive and the judiciary prior to enactment, and a law so submitted is enacted over their objection, "[i]t sd. not be allowed the Judges or [the] Executive to pronounce a law thus enacted, unconstit. & invalid." 5 THE WRITINGS OF JAMES MADISON, *supra* note 39, at 294. The remark suggests that Madison at least contemplated the idea of presidential non-enforcement. Yet since our system *has* executive consultation, created by the Presentment Clause, the remark also implies that Madison saw no place for the power under the actual Constitution. Indeed, in a letter written four years later, Madison said, "[y]ou know already that the President has exerted his power of checking the unconstitutional career of Congress. The judges have also called the attention of the public to Legislative fallibility, by pronouncing a law providing for Invalid Pensioners unconstitutional and void[.]" Letter from James Madison to Gen. Henry Lee (Apr. 15, 1792), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 554 (1865). "[H]is power of checking" must refer to the President's veto, since no acts of non-enforcement had then taken place.
- 193 Prakash & Yoo, *supra* note 9, at 975 (providing a table reporting these discussions); Prakash, *supra* note 9, at 1659 & n.186 (referencing Prakash & Yoo, *supra* note 9, at 161).
- 194 I assume here that there is not some specific reason to think that the historical record is skewed, that is, that evidence of non-enforcement was not uniquely suppressed or unavailable. In other words, I am treating the extant, published record as representative of the entire range of commentary, including unpreserved statements. If that is correct, then we should assume that a number of discussions of judicial review were *also* lost or remain unknown, and we would need to compare missing discussions of non-enforcement with the extant *and* missing discussions of judicial review. This would make the Prakash & Yoo figure too low.

The pattern of evidence after ratification confirms this view. In the first decade of government under the Constitution there is no known explicit defense of a presidential power to refuse to enforce the law on constitutional grounds. Neither Presidents George Washington nor John Adams refused to enforce a duly enacted law on grounds that he believed it unconstitutional, and neither made a claim to enjoy such a power.<sup>195</sup> Sai Prakash has observed that Washington described the obligation to obey “constitutional laws,” which Prakash reads as impliedly endorsing a presidential duty of non-enforcement.<sup>196</sup> Washington, however, never identified the phrase as carrying such freight, and he never connected the idea to the presidential office—this during a period that saw repeated discussion of a *judicial* duty to apply only “constitutional laws.” The point suffers from a more general defect that, unfortunately, affects much of Prakash’s analysis, which is premised on the proposition that the founding generation widely agreed that an unconstitutional law was void and thus “no law at all.”<sup>197</sup> One cannot reason from the premise that an unconstitutional law is void to the conclusion that the President had a power to refuse to enforce it; the basic lesson of Wood, Snowiss, and Kramer’s works is that officers had to *justify* the practice of determining and enforcing constitutional violations within their office, since fundamental law was designed to regulate *them* and was tradi-

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195 Prakash, *supra* note 9, at 1662 (“Washington never actually refused to enforce a statute on the grounds that it was unconstitutional. . . . [T]here is no instance of President John Adams refusing to enforce a statute on the grounds that it was unconstitutional.”). It is likely that President Washington and President Adams impounded funds appropriated by Congress, but their doing so is not best described as non-enforcement, since it was “largely attributable to the fact that, unlike today, appropriations bills ‘were quite general in their terms and, by obvious . . . intent, left to the President . . . the [power] for determining . . . in what particular manner the funds would be spent.’” Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 5 (1974) (citation omitted).

196 See Prakash, *supra* note 9, at 1660–61 (discussing various remarks of Washington when he used the term “constitutional”). Even if Prakash is correct to connect Washington’s phrase to the presidential office, the deontic status seems wrong. How could non-enforcement be a *duty* if constitutionality only created an *obligation* to follow the law?

197 See Prakash, *supra* note 9, at 1616–17, 1658–59 (“At the founding, such laws were seen as null and void, *ab initio*. Because unconstitutional laws were nullities, they supplied no law for the President to enforce. Necessarily, he could have no power or duty to enforce them. Under the original Constitution, the President had no more power or duty to execute unconstitutional laws than he had to execute the laws of the states or other nations.”). Prakash has reiterated this analysis in his recent work with Neil Devins attacking presidential duties to enforce and defend unconstitutional laws. See Devins & Prakash, *supra* note 9, at 522, 533 (“Because unconstitutional laws are void and hence not actual laws, the Clause does not oblige the President to enforce or defend them.”).

tionally enforced through popular mechanisms.<sup>198</sup> Prakash also suggests that Washington never endorsed a presidential power to refuse to enforce unconstitutional law because, as the first President, he had an opportunity to *veto* all the bills he thought unconstitutional.<sup>199</sup> Since Congress never overrode Washington's veto, the President never had need of a non-enforcement power. Yet this hardly means that non-enforcement was never relevant to the President's decision calculus. Washington had reason to broach the topic when Jefferson, then his Secretary of State, advised him that the President could express his constitutional objection to the Bank Bill through a veto.<sup>200</sup> Indeed, *any* constitutional objection to a bill directing action in the executive department should have raised the issue. In sorting through their options, Washington's advisors had reason to consider the possibility of a veto override and to plan accordingly.<sup>201</sup> Non-enforcement would have been an alternative. For these reasons, it is difficult to take seriously the speculation that Washington, and Adams after him, "likely would have refused to enforce" a law enacted over a constitutional veto.<sup>202</sup> The fact of the matter is that neither President did, and neither expressed the view that he had such a power.

In 1801, President Thomas Jefferson ended prosecutions under the Sedition Act and pardoned those convicted. If we date non-enforcement to these acts, it is at least fifteen years younger than judicial review. If we date the defense of non-enforcement to Jeffer-

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198 See, e.g., Hulsebosch, *supra* note 73, at 825; Wood, *supra* note 31, at 160–63.

199 See Prakash, *supra* note 9, at 1662 (explaining "why Washington never engaged in Executive Disregard"). Prakash also points to President Washington's refusal to honor a request from the House of Representatives for communications regarding the negotiation of the Jay Treaty, *id.* at 1661–62, but on this question, a one-house "resolution" is not analogous to a bill, due to the lack of a veto. The existence of the limited veto for unconstitutional bills is the best structural argument against non-enforcement. Again, the point is not that the President would not act on the basis of his understanding of the Constitution; it is that the President specifically would not refuse to enforce laws he deemed unconstitutional.

200 See Secretary of State Jefferson, *Opinion on the Constitutionality of the Bank* (Feb. 15, 1791), in PAULSEN, CALABRESI ET AL., *supra* note 18, at 62 ("The negative of the President [the veto] is the shield provided by the Constitution to protect against the invasions of the legislature." (insertion by editors)); MAY, *supra* note 17, at 37 (discussing Jefferson's endorsement of the veto when potentially being applied to the Bank Bill). The Bank Bill directed the United States to receive notes issued by the bank "in all payments to the United States." *An Act to Incorporate the Subscribers to the Bank of the United States* § 10, 3 Stat. 191, 196 (1791). The President could have directed the secretary of the treasury to refuse to accept the notes as payment.

201 See Harry C. Thomson, *The First Presidential Vetoes*, 8 PRES. STUDS. Q. 27, 30–31 (1978) (discussing veto of reapportionment act and attempted override).

202 Prakash, *supra* note 9, at 1662.

son's defense of his acts in contemporaneous writings and subsequent letters,<sup>203</sup> it postdates the defense of judicial review by at least fifteen years.<sup>204</sup> This demands an explanation.

### B. Negative evidence

Not only is there a lack of evidence that Framers drew the conclusion of the Non-Enforcement Argument, there is evidence that they *rejected* its conclusion. Christopher May advanced this argument in his study of the suspension power and non-enforcement. Suspension was a royal prerogative to temporarily abrogate a statute.<sup>205</sup> May analogized suspension to non-enforcement, and then argued that the widespread American rejection of suspension implied a rejection of non-enforcement.<sup>206</sup> Obviously, the force of May's argument depends on the force of the analogy between suspension and non-enforcement—and that analogy has been challenged.<sup>207</sup> In the course of developing his argument, May observed that on several occasions Framers spoke as if judicial review were the only institutional protection against laws violating individual rights.<sup>208</sup> This point has force whether or not non-enforcement functionally duplicates, or even approximates, the prerogative of suspension. Thus, May pointed to Alexander Hamilton's language in *Federalist* 78 that a Constitution's exceptions to the legislative power "can be preserved *in practice no other way* than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."<sup>209</sup> Apparently, Hamilton assumed that the President did not have a non-enforcement power, since such a power could also be used to keep Congress within its constitutional limits.

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203 See *supra* note 43.

204 Christopher May, who opposes non-enforcement, dates its first assertion to 1860. See MAY, *supra* note 17, at 127.

205 See MAY, *supra* note 17, at 4 (discussing royal prerogatives in relation to statutes in England).

206 MAY, *supra* note 17, at 37. Interestingly, May adopted the same "deductive" or "Euclidean" strategy as Michael Paulsen. See Paulsen, *supra* note 15, at 226 (describing his approach as "Euclidean"). But he defended a logically contrary view. Paulsen argued that if judicial review was justified, then non-enforcement was as well; and judicial review was justified. May argued that if the suspension prerogative was rejected, then non-enforcement was rejected as well; and suspension was rejected. The strategy is indicative of the lack of direct evidence we have on the issue of non-enforcement. No one was talking about it.

207 See, e.g., J. Randy Beck, *Book Review: Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 423–24 (1999) (finding flaws in May's argument).

208 MAY, *supra* note 17, at 14, 25.

209 THE FEDERALIST NO. 78 (Alexander Hamilton).



Hamilton may have seen a greater need for judicial enforcement of the Constitution than did most of his peers.<sup>210</sup> But the point about ‘negative evidence’ does not depend on Hamilton’s idiosyncrasy. The argument that courts of law were the only institution that could, or would, protect the people from legislative abuses was in fact widespread. Examples are easy to adduce. They lie at the surface of the historical record, both before and after ratification. Most of these comments assume that the President lacks a non-enforcement power, but none implies that judicial review is the only means of enforcing the Constitution, or that judges are supreme in determining its meaning.

Thus, for example, the idea that courts *alone* could protect the people from legislative excess drove delegates to the federal convention to reject the council of revision. Like the New York body on which it was based, the council proposed in Philadelphia as part of Madison’s Virginia Plan comprised the President and several federal judges, who would together exercise a qualified negative on federal and state legislation.<sup>211</sup> Almost at once, delegates objected to the proposal on the grounds that it might undercut judicial review, by biasing judges in favor of laws they had previously approved.<sup>212</sup> According to Rufus King, whose state had granted the veto to the governor alone, “the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”<sup>213</sup> The emphasis on judicial review drew its own objections from John Mercer and John Dickinson. After listening to Mercer argue that judges should not enjoy an authority to declare unconstitutional law void, Dickinson said he was “strongly impressed,” and “thought no such power ought to exist.” Yet, “at the same time,” Dickinson said, he was “at a loss what expedient to substitute.”<sup>214</sup> Madison surely felt exasperated. He *had* suggested another “expedi-

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210 See KRAMER, *supra* note 34, at 81 (addressing the idea that Hamilton “stak[ed] out” an “extreme position”); see also STIMSON, *supra* note 80, at 119.

211 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 21 (Resolution 8). On the relationship to New York, see Roedel, *supra* note 153, at 261–62.

212 See RAKOVE, *supra* note 65, at 262 (“The opponents of the council of revision were more inclined to emphasize the separation of powers . . .”); see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 75 (providing Caleb Strong’s opinion as to the proper role of the judiciary); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 79 (providing the objections of Nathaniel Gorham); *id.* at 80 (providing the objection of John Rutledge).

213 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 98.

214 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 299.

ent”—the Council of Revision!—only to have Dickinson reject it.<sup>215</sup> Something was driving leading delegates towards a view of constitutional enforcement that involved adjudication in a court of law, regardless of whether they thought such a practice fully consistent with republicanism. Hence Dickinson’s confusion.

A similar logic was at work in ratifying conventions. At the Virginia ratifying convention, for example, where the federal judiciary was extensively discussed, both Federalists and Anti-federalists attributed to courts alone the power to check legislative violations of the Constitution, but for different reasons.<sup>216</sup> The clearest example is a well-known speech by the young John Marshall, then holding a position on Richmond’s hustings court, in which he defended Article III against attacks by George Mason and Patrick Henry.<sup>217</sup> The day before, Mason had argued that federal courts would supplant state courts, on the grounds that the jurisdiction of federal courts extended to all cases arising under federal law, and federal law was to be superior to state law.<sup>218</sup> Indeed, given that Congress could enact laws concerning “every object of private property,” federal courts would, in effect, “destroy the State Governments.”<sup>219</sup> Marshall met the argument at what he thought was its obvious point of weakness. “Has the Government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers?”<sup>220</sup> It was clear that the Constitution conferred no such authority on Congress. If, as Henry had suggested, Congress nevertheless did “make a law not warranted by any of the powers enumerated, it would be considered by

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215 See HAMBURGER, *supra* note 44, at 510–11 (describing Dickinson’s view); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 108–09 (“Dickerson [*sic*]—agt. it—you must separate the Leg. Jud. & Ex.—but you propose to give the Executive a share in Legislation—why not the Judicial—There is a Difference—the Judges must interpret the Laws they ought not to be legislators. The Executive is merely ministerial . . .”). In “Letters of Fabius,” Dickinson apparently came around to judicial review, but the text is ambiguous and must be read against Dickinson’s statements in the convention. See BERGER, *supra* note 184, at 64–65 (explaining how Dickinson passively voted for judicial review); see also PAMPHLETS OF THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788, at 184 (Paul Leicester Ford ed., 1888) (reprinting Dickinson’s statement that “the president, and the federal independent judges, [would be] so much concerned in the execution of the laws, and in the determination of their constitutionality”).

216 On the discussion of the judiciary at the Virginia convention, see MAIER, *supra* note 160, at 286–87; Bilder, *supra* note 77, at 551.

217 See 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1430–39 (John P. Kaminski, Gaspare J. Saladino et al. eds., 1993) [hereinafter 10 DHRC] (reprinting Marshall’s speech); see also NELSON, *supra* note 50, at 43.

218 10 DHRC, *supra* note 217, at 1401–02.

219 10 DHRC, *supra* note 217, at 1402.

220 10 DHRC, *supra* note 217, at 1431.

the Judges as an infringement of the Constitution which they are to guard . . . . They would declare it void.”<sup>221</sup> Federal jurisdiction to adjudicate such cases was, said Marshall, “necessary.” He explained:

What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? . . . To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the Judiciary? *There is no other body that affords such a protection.*<sup>222</sup>

Marshall’s point does not deny that the people themselves interpret and enforce the Constitution. He assumes the *opposite*—that the Constitution might be enforced by the people themselves, acting ‘out of doors.’ Marshall’s concern was with the violence and disorder that popular enforcement tended to create.<sup>223</sup>

Marshall made no mention of the President, and, indeed, it would have made little sense for him to do so. Mason had suggested that the federal courts would shield federal *executive* officers, who, he predicted, would be free to abuse the people of Virginia without legal consequence.<sup>224</sup> An appeal to the executive authority would have played right into Mason’s hands. Just before the convention had taken up the federal judiciary, it had discussed Article II, where “Henry, Mason, [James] Monroe, and [William] Grayson raised one objection after another” to the President, who, they argued, “had too much power.”<sup>225</sup> And although the federal judiciary might dominate state governments, Henry thought it plainly overmatched by its coordinate departments in the national government. It could not serve as a constitutional check, he said, as the Virginia state judiciary had against the excesses of the state assembly.<sup>226</sup> A presidential power of non-

<sup>221</sup> 10 DHRC, *supra* note 217, at 1431.

<sup>222</sup> 10 DHRC, *supra* note 217, at 1432 (emphasis added).

<sup>223</sup> In this respect, Marshall anticipates the concern with mobbing and protecting property rights that came to characterize the Federalist party in the second half of the 1790s. See KRAMER, *supra* note 34, at 109–11 (describing growing concerns with violence amongst the Federalists); NELSON, *supra* note 50, at 40.

<sup>224</sup> 10 DHRC, *supra* note 217, at 1404 (providing an example of the potential for abuse).

<sup>225</sup> MAIER, *supra* note 160, at 286; see THE FEDERALIST NO. 67 (Alexander Hamilton) (discussing the executive department); cf. RAKOVE, *supra* note 65, at 273 (describing the Anti-federalist fear that “ambition or desperation would drive *individual* presidents to attempt to set themselves up literally as kings”).

<sup>226</sup> 10 DHRC, *supra* note 217, at 1219 (“The Honorable Gentleman [Edmund Pendleton] did our Judiciary honour in saying, that they had firmness to counteract the Legislature in some cases. Yes, Sir, our Judges opposed the acts of the Legislature. . . . Are you sure that your Federal Judiciary will act thus? . . . Where are your land-marks in this Government? I will be bold to say you cannot find any in it. I take it as the highest encomium

enforcement without an executive council would have worsened the imbalance. There was thus no reason for a federalist to defend a non-enforcement power at the Virginia convention.<sup>227</sup> A sensible delegate, like Marshall, argued precisely the opposite.<sup>228</sup>

The pattern of evidence after ratification buttresses this conclusion, just as it did above. Thus, following presentment by the First Congress of a bill to fix the seat of government in Washington D.C., “Junius Americanus” published a letter in *The Daily Advertiser*, despairing, for over four columns, about the bill’s unconstitutionality.<sup>229</sup> As Junius viewed the matter, the Constitution committed to Congress alone the determination of when and where to meet, which the bill to fix the seat of government would violate when signed by the President.<sup>230</sup> Junius was unmoved by the suggestion that once enacted, the law would be “inoperative” because “repugnant.”<sup>231</sup> “[T]his is however a mistaken idea,” he said, “for it will have an operation, *unless formally annulled by the judiciary*, and it is impossible the construction of it can ever go before the federal courts.”<sup>232</sup> Junius returned to the point repeatedly, and in language that evidenced a detailed view of the scope of the president’s interpretative authority. Thus,

[e]very law does not undergo the revision of the judiciary; this will certainly not; the President of the United States can alone arrest its progress. Having his sanction, the public will consider every part of the bill as valid, because they know he would not approve any bill which contained a syl-

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on this country [i.e., Virginia], that acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.”).

227 That there was no reason for a federalist to defend non-enforcement does not mean federalists acted strategically. To take Marshall as an example, it is difficult to imagine—and there is no evidence to suggest—that Marshall really believed non-enforcement was desirable and permitted by the draft Constitution, but concealed the belief in order to rebut Mason.

228 For other examples, see 10 DHRC, *supra* note 217, at 1197 (discussing of judicial review by Edmund Pendleton); *id.* at 1327 (reprinting of George Nicholas’s views on judicial review). Similar descriptions of the judiciary as the only institution capable of protecting the people from legislative violation of the Constitution, without mention of presidential non-enforcement, occurred in New York, Connecticut and Massachusetts. See Bilder, *supra* note 77, at 551–52 & nn.262–71 (discussing these states).

229 Letter of Junius Americanus, 6 THE DAILY ADVERTISER, July 13, 1790. See the analysis of the bill in David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 849 (1994). On Junius’s letter, see CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 105 (1925).

230 See U.S. CONST. art. I, §§ 4–5 (prescribing the meeting of Congress). The one exception is the President’s power to determine adjournment when the houses disagree. See *id.* at art. II, § 3.

231 Letter of Junius Americanus, *supra* note 229.

232 Letter of Junius Americanus, *supra* note 229 (emphasis added). Junius does not explain why he thinks the matter could not become a case or controversy.

lable that was unconstitutional; the clause will then be deemed binding, because every part of the bill must have its operation.<sup>233</sup>

According to Junius, the President is the only one positioned to arrest the progress of the “law”—but only using the veto. For, reasons Junius, if the President does provide “his sanction,” then every part of the “bill” will be considered “valid,” and thus “must have its operation.” Had Junius thought there was a power of non-enforcement, it should have come as some comfort, enabling the President to sign the bill *and* refuse to enforce the provision fixing a time and place of meeting.

The same set of assumptions animated constitutional argument within Congress. In the First Congress, for example, both proponents and opponents of the Bank of the United States assumed that the Supreme Court would adjudicate any question about the bank’s constitutionality.<sup>234</sup> Madison wanted to avoid such an outcome; Elias Boudinot, in contrast, took comfort in the idea that “if, from inattention, want of precision, or any other defect, he should do wrong, there was a power in the Government which could constitutionally prevent the operation of such a wrong measure.”<sup>235</sup> Boudinot, of course, was not referring to the President, but to “the Judiciary of the United States, who might adjudge [the Bank law] to be contrary to the Constitution, and therefore void.”<sup>236</sup>

The point was not confined to those who would later become Federalists. Indeed, as the Jeffersonian Republican party emerged in the mid-1790s, distrust of executive authority and of executive influence on the judiciary became a central pillar in their adaptation of English oppositional thought.<sup>237</sup> Consider the famous attack on judi-

<sup>233</sup> Letter of Junius Americanus, *supra* note 229.

<sup>234</sup> WARREN, *supra* note 229, at 106.

<sup>235</sup> 2 ANNALS OF CONG. 1927 (1791). Boudinot’s comment has had a long life. Wilson referenced it in *Lectures on Law*, as did Joseph Story in his *Commentaries on the Constitution*, and Charles Warren in *Congress, the Constitution, and the Court*. See 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 541–42 (describing the ability of a nation to ensure citizens do right); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 472 n.3 (1833) (referencing Boudinot’s comment in a footnote); WARREN, *supra* note 229, at 107–08 (quoting Boudinot).

<sup>236</sup> 2 ANNALS OF CONG. 1927 (1791).

<sup>237</sup> See LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 52–63, 247–50 (1978) (describing the Republican focus, while in opposition to the Adams administration, on the danger of “patronage,” “corruption,” and “executive influence”); VILE, *supra* note 82, at 171 (similar). This worry was not confined to influence on the legislature through “placement.” Republicans also objected to the service of Chief Justice Jay and Chief Justice Ellsworth as special ambassadors in the conflicts with Britain and France. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 74–75, 89–95, 118–19 (1995) (noting

cial review in the Sixth Congress, by then-Senator Charles Pinckney. Introducing his proposal to prohibit plural office-holding by federal judges, Pinckney described the judicial power “either to execute [the laws] or not, as they think proper,” as “the dangerous right . . . a right in my judgment as unfounded and as dangerous as any that was ever attempted in a free government.”<sup>238</sup> Just to bring the point home, Pinckney then asked his audience to imagine the implications for *executive* power. “What might be the consequences,” he announced, “if the President could at any time get rid of obnoxious laws by persuading or influencing the Judges to decide that they were unconstitutional, and ought not to be executed?”<sup>239</sup> Of course, non-enforcement would obviate any need for stooping to *persuasion*. Pinckney, apparently, could not imagine such a thing, for it would have made nonsense of his point.

Even after the Republican party took control of the presidency and the Congress, during the period in which Jefferson is commonly thought to have refused to enforce the Sedition Act, Republicans in Congress never mentioned the President in response to repeated assertions that only courts could protect the people from legislative excess. Examples of such claims by Federalists in the debate over repeal of the Judiciary Act are too numerous to discuss individually. To take a pedestrian example from the debate in the Senate, Aaron Ogden asked his fellow senators, “[s]uppose the Legislature should pass bills of attainder, or an unconstitutional tax, where can an oppressed citizen find protection but in a court of justice firmly denying to carry into execution an unconstitutional law?”<sup>240</sup> Ogden’s point assumes another department cannot provide similar protection. The argument was thought strong enough to become a Federalist refrain.<sup>241</sup>

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some of these oppositions); STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 152–53* (1997) (noting wariness among “[s]ome members of Congress” with regards to sending Chief Judge Ellsworth “on a diplomatic mission”).

<sup>238</sup> 10 ANNALS OF CONG. 101 (1800).

<sup>239</sup> *Id.*

<sup>240</sup> 11 ANNALS OF CONG. 175 (1802).

<sup>241</sup> *See, e.g., id.* at 56 (statement of Uriah Tracy) (“What security is there to an individual [from an ex post facto law]? None in the world but by an appeal to the Judiciary . . .”); *id.* at 83 (statement of Gouverneur Morris) (“Suppose, in the omnipotence of your Legislative authority, you trench upon the rights of your fellow citizens . . . If the judiciary department preserve its vigor, it will stop you short. Instead of a resort to arms, there will be a happier appeal to argument.”); *id.* at 529–30 (statement of Archibald Henderson) (“In vain may he hold out the Constitution and deny the authority of Congress to pass a law of such undefined signification, and call upon the judges to protect him; he will be told that the opinion of Congress now is, that we have no right to judge of their authority . . .”); *id.* at 574 (statement of John Stanley) (“Should, unhappily, a Legislature be found who . . . should transgress the bounds prescribed, what is the security of the citi-

Some developed it to considerable lengths. In the House, for example, James Bayard offered a particularly colorful version, which illustrates, very clearly, basic assumptions about the President's role in constitutional enforcement. Bayard said,

[I]et me now ask if the power to decide upon the validity of our laws resides with the people? Gentlemen cannot deny this right to the people. I admit that they possess it. But if, at the same time, it does not belong to the courts of the United States, where does it lead the people? It leads them to the gallows. Let us supposed that Congress . . . pass an unconstitutional law. . . . The people [subject to the law] contest the validity of the law. They forcibly resist its execution. *They are brought by the Executive authority before the courts upon charges of treason.* The law is unconstitutional, the people have done right, but the court are [sic] bound by the law, and obliged to pronounce upon them the sentence which it inflicts. Deny to the courts of the United States the power of judging upon the constitutionality of our laws, and it is vain to talk of it existing elsewhere.<sup>242</sup>

Far from protecting individuals, Bayard's "Executive authority" prosecutes them for treason!

Only one Republican sought to challenge Bayard's view of the executive. In written remarks later added to the House record, Representative Jonathan Bacon argued that "every officer and . . . every citizen" had an "inherent and . . . indispensable duty" "to judge for themselves of the constitutionality of every statute on which they are called to act in their respective spheres."<sup>243</sup> Bacon supported his position with a version of the Standard Justification.<sup>244</sup> If one thinks of the law as directing or "calling on" the President to enforce it, then Bacon's position implies a power of non-enforcement.<sup>245</sup> The appearance of this view is significant. But the real *explanans* is why the point was made only *once* during the debate over repeal, and never on

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zen? . . . The Judiciary are our security."); *id.* at 690 (statement of Benjamin Huger) ("I hesitate not in saying that, between an independent Judiciary, constituting a tribunal which can control the unconstitutional attempts of the other two branches of the Government . . . between such a tribunal and the bayonet there remains no resource or alternative."); *id.* at 842 (statement of John Dennis) (arguing that the judiciary was created "for [the] purpose" "of giving efficacy to these declarations" against *ex post facto* laws); *id.* at 884 (statement of Seth Hastings) ("[I]f the Judiciary power has no Constitutional check upon the acts and doings of the Legislature, Congress may pass an *ex post facto* law . . ."); *id.* at 927–28 (statement of Samuel Dana) ("If any unconstitutional act is passed, what must be done for relief against it, according to the plan of the gentlemen who advocate the bill on the table? . . . Must persons be subjected to the operation of an unconstitutional act until the period of elections comes round . . . ?").

242 *Id.* at 646 (emphasis added).

243 *Id.* at 982.

244 *See id.* at 982–83 (providing a continuation of Bacon's argument).

245 *See supra* Part I.B.

the floor.<sup>246</sup> Republicans could avail themselves of a number of different responses to Bayard. They could challenge the assumption that federal courts would actually provide a remedy for legislative violations of constitutional rights, and describe the courts' political conduct during the Sedition Act controversy. Naturally, some Republicans made this point.<sup>247</sup> They could argue that, whether or not the courts were fully independent of legislative control, judges would continue to perform judicial review out of duty; some made this argument as well, drawing on experience in state government.<sup>248</sup> And they could argue that a proper republican remedy for legislative excess was the corrective applied by the people themselves during election—precisely what had occurred in Jefferson's 'revolution.'<sup>249</sup> In the end, responses like these crowded out Bacon's view. It seems likely that, having nurtured such a profound distrust of executive authority during their decade in opposition, Republicans found it difficult suddenly to pivot and argue that the President possessed a rather broad authority to refuse to enforce the law. The received Republican view in 1802 was, instead, to distrust the executive, and to assume a politically neutral judiciary would protect individuals from both leg-

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<sup>246</sup> Senator John Breckinridge's well-known defense of Congress's supremacy in determining the boundaries of legislative power, 11 ANNALS OF CONG. 179 (1802), does not support non-enforcement, but implies an obligation to give effect to Congress's interpretation of the Constitution. *See infra* note 435.

<sup>247</sup> *See, e.g.*, 11 ANNALS OF CONG. 661 (1802) (statement of John Randolph) (speaking negatively about the judiciary as compared to the legislature).

<sup>248</sup> *See, e.g., id.* at 698 (statement of then-state Legislator Israel Smith) ("Whether the judge holds his office at the will of the President, or for one year, or during good behaviour, it is equally his duty to decide a law void, which directly infringes the Constitution."); *id.* at 973 (statement of then-state Legislator Joseph Varnum) ("[S]ir, notwithstanding [in New Hampshire] the entire dependence on the Legislature for the existence of the courts of common pleas, I cannot imagine that the independence of the judges has ever been affected by it. There is an honorable gentleman from that State now on this floor, a judge of one of those courts, who, with his associates, had the independence . . . to declare an act of the Legislature unconstitutional."). Varnum was likely referring to Abiel Foster, a representative from New Hampshire who served as a judge on the Court of Common Pleas for Rockingham County from 1784–1788. *See* REID, *supra* note 58, at 29–30; FOSTER, *Abiel (1735–1806)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000297> (providing biographical information). Notably, Foster had no legal training. *See* JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 24 (2004) [hereinafter REID, CONTROLLING] (labeling Foster as a "lay judge").

<sup>249</sup> *See, e.g.*, 11 ANNALS OF CONG. 531 (1802) (statement of Robert Williams) ("Are we then to be told that there is more safety in confiding this important power [i.e., the power to interpret the Constitution] to the last department, so far removed from the people, than in departments flowing directly from the people, responsible to and returning at short intervals into the mass of the people?").



islative and executive excess.<sup>250</sup> This left them unable to rebut the Federalist assumption that the President would be exposed to the same partisan forces that produced the legislature's violation of the Constitution in the first place.<sup>251</sup>

### C. A Closer Look at the Standard Justification

When one adds the evidence that Framers rejected a non-enforcement power to the lack of any sustained, public defense of that power, it suggests that something is amiss with the Non-Enforcement Argument. No one accepted it. This conclusion also affects the Standard Justification of judicial review. Since Non-Enforcement and our formulation of the Standard Justification stand or fall together, if something is amiss with Non-Enforcement, then something is amiss with the Standard Justification. But what is amiss, and what can it tell us about non-enforcement and judicial review?

#### 1. Constitutional Agency

Recall that there are two versions of the Standard Justification: one premised on the idea that judges are the constitutional agents of the people, and one premised on the nature of the duty to apply the law. Begin with the version premised on constitutional agency. As Iredell wrote in "To the Public," judges hold their office "*for the benefit*

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<sup>250</sup> See Powell, *supra* note 191, at 1004 (observing that "a central Republican theme in the 1790s was opposition to the Federalist ideal of a strong executive"); see also 11 ANNALS OF CONG. 73 (1802) (Speech of David Stone) ("The objects of courts of law, as I understand them, are, to settle questions of right between suitors; to enforce obedience to the laws, and to protect the citizens against oppressive use of power in the Executive offices."). It was the Federalists who supported a broader executive authority, as even Jefferson recognized. In a letter to John Dickinson written just after the 1800 election, Jefferson wrote, "I consider the pure federalist as a republican who would prefer *a somewhat stronger executive*, and the republican as one willing to trust the legislature as a broader representation of the people, and a safer deposit of power for many reasons." Letter to John Dickinson (July 23, 1801), in 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 37, at 280, 281 (emphasis added).

<sup>251</sup> These forces would align the President with the Congress that, for example, passed a bill of attainder. See 11 ANNALS OF CONG. 689 (1802) (statement of Benjamin Huger) ("From an *ex post facto* law, from a suspension of the *habeas corpus* in time of peace, from a bill of attainder, or from any other act of violence, however unconstitutional, *on the part of the Executive and Legislature*, where are we to look up for relief?") (emphasis added). Representative Huger's example perfectly reverses an example Judge Frank Easterbrook adduced (200 years later) in support of non-enforcement—revealing how disparate Easterbrook's own assumptions are from those that guided those in the repeal debate. See Easterbrook, *supra* note 16, at 922–24 (using a bill of attainder as an example and exploring how it should be treated by the different branches of government).

of the whole people,” and are “not mere servants of the Assembly.”<sup>252</sup> Being an agent of the people implied a duty to comply with their Constitution. Since giving effect to an unconstitutional law meant serving the assembly instead of obeying the Constitution, it followed that a judge must consider the Constitution when deciding a case.<sup>253</sup> He could not close his eyes to it.

Even if we suppose that agency implies a duty to comply with the Constitution, it does not follow that by giving effect to an unconstitutional law, a judge disobeys the Constitution. We can see this by considering the implications of a simple separation of governmental functions. Suppose, for example, that the people give one agent or group of agents the power to enforce the law. We need not assume that the delegation is to a single person, or to persons within only one governmental “branch”—it just needs to be to a delegation that *excludes* someone. Other agents lack this power. The agents without enforcement power are, by assumption, unauthorized to make their own determinations of how the law should be enforced. They must accept the decisions of the agents given enforcement authority. *This does not make the non-enforcing agents subordinate*,<sup>254</sup> the non-enforcers have their own powers, and, as Madison put it, a “will of [their] own”—that is, an authority to determine how best to exercise those powers and what limits the Constitution places on them.<sup>255</sup> It follows, then, that merely being a constitutional agent cannot immunize one from being subject to the decisions of another agent, including decisions that reflect a view of the Constitution’s meaning. Indeed, judges could be such agents. The powers delegated to judges might not include the authority to consider the Constitution and determine its meaning. That authority might have been given to some other agent; or it might have been given to no agent, and remain with the people themselves.<sup>256</sup> To know whether judges in fact have the authority to consider the Constitution in the course of adjudicating cases, we need to know something more about the powers they were delegated. Only then can we conclude whether a judge who fails to consider the Constitution ‘disobeys’ it.

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252 Iredell, *supra* note 105, at 148.

253 *See supra* Part I.B.

254 *See* Harrison, *supra* note 12, at 362–63, 380 (noting that one branch of government can “accept another’s determination” without being subordinate to it).

255 THE FEDERALIST NO. 51 (James Madison).

256 THE FEDERALIST NO. 49 (James Madison) (observing that powers can recur back to the people, the “original authority”).

This argument, premised on the separation of powers, would have been familiar to the Framers as students of English oppositional politics.<sup>257</sup> Indeed, it is a recognizable variant of an argument Iredell himself made at the end of “To the Public.” In response to the criticism that he had implied a power of judicial review not only in North Carolina’s Superior Courts of Law and Equity, but also in the “county courts,” whose justices of the peace probably lacked legal training, Iredell responded, “I admit it.”<sup>258</sup> The county courts, he reasoned, “exercise . . . judicial power,” and thus enjoyed its concomitant, judicial review.<sup>259</sup> Appeals would lie, in any case, from the county courts to the superior courts. Yet Iredell balked at extending this power to refuse to enforce the law beyond the courts. He continued:

The objection, however, urged by some persons, that sheriffs and other ministerial officers must exercise their judgment too, does not apply. For if the power of judging rests with the courts, their decision is final as to the subject matter. Did ever a sheriff refuse to hang a man, because he thought he was unjustly convicted of murder?<sup>260</sup>

Ministerial officers are not empowered, said Iredell, to judge whether those court orders comply with the Constitution. This is because “the power of judging rests with the courts.”<sup>261</sup> Sheriffs were not given the power of judging, and in this respect they were subject to the decisions of those who were.<sup>262</sup> Judges on the state’s superior courts,

<sup>257</sup> See VILE, *supra* note 82, at 43–44 (discussing the Herle-Ferne debate); VILE, *supra* note 82, at 75 (“In the first half of the eighteenth century the theory of mixed government was in the ascendancy again . . . . But it was no longer the undifferentiated theory of mixed government that had preceded the Civil War. The ideas behind separation of powers were added to it so that each element of the mixed government might wield an independent and co-ordinate authority that gave it the ability to check the exercise of power by the other branches.”).

<sup>258</sup> Iredell, *supra* note 105, at 149. For a discussion of justices of the peace in royal North Carolina during the period immediately preceding the Revolution, see SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, at 198 (2011).

<sup>259</sup> Iredell, *supra* note 105, at 149; see also GERBER, *supra* note 258, at 196 (discussing the division of common law courts in North Carolina).

<sup>260</sup> Iredell, *supra* note 105, at 149.

<sup>261</sup> Iredell, *supra* note 105, at 149.

<sup>262</sup> Iredell’s argument applies by its terms to ministerial officers, but its implications extend beyond them. Iredell’s premise is that “the power of judging rests with the courts.” Iredell, *supra* note 105, at 149. It does not lie elsewhere, as the provision in state’s 1776 Constitution separating powers confirms. See N.C. CONST. OF 1776 art. IV (providing for the separation of powers). Since the power of judging lies with the courts, and not elsewhere, it does not lie with any officer who is not “with the courts,” whatever his rank. Indeed, Iredell may have been thinking of North Carolina colonial Governor Richard Everard, who in 1729 had refused to execute a sentence of death entered on a jury verdict in the colony’s General Court. The effect, widely known to North Carolinians in the 1730s, was to undermine the courts and create “chaos.” See 2 WILLIAM E. NELSON, THE COMMON

at whom Iredell's essay was aimed, were likely to be concerned about the scope of any duty to consider the Constitution.<sup>263</sup> If the duty were one that an officer had by virtue of holding *an* office (any office), then it would be a duty all officers had; but for all officers to be constantly duty-bound to act only on their own view of the Constitution could be thought to invite disorder. North Carolina had been forced to dispatch the self-governing 'Regulators' with an army of several thousand men only fifteen years earlier.<sup>264</sup> Iredell's response to this concern was to distinguish *kinds* of constitutional agents according to the *powers* of their office. Those with an office requiring application of the law were duty-bound to consider the Constitution when doing so. For the rest, merely being the people's agents carried no such requirement.

Other forms of the constitutional agency argument fare no better. As noted above, disputants tended to merge the idea that constitutional agency implied a duty of obedience with other, related ideas about constitutional enforcement.<sup>265</sup> Thus, judicial review was sometimes likened to popular disobedience of an unconstitutional law, justifying judges in refusing to enforce the law.<sup>266</sup> Yet the same problem presents itself. One can assume, as Iredell does in "To the Public," that the people enforce the Constitution on the basis of their understanding of its limits.<sup>267</sup> The idea is plainly compatible with the existence of different constitutional offices. An officer whom (let us suppose) the Constitution obligates to implement the interpretations of another may be justified in refusing to obey an unconstitutional act as an act of popular resistance. However, this authority *does not flow from his office*, and, consequently, the officer's use of the powers of his office to advance his own views is open to challenge. As Philip Hamburger has shown, and as I discuss below, by the 1790s there was significant concern about judges' use of written "resolutions" to express

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LAW IN COLONIAL AMERICA 96–97 (2012) (discussing *King v. Smith*, N.C. Gen. Ct. 1729, in 2 Colonial and State Records of North Carolina 829 (1886)).

263 See Iredell, *supra* note 105, at 149 (observing that the "liberty of appeal . . . rests . . . with the superior courts").

264 See, e.g., William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1026–28 (2010).

265 See *supra* notes 122–29 and accompanying text.

266 See, e.g., KRAMER, *supra* note 34, at 53–54 (discussing the fact that violence or "civil unrest" often ensued when the public did not like a particular law).

267 See Iredell, *supra* note 105, at 147 (noting that resistance of the people is one option to quell a violation of the Constitution by the Assembly). Iredell resembles Wilson in this respect. 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 421 (arguing that law should be simple and easy to understand).

constitutional protest.<sup>268</sup> What required justification was the practice of enforcing the Constitution within a court of law. One could accept that popular disobedience was occasionally justified, but maintain that judges were constrained by the commands of the assembly in discharging their official duties. Just as above, the office of the judge might not extend to constitutional disobedience.

## 2. *The Duty to Apply the Law*

In effect, we are pushed towards the second version of the Non-Enforcement argument, premised on the nature of the duty to apply the law. If the Standard Justification is going to succeed, it is this idea that must do the work. Indeed, the leading defenses of judicial review in the ratification period make consistent use of the notion of the duty to apply the law and its connection to the judicial office. For example, Iredell writes that a judge's consideration of the Constitution, and his decision to privilege it above ordinary law, "is not a usurped or discretionary power, *but one inevitably resulting from the constitution of [his] office.*"<sup>269</sup> Similarly, in *Federalist* 78, Hamilton asserts that it "belongs" to the judicial office to "ascertain [the Constitution's] meaning, as well as the meaning of any particular act proceeding from the legislative body."<sup>270</sup> In the influential case of *Kemper v. Hawkins*, which I discuss in detail below, Judge St. George Tucker wrote that the Constitution must be "resorted to" anytime it is necessary "to expound what the law is," and that such "exposition . . . is the *duty and office of the judiciary* to make."<sup>271</sup>

The key question is whether this duty also attaches to the executive office. While the President does apply the law, doing so does not bring him within the ambit of the Standard Justification. This is because the Standard Justification does not turn merely on the application of general rules to specific situations. As we will see, a number of the leading defenses of judicial review reflect this point. Consider Chief Justice John Marshall in *Marbury v. Madison*. As others have noted, Marshall's defense of judicial review in *Marbury* replicates the logic of the Standard Justification, which was, by the 1790s, widely ac-

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<sup>268</sup> See HAMBURGER, *supra* note 44, at 561 (explaining that the judges adopted a resolution); *infra* notes 335–66 and accompanying text. There was also concern about federal judges exploiting their status and authority toward the political goals of the administration. See *infra* notes 452–61 and accompanying text.

<sup>269</sup> Iredell, *supra* note 105, at 148 (emphasis added).

<sup>270</sup> THE FEDERALIST NO. 78 (Alexander Hamilton)

<sup>271</sup> *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (Va. 1793) (Opinion of Tucker, J.) (emphasis added).

cepted, even by Republicans.<sup>272</sup> Marshall begins his defense with the assertion that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>273</sup> This is Premise 1 of the Standard Justification, namely, a characterization of the judicial office that supports consideration of the Constitution in the course of adjudication. The next sentence in the opinion justifies this characterization. “Those who apply the rule to particular cases,” says Marshall, “must of necessity expound and interpret that rule.”<sup>274</sup> “Cases” is not a throwaway term in this sentence. It does not mean “instances,” “situations” or “occasions.” Rather, as David Engdahl and Charles Hobson have argued, Marshall uses “case” in its legal sense, which embodies a vision of the form that a dispute takes within a court of law, and the norms that govern the litigation of such a dispute.<sup>275</sup> In particular, says Marshall, litigation of a dispute necessitates *expounding* the law (“those who apply the law to particular *cases* must of necessity *expound*”); and it is expounding the law that, in turn, requires the court to consider the Constitution.<sup>276</sup>

If this is correct, then it drives a wedge between the Standard Justification and the Non-Enforcement Argument. Consider, again, our formulation of the Non-Enforcement Argument:

P1'. The duty of the executive power is to execute the laws of the state.

P2. The Constitution is a law of the state.

P3. An unconstitutional act of the assembly is void, and thus not a law of the state.

C'. If the executive power executes an unconstitutional act of the assembly, rather than the Constitution, it does not execute the laws of the state, and thus it violates its duty.

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272 See, e.g., HOBSON, *supra* note 11, at 55 (noting that in *Marbury*, “Marshall was merely restating widely accepted principles and beliefs”); SNOWISS, *supra* note 46, at 109 (arguing that Marshall did not make unique arguments in *Marbury*). On the Republican acceptance of judicial review in 1803, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 16, 20 (2001); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 66 (1971); WARREN, *supra* note 229, at 122–27; Corwin, *supra* note 146, at 570; Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in *CONSTITUTIONAL LAW STORIES* 13 (Michael Dorf ed., 2004); James M. O’Fallon, *Marbury*, 44 *STAN. L. REV.* 219, 227 (1992).

273 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

274 *Id.*

275 See HOBSON, *supra* note 11, at 52 (highlighting Marshall’s focus on the word “case” and applying it in *Marbury*); David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 *DUKE L.J.* 279, 310, 318, 325, 330 (1992) (discussing Marshall’s conception of “case”).

276 See BERGER, *supra* note 184, at 50–63 (discussing what was meant by “expound”).

The problem is with P1'. The duty of the executive power is to execute the laws of the state. The Constitution is a law, but it is a *fundamental* law. Because it is fundamental, one must justify the President's consideration of the Constitution in the course of satisfying his official duty to execute the law; one cannot simply assume that fundamental law may be enforced by the procedures and institutions used to enforce ordinary law.<sup>277</sup> Support for presidential consideration of the Constitution had rested on a parallel to the judicial duty to apply the law. However, on closer inspection, the judicial office is concerned with applying the law to "cases," which requires "expounding" the law. In this way, the idea of a "case" and "expounding" the law figure essentially in the Standard Justification, but not in the Non-Enforcement Argument. I conclude that if there is a non-enforcement power, it must rest on some other basis for considering the Constitution in the course of satisfying the duty to execute the law.

Does this make the President into an overgrown version of Ire-dell's ministerial sheriff? No. The President is not an inferior officer or an "errand boy."<sup>278</sup> He leads a coordinate department; he enjoys an authority to (independently) interpret the Constitution.<sup>279</sup> The President may give effect to his view of the Constitution in specific ways, but a list of these ways is not open-ended. It includes the power to issue vetoes, grant pardons, propose legislation, and to do other things as well, depending on the state of constitutional politics.<sup>280</sup> But the Non-Enforcement Argument can provide no support for adding to this list the power to execute the law, such as the Take Care Clause and (perhaps) the Article II Vesting Clause grant.<sup>281</sup> From the perspective of the founding era, at least, the President's executive power

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277 See SNOWISS, *supra* note 46, at 1–2 (highlighting the differences between fundamental and ordinary law).

278 Harvey C. Mansfield, Jr., *The Ambivalence of Executive Power*, in *The Presidency*, in THE CONSTITUTIONAL ORDER 315–16 (1981).

279 See Steilen, *supra* note 32, at 355–60 (defining "coordinacy" and exploring its implications for presidential authority).

280 See, e.g., Easterbrook, *supra* note 16, at 907–11 (describing the various core powers the President possesses); Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 544–53 (2009) (examining "the nature of limitations on the President's powers"). On the relationship between constitutional politics and executive interpretative authority, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 1–27 (2007).

281 On the Vesting Clause as a source of presidential interpretative power, see Lawson & Moore, *supra* note 13, at 1281–82. On the Take Care Clause as a source of power, see Easterbrook, *supra* note 16, at 919–22.

and his obligation to see that the law is faithfully executed extend only to *ordinary* law. The executive duty of the presidency is a ministerial duty—but the same is not true of the President’s other powers and duties.

### III. RECONSTRUCTING THE STANDARD JUSTIFICATION

The Standard Justification cannot be adapted to support a power of non-enforcement because the argument turns on the judicial duty to expound the law. Judges expound the law to decide a case, which the President does not do. In the final Part of this Article I fill out these assertions by examining the ideas of a “case” and “expounding” the law. The effort is preliminary and not exhaustive. My aim is to essay an explanation of how the Framers could have believed that the President had a power to interpret the Constitution, but not a power to refuse to enforce unconstitutional laws.

The key to the story I tell is the court itself. Traditionally, American jurisdictions distributed the adjudicatory function relatively widely. Judges shared interpretative power (to the extent they had it at all) with juries and with popular assemblies, through which the people gave effect to their understanding of the law.<sup>282</sup> This distribution changed in the last quarter of the eighteenth century, shifting away from popular assemblies and towards actors embedded within a court of law, primarily judges.<sup>283</sup> Of course, these shifts occurred at different times in different states, depending on the politics of the place. In most jurisdictions, however, courts better approximated widely

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<sup>282</sup> On the interpretive powers of American juries, see NELSON, *supra* note 72, at 20–34; REID, CONTROLLING, *supra* note 248, at 108–25 (discussing how the judges interacted with juries); STIMSON, *supra* note 80, at 48–49, 59–60; Nelson, *supra* note 264, at 1003. For recent discussions of assembly adjudication, see REID, *supra* note 58, at 9–10, 62–70 (discussing the case of New Hampshire, among other states); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1463–75 (1998) (discussing “[a]djudication as an [e]lement of [g]overnance”). An older discussion can be found in Corwin, *supra* note 146, at 556 & n.53.

<sup>283</sup> As this point suggests, the “judge v. jury” template adopted by many historical studies of interpretative authority is inadequate and in some cases quite distortive. After the Revolution, the jury’s primary antagonist was not the judge, but the popular assembly, which eventually allocated the jury’s interpretative authority to the judge to increase predictability and protect business interests. See, e.g., NELSON, *supra* note 72, at 8 (noting how the jury system was negatively affected by “business entrepreneurs”). In other cases, judges and juries cooperated to enhance their collective interpretative authority; thus, New Hampshire judges of the “common sense” school (mostly untrained laymen) sought to promote and protect jural decision-making in order to insulate regional courts from the controls of precedent and appellate review. See, e.g., REID, CONTROLLING, *supra* note 248, at 24–26 (showing how New Hampshire judges worked with juries).



held ideals about the role of reason in government than did the popular assemblies, which were driven by local politics.<sup>284</sup> In the eyes of reformers, courts of law were an attractive place to locate fundamental political decisions, and, in this sense, it is *forum* that best explains the legalization of constitutional dispute. Indeed, there is reason to believe that ideas we later came to hold about judges—for example, about the importance of their ‘independence’ from the legislature—were a product, in large part, of shared convictions about proper proceedings in a court of law.<sup>285</sup> We can examine those convictions through a close analysis of the ideas of a “case” and “expounding.” A “case” was a dispute shaped by the process of “forensic litigation” in a court of law. Deciding a case required the court to “expound” the law, in the sense that the court was supposed to show how its judgment was rooted in the law of the community, as opposed to the interests of judge or jury. Expounding the law, in turn, might require the court to engage in judicial review. It was thus the demands of the forum that distinguished the interpretative powers of the judiciary from those of the executive. The President did not decide cases or expound the law.

#### A. *The Idea of a “Case”*

I want to begin by examining the idea of a “case.” By the 1790s, and probably earlier, “case” was regularly used to describe legal proceedings.<sup>286</sup> A “case” was a dispute that had assumed a form that

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284 See Kent, *supra* note 51, at 941–42; WOOD, EMPIRE, *supra* note 77, at 190–91 (describing the use of instructions in state assemblies). Disappointment with adjudication by popular assemblies also drove the development of due process doctrine. Some of the early judicial review cases can be read as due process cases, where the animating idea is separation legislative and judicial functions. See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1704–06, 1709–13 (2012).

285 See G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J.L. & PUB. POL’Y 643, 660–61 (2012) (“Judicial independence and arguments in its favor are premised on a picture of judges engaged in the resolution of controversies.”). Keep in mind that judges in most American jurisdictions were not independent at the time the federal Constitution was ratified. See GERBER, *supra* note 258, at 327 (noting that of the original colonies, “only Virginia and North Carolina completely constitutionalized the idea of judicial independence in the federal conception of the judicial institution prior to the Federal Constitution of 1787”).

286 See JAY, *supra* note 237, at 62–63; see also 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 110, at 703 (“The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions *in cases*, in which the manner or principles of this application are disputed by the parties interested in them.”) (emphasis added). But see HAMBURGER, *supra* note 44, at 536–37 (arguing that “case” had a wider meaning in the 1780s).

made it properly resolvable within a court of law. It was a dispute “judicially determined,” as it was sometimes put, rather than “extrajudicially.”<sup>287</sup> As Marshall described the idea in a speech given in 1800 on the floor of the House,

[a] case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken shape for judicial decision. If the judicial power extended to every *question* under the Constitution it would involve almost every subject proper for legislative discussion and decision . . . [T]he other departments would be swallowed up by the judiciary. . . . By extending the judicial power to all *cases in law and equity*, the Constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.<sup>288</sup>

The key distinction in the passage is between a “case” and a “question.” A “question” would appear to be any reasonably unsettled proposition in the law.<sup>289</sup> A “case,” in contrast, is a kind of dispute.<sup>290</sup>

287 JAY, *supra* note 237, at 151–52 (discussing New York Governor John Jay’s request for an advisory opinion from state judges and their refusal); see Bloch, *supra* note 19, at 594 & n.107 (discussing the Invalid Pension Act cases); Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in JAY, *supra* note 237, at 179, 179–80 (“The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to . . .”).

288 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95–96.

289 See HAMBURGER, *supra* note 44, at 537 (“[W]hereas in law a ‘cause,’ ‘case,’ or ‘controversy’ ordinarily referred to a particular dispute, a ‘question’ usually alluded to a more abstract disagreement, which rose above a particular legal dispute and thus might just as well be debated by a philosopher or a politician.”).

290 At times in his lengthy address, Marshall uses “case” in its loose sense of particular circumstance. See, e.g., 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95 (“This Mr. Marshall said led to his second proposition, which was—That the *case* was a *case* for executive and not judicial decision.”) (emphasis added). Nevertheless, I follow David Engdahl and Charles Hobson in identifying “case” as the relevant term, and not “case in law,” which Marshall also used in his 1800 speech. See HOBSON, *supra* note 112, at 52 (noting Marshall’s view that judicial power extends only to “cases,” not to all “questions” arising under the Constitution); see also Engdahl, *supra* note 275, at 311 n.103, 318, 325–26 (similar); JAY, *supra* note 237, at 62 (“[I]n that period [i.e., the late 1780s], ‘controversy’ commonly was used interchangeably with the word ‘case’ in reference to litigation.”). Samuel Johnson’s 1768 dictionary identifies both legal and non-legal meanings for “case,” but no entry for “case in law.” See SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 757 (3d ed. 1768) (defining “case”). “Case in law” could be understood as a legal case *at law*—i.e., subject to the common law or the law of the state. A key question is whether one can, without begging the question, interpret “case” in *Marbury* as referring to a dispute in court, rather than simply “particular circumstances.” Engdahl has argued that one can, based in part on other occurrences of “case” in *Marbury*. See Engdahl, *supra* note

It is distinguished by the “shape” it has taken, namely, a shape that makes “judicial decision” possible. So what makes it possible to resolve a dispute by judicial decision? At the very least, the court must be able to enter a valid judgment, which means, says Marshall, that the parties to the dispute must be “reached by [the court’s] process, and bound by its power,” and the court must have jurisdiction to make an “ultimate decision” about the rights at issue.<sup>291</sup> But, in addition, Marshall argues that the dispute “must assume a legal form, for forensic litigation, and judicial decision.”<sup>292</sup> In other words, it must be suited for resolution in a court of law, using the procedures and tools employed in that forum to resolve disputes.

This definition of “case” played a crucial role in Marshall’s defense of President Adams against charges that the President had usurped judicial authority.<sup>293</sup> The term thus perfectly captures the distinction between executive and judicial interpretative authority. Adams had received a diplomatic request to extradite a man, Thomas Nash, accused of participating in a mutiny aboard a British ship.<sup>294</sup> After considering the request, he transmitted his own “advice and request” to the federal judge with jurisdiction over the matter, asking the judge to deliver Nash to the British government. The judge held a *habeas* hearing, in which Nash desperately claimed to be an American by the name of Jonathan Robbins. Nevertheless, the judge complied with the request to hand over Nash/Robbins, whom the British promptly had transported to Jamaica, court-martialed and hanged. House Republicans were outraged.<sup>295</sup> They introduced a resolution censuring Adams for answering “questions” about the meaning of federal law, a federal treaty and the Constitution—authority they be-

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275, at 325–26 (noting that this distinction of “case” had been both featured in public debate and emphasized by Marshall himself).

291 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95–96.

292 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95–96.

293 See Walter Dellinger & H. Jefferson Powell, *Marshall’s Questions*, 2 GREEN BAG 367, 369–70 (1999) (detailing Marshall’s defense of Adams and Judge Bee against Republican led constitutional attacks and the role the word “case” played); Engdahl, *supra* note 275, at 304–14 (describing how Marshall rose to the occasion to protect Adams’ interests and made the distinction between “cases” and “questions”).

294 Engdahl, *supra* note 275, at 308.

295 Republicans tended to credit Nash’s claim to be an American citizen, which Dellinger and Powell suggest had some merit. See Dellinger & Powell, *supra* note 293, at 369 n.11 (“Robbins’s claim of United States citizenship, despite its suspicious timing, may well have been correct.” (citing Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLECTIONS 99 (1975)). Republicans were undoubtedly primed to take offense by what they perceived to be the Adams administration’s pro-British leanings. See Engdahl, *supra* note 275, at 307–09.

lieved was reserved under Article III for the federal courts—and for interfering “in a case where those courts had already assumed and exercised jurisdiction.”<sup>296</sup> In response, Marshall argued that the Constitution did not actually give federal courts jurisdiction over all such “questions,” as the resolution maintained, but only over “cases.”<sup>297</sup> To claim an exclusive authority over questions arising under federal law, treaties, and the Constitution would lead the judiciary to usurp executive authority. “A variety of legal questions must present themselves in the performance of every part of Executive duty,” Marshall observed, “but these questions are not therefore to be decided in court.”<sup>298</sup> The questions in this case were “questions of law, but they were questions of *political law*,” while the grant of jurisdiction to the federal courts “had never been understood, to confer on that department, *any political power whatever*.”<sup>299</sup>

Marshall’s defense shared much in common with an earlier defense of presidential authority against similar charges of usurpation, which he cited in his speech.<sup>300</sup> Writing in 1793 as “Pacificus,” Alexander Hamilton had defended President Washington’s authority to proclaim the United States a neutral in the war between Britain and France, and, as he had stated, “under no obligations of Treaty, to become an associate” of one warring power or the other.<sup>301</sup> In response to the objection that such a determination should have been made by the “Judiciary Department,” Pacificus maintained that “the province of that Department is to *decide litigations in particular cases*,” and that while it could interpret treaties, it should do so “only in litigated cases; that is, where contending parties bring before it a specific contro-

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296 10 ANNALS OF CONG. 533 (1800).

297 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95 (emphasis added).

298 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 103.

299 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 103 (emphasis added). Walter Dellinger and Jeff Powell rightly emphasize the idea of “political law” in Marshall’s defense, which casts an important light on the first two issues in *Marbury*, written by Marshall only three years later. See Dellinger & Powell, *supra* note 293, at 371, 373–74 (presenting Marshall’s argument “that our constitutional system gives the *political* branches exclusive, *de jure* authority to answer some questions of *law*”).

300 See 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 103–04.

301 Alexander Hamilton, Pacificus Number I (June 29, 1793), in THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 9 (Morton Frisch ed., 2007); see also; CASTO, *supra* note 237, at 73; JAY, *supra* note 237, at 156; George Washington, The Proclamation of Neutrality (Apr. 22, 1793), in THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra*, at 1.

versy.”<sup>302</sup> The judicial department had “no concern with pronouncing upon . . . *external political relations*.”<sup>303</sup>

At bottom, then, what made a dispute resolvable by judicial decision was that it was non-political. “Cases” were non-political. It was also a point of foundational importance for Marshall; Charles Hobson has argued that “the separation of law and politics was perhaps the fundamental proposition underlying Marshall’s jurisprudence.”<sup>304</sup> The question is what *made* a case non-political. How did a mere dispute *become* non-political, and thus a full-blooded case? The answer lies in the process of “forensic litigation” that characterized procedure in courts of law. It was forensic litigation that “shape[d]” and “form[ed]”<sup>305</sup> a dispute into one that *could* be resolved in a non-political way. It did this, ideally, by limiting the discretion of the judge. Litigation replaced unbounded or even prudential political discretion with *legal discretion*, and it was the exercise of legal discretion that distinguished “judicial decision.”<sup>306</sup> As Hobson summarizes the idea, “[a]s long as [judicial] creativity was perceived to operate within the confines of legal discretion, judges were not ‘legislators.’”<sup>307</sup> Litigation could do this because it was, in the common law

<sup>302</sup> Hamilton, *supra* note 301 (emphases added).

<sup>303</sup> Hamilton, *supra* note 301 (emphases added). Subsequently, in one of the Virginia debt cases, John Jay took the view that courts were incompetent to judge a treaty void for non-performance. See JAY, *supra* note 237, at 164. Jay wrote,

[o]n comparing the principles which govern and decide the necessary validity of a treaty, with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial, and the latter *are of a political nature*. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments which are charged with the political interests of the state.

Jones v. Walker, 13 F. Cas. 1059, 1062 (C.C.D. Va. n.d.) (No. 7,507) (emphasis added); see also Ware v. Hylton, 3 U.S. 199, 260 (1796) (opinion of Iredell, J.) (“These are considerations of policy, . . . certainly entirely incompetent to the examination and decision of a Court of Justice.”).

<sup>304</sup> HOBSON, *supra* note 112, at 52; see also NELSON, *supra* note 50, at 59–60.

<sup>305</sup> 4 THE PAPERS OF JOHN MARSHALL, *supra* note 48, at 95–96.

<sup>306</sup> See Kent, *supra* note 51, at 942 (“[T]he interpretation or construction of the Constitution is as much a JUDICIAL act, and requires the exercise of the same LEGAL DISCRETION, as the interpretation or construction of a law.”). H. Jefferson Powell examined the history of the expression “legal discretion” in some detail in his important article, “The Political Grammar of Early Constitutional Law.” See Powell, *supra* note 191, at 1006 (“‘Discretion’ in the judicial context thus had little to do with choice; it was, rather, the court’s skillful exercise of judgment in discerning and applying correctly the rules of law.”); *id.* at 1007 (“[L]egal discretion and politics were usually differentiated sharply.”); cf. HAMBURGER, *supra* note 44, at 135–36 (describing Coke’s distinction between the discretion of the individual man and the discretion of the law).

<sup>307</sup> HOBSON, *supra* note 112, at 35. For the development of this idea on the national level in the early nineteenth century, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 135–55 (Oxford U. Press 1991) (1988).

tradition, an oral practice of “deliberative reasoning and argument in an interlocutory, indeed forensic, context.”<sup>308</sup> Using the tools of rhetoric, grammar, and logic, in open disputation in a public forum, the parties and the judge could shape the dispute into one that a judge or jury could resolve neutrally, according to recognized community standards.<sup>309</sup> What emerged in this process, Marshall said later, was “human reason applied by courts, not *capriciously*, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things.”<sup>310</sup>

These ideas were linked to movements for institutional reform in the 1780s and 1790s, particularly those aimed at state court systems. Virginia is an outstanding example, and events in that state shed light on why the idea of a “case” was significant to Marshall.<sup>311</sup> Formally, after 1776 Virginia had a three-tiered system of courts, with its “Court of Appeals” serving as a court of last resort, the “General Court” as a central court of civil and criminal jurisdiction, and county courts headed by justices of the peace at the bottom.<sup>312</sup> But, in reality, Virginia had an extremely decentralized court system, since the county

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<sup>308</sup> Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONW. L.J. 1, 7 (2003); see also Alan Dillard Boyer, “Understanding, Authority, and Will”: *Sir Edward Coke and the Elizabethian Origins of Judicial Review*, 39 B.C. L. REV. 43, 50 (1997) (“[B]oth Coke and Fraunce shared the belief that the truest understanding of an issue is that reached by disputation and discussion . . .”).

<sup>309</sup> See MICHAEL LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760–1850*, at 58–64 (1991) (discussing early “epistemological approach[es] to legal reasoning”); Boyer, *supra* note 308, at 50–60 (discussing early ideas that “the wisdom of the group will be fuller and more trustworthy than the opinion of any one lawyer or orator”); Postema, *supra* note 308, at 7–10 (discussing the “form and structure of legal reasoning”). Note that Lobban, Postema, and Boyer are all describing generally Cokean views of the common law, whereas Marshall was much more of a Blackstonian deductivist.

<sup>310</sup> *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) (emphasis added).

<sup>311</sup> On reform efforts in Virginia, see F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1783–1828*, at 12–33 (1994); A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810*, at 161–202 (1981). Similar reform efforts occurred in New Hampshire, but about a decade later. See REID, *CONTROLLING*, *supra* note 248, at 119 (placing this reform in the early 1800s); REID, *supra* note 58, at 24–70 (discussing judicial reform in New Hampshire). There were reform and counter-reform movements in Pennsylvania and Georgia as well. See WOOD, *EMPIRE*, *supra* note 77, at 425–431 (discussing the debates about “the role of law and the judiciary in American life . . . in the states”); REID, *supra* note 58, at 7–23 (highlighting that the events that occurred in New Hampshire were also occurring in other states).

<sup>312</sup> See GERBER, *supra* note 258, at 60 (discussing the roles of each of the types of judges who served in these courts); THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 193 (3d Am. ed. 1801) (discussing Virginia’s court structure). In addition, coordinate to the General Court were a Court of Admiralty and a Court of Chancery.

courts handled nearly all litigation, as well as a wide variety of administrative matters.<sup>313</sup> Indeed, Virginia justices of the peace had long controlled almost every important issue of county policy—including tax levies, licensing, agricultural inspections, and road maintenance.<sup>314</sup> Nor did the system admit of any ready controls. Appeals from the county courts to the General Court were possible, but might take “six or seven” years.<sup>315</sup> Justices of the peace were formally appointed by the governor, but in reality had long been permitted to nominate their own successors, which they used to perpetuate the influence of their families and associates.<sup>316</sup> The result was a kind of ‘country’ aristocracy. Unsurprisingly, this aristocracy conducted their courts in a homespun and sometimes inquisitorial manner. While William Nelson has argued that early royal Virginia quickly adopted the common law in order to encourage private investment,<sup>317</sup> trained lawyers that came to Virginia before the turn of the eighteenth century complained loudly about the lack of sophistication and procedural informality at all levels of Virginia courts, but especially the county courts.<sup>318</sup> Justices were untrained in the common law, mixed law and politics, and were essentially unchecked by any republican authority.

In the 1780s, as reform efforts struggled along, Marshall practiced law before the Virginia General Court and the Court of Appeals, as well as the state’s Court of Chancery. It was in practicing before the central courts that Marshall developed the approach to litigation for which he later became well-known.<sup>319</sup> Almost invariably, Marshall’s strategy was to identify relevant high-level principles, and then deduce from those principles the proper result in the instant case—a

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313 See MILLER, *supra* note 311, at 24–25 (discussing the many roles of the justices of the peace).

314 See James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal System of British America*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 555, 560 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing that most of the power in early Virginia was held by the justices of the peace).

315 ROEBER, *supra* note 311, at 196 (quoting VA. INDEP. CHRONICLE (Mar. 28, 1787)).

316 See Henretta, *supra* note 314, at 560 (“The county courts had become self-perpetuating oligarchies of justices . . .”).

317 See 1 NELSON, *supra* note 262, at 36–37 (discussing the adoption of common law in Virginia).

318 See ROEBER, *supra* note 311, at 57–60 nn.37–45 (providing support for this conception of the Virginia courts); Henretta, *supra* note 314, at 571 (noting the absence of professional lawyers in Virginia).

319 HOBSON, *supra* note 112, at 30–33, 42–43 (discussing “Marshall’s common law litigation”); see NELSON, *supra* note 50, at 43.

distinctively Blackstonian version of forensics.<sup>320</sup> What made the approach so forceful was the impression of ‘logical’ or ‘geometric’ certainty that Marshall was able to convey, which suggested a severe constraint on the discretion of the judge or jury.<sup>321</sup> Reform proposals that would create intermediate assize or district courts, staffed by central court judges, promised to encourage the growth of these litigation methods, and perhaps even bring trained lawyers and common law procedures to the county courts.<sup>322</sup> This would enhance the republican legitimacy of those courts, by reinforcing “an emerging distinction between ‘legislative will’ and ‘justice’ . . . [which] became the foundation of a conception of judicial independence and discretion that was consistent with the republican belief in the sovereignty of the people.”<sup>323</sup>

The movement for reform of Virginia’s courts was also connected to developments in the state’s assembly. Like the popular assemblies of several other states, described above, the Virginia General Assembly in the 1780s was riven by party disputes, divided in its case along ‘country’ and reform lines.<sup>324</sup> Justices of the peace, sitting as a significant voting bloc in the Virginia House of Delegates, worked to protect the interests of indebted rural planters against the interests of merchants and creditors in the state’s population centers.<sup>325</sup> The country party pushed through measures to prevent the efficient collection of debt and derailed proposals that would have made it possible for British and American creditors to collect even principal in a timely fashion.<sup>326</sup> The party supported its measures in the familiar

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320 See HOBSON, *supra* note 112, at 32–33 (discussing Marshall’s tactics); LOBBAN, *supra* note 309, at 57–61 (describing Blackstone’s methodology).

321 See HOBSON, *supra* note 112, at 32–33 (arguing that in litigating cases, Marshall “followed the straight and narrow path of logic, presenting his case like a geometric proof”).

322 See, e.g., ROEBER, *supra* note 311, at 197 (discussing the possibility that “a more professional court system” would be the result of reform in Virginia).

323 HOBSON, *supra* note 112, at 39; see also ROEBER, *supra* note 311, at 166–69 (discussing Jefferson’s impact on judicial reform in Virginia); WHITE, *supra* note 307, at 129 (“American judges were conceded to be the expositors of common law rules, but since the rules themselves needed to retain their consonance with fundamental principle, exposition was not the same as lawmaking.”).

324 See ROEBER, *supra* note 311, at 33–61, 178–79. For the effect of party politics in other state assemblies, see *supra* notes 70–73 and accompanying text. See generally WOOD, *supra* note 46, at 191 (noting a rift between eighteenth century American politicians and their constituents regarding matters of public policy).

325 See, e.g., Henretta, *supra* note 314, at 589 (“Roughly half the members of the House of Burgesses sat as justices in their home counties and opposed proposals that would limit their legal authority or replace them with elected aldermen.”); see also HOBSON, *supra* note 112, at 38; MILLER, *supra* note 311, at 12–16.

326 One example of impeding collection is Virginia’s practice of assuming private debts. See *Jones v. Walker*, 13 F. Cas. 1059, 1067 (C.C.D.Va. 1793) (No. 7,507) (“Here it becomes



language of the English opposition, ably deployed by Patrick Henry—less government meant less corruption—but to the eyes of reformers, like Marshall and Madison, the “laws were passed merely to satisfy the interest of a majority.”<sup>327</sup> Court reform at the state level was thus crucial not only because it could grease the skids for debt-collection policies reformers thought vital, but because it promised to create an institution for collective decision-making that would give effect to “human reason,” rather than the passion and self-interest that gripped the assembly.<sup>328</sup> In the terminology of the period, courts could play a decisive role in ensuring the rule of “public opinion”—that is, “*the reason*[ ] of the public,” rather than the passion of a bare majority.<sup>329</sup> The key to securing a government founded on public opinion was to encourage both the communication of ideas *and* their evaluation in open forums suited to subjecting the organic sentiment of the people to the scrutiny of reason.<sup>330</sup> While this may have been a

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necessary to inquire . . . [w]hether the payment into the loan-office, and the receipt and discharge thereupon given by Virginia to the debtor, is a lawful impediment . . . [.]”: JAY, *supra* note 237, at 162–65 (“Private debtors in the various states owed staggering sums to British Creditors . . . Virginians, who topped the list, owed almost half of the overall debt due to British creditors. . . . One [Virginia] statute provided that the debt obligations would be discharged to the extent payment that was made to the Virginia treasury . . .”).

<sup>327</sup> MILLER, *supra* note 311, at 13, 15–16.

<sup>328</sup> Again, there is a striking parallel to draw between judicial review and the development of due process doctrine according to Chapman and McConnell. As Chapman and McConnell tell it, the idea that due process prohibited legislative adjudication grew out of a sense that the legislative process was incapable of providing the kinds of pre-deprivation protections that existed in courts of law. *See, e.g.*, Chapman & McConnell, *supra* note 284, at 1712, 1716, 1729–32 (“To say that due process cannot be ‘referred to an act of legislature’ is not to say that due process principles do not apply, but that the legislature is institutionally incapable of satisfying them. Hamilton specifically rejected the argument that whatever the legislature does is by definition consistent with ‘the law of the land.’”). The many sources quoted and described by John Reid show that Chapman and McConnell underestimate the degree to which state assemblies continued to exercise adjudicatory authority well into the 1800s, at least in New Hampshire, but probably in other states as well. *See, e.g.*, REID, *supra* note 58, at 7–11, 61–70 (providing historical evidence on this point).

<sup>329</sup> The quoted language is, of course, from *Federalist 49*. THE FEDERALIST NO. 49 (James Madison), *supra* note 32, at 276. *See also* KRAMER, *supra* note 34, at 114 (“[P]ublic opinion would work to secure rather than undermine republican government only if and for so long as the public was guided by reason . . . [J]udicial review . . . add[ed] another voice capable of forcing further public deliberation when it came to constitutional matters.”); Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WM. & MARY Q. 925, 948 (2002) (describing the notion of “public opinion”).

<sup>330</sup> *See, e.g.*, KRAMER, *supra* note 34, at 114 (“[P]ublic opinion would work to secure rather than undermine republican government only if and for so long as the public was guided by reason.”); Sheehan, *supra* note 329, at 937–38 (“The proponents of a politics of public opinion agreed on the vital importance of the enlightened members of society to the formation of a public voice grounded in reason.”). Wood has argued that the leadership role provided by gentlemen in the process of forming public opinion was essentially gone

traditional function of popular assemblies, it was not one well served by assemblies in the 1780s.<sup>331</sup> Yet it was a purpose that (properly reformed) courts of law could serve—and that they naturally *should* serve, in light of the process of litigation. Because forensic litigation forced the parties publicly to test their claims against one another, before a neutral decision-maker, according to community standards, it would be difficult for party politics to control the outcome of a case.<sup>332</sup> In this sense, courts of law could discipline legislative will by channeling that will within boundaries set by the reason of the political community.<sup>333</sup>

### B. *Kemper v. Hawkins and Judicial Resolutions*

For courts to play such a role, American judges would have to change some of their ways. In particular, if the authority of the judge

by 1800, and that the more horizontal, democratic practices that became dominant were premised on the idea that a collision of ideas would result in the emergence of truth. See Gordon S. Wood, *The Democratization of Mind in the American Revolution*, in LEADERSHIP IN THE AMERICAN REVOLUTION 63, 82 (1974) (arguing that public opinion “became the resolving force not only of political truth but of all truth”). This notion of a “collision of ideas” fit naturally with the classical account of litigation in common law courts as “deliberative reasoning and argument in an interlocutory, and indeed forensic, context.” Postema, *supra* note 308, at 7; see *supra* note 308 and accompanying text.

<sup>331</sup> See THE FEDERALIST NO. 10 (James Madison), *supra* note 33, at 48–51. For this function of the popular assembly, see Sheehan, *supra* note 329, at 939 (“Turgot . . . promoted the establishment of a multilayered system of deliberative assemblies and institutional devices and checks that were intended to transform individual wills and preferences into a common reason.”). Until the middle of the eighteenth century, most colonial assemblies in America had conducted themselves like courts. See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 54 (1943) (“Not only did the colonial assemblies perform various judicial functions, but most of them also, by their equipment and methods of procedure, as well as by specific statements, proclaimed themselves to be courts.”); Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 559 (1992) (stating that, as state assemblies concentrated more on legislation, they “began divesting themselves of judicial functions”).

<sup>332</sup> Justice Paterson described the contrast between proceedings in a court of law and those in an assembly in his charge in *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (C.C.D. Pa. 1795). The case involved a dispute over title that the Pennsylvania Assembly had quieted by legislative act. Paterson argued that the “proofs and allegations” presented to a jury in title proceedings in a “court of law” were preservative of individual rights; in the Assembly, in contrast, “[t]he proprietor stands afar off, a solitary and unprotected member of the community, and is [stripped] of his property, without his consent, without a hearing, [and] without notice . . .” *Id.* at 315.

<sup>333</sup> This is what distinguishes “public opinion” theory from mixed government theory. In mixed government theory, the departments of government contend with each other politically, and in so doing limit government; in the theory of “public opinion,” in contrast, governmental power is not limited by contending political forces, but by reason, given effect by appropriate institutional design. See Sheehan, *supra* note 329, at 931 (discussing Madison’s theory of public opinion).

was attached to the case, then it threw into doubt the legitimacy with which the judge acted *outside* legal proceedings, as he often did in the decades prior to the Revolution. Consequently, as the justification for judicial review matured in the 1790s, the idea of the “case” began to figure more prominently. *Kamper v. Hawkins* illustrates this proposition. *Kamper* was the “best known and most influential” discussion of judicial review in the years before *Marbury*.<sup>334</sup> The leading opinions in *Kamper*, written by Judge Spencer Roane and Judge St. George Tucker, defend judicial review in terms familiar from “To the Public.”<sup>335</sup> Yet the most important issue in the case was *not* judicial review. Instead, it was what judicial acts were legally authoritative.

The case in *Kamper* arose out of a 1792 act of the Virginia General Assembly altering the state’s system of district courts, which the reform party had eventually succeeded in pushing through.<sup>336</sup> District courts were then staffed on the model of a circuit system, by judges sitting on the state’s central General Court.<sup>337</sup> The act of 1792 gave these judges an authority to stay proceedings by the issuance of an injunction, apparently in an effort to “decentralize chancery jurisdiction.”<sup>338</sup> The arrangement raised a number of constitutional questions. Among these, the most important was the status of the district courts relative to the Assembly. As Judge Tucker put it, the district courts were “legislative,” in the sense that the Assembly had created them; yet they would exercise powers under the 1792 reform that the state Constitution had impliedly given to courts independent of the

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334 KRAMER, *supra* note 34, at 100.

335 See SNOWISS, *supra* note 46, at 53 (presenting Tucker’s arguments); HOBSON, *supra* note 112, at 65.

336 See GERBER, *supra* note 258, at 65. The district courts were intermediate courts, which Madison and other reformers had finally succeeded in creating in the late 1780s. See *infra* note 341.

337 See 13 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 430 (1823) (reprinting the laws of Virginia relating to judges in the general court).

338 HOBSON, *supra* note 112, at 45; see HENING, *supra* note 337, at 432–33 (providing a law relating to “[t]he district courts in term time”). Virginia law granted jurisdiction over causes in chancery to the high court of chancery, which was staffed by judges in chancery. HENING, *supra* note 337, at 406 (providing a law relating to the jurisdiction of this court). The 1776 Constitution made judges in chancery independent of the assembly. See VIRGINIA CONST. OF 1776 (“The Legislative, Executive and Judiciary Departments, shall be separate and distinct . . .”).

Assembly.<sup>339</sup> Such an arrangement threatened to undermine the state's commitment to the separation of powers.<sup>340</sup>

Arguably, the judges had a precedent they could use to invalidate the questionable provisions in the 1792 act. The act of 1788 creating the district courts had originally staffed them using judges commissioned to sit on the state's Court of Appeals.<sup>341</sup> This arrangement significantly increased the workload of Court of Appeals judges, who viewed it as an end-run around judicial salary protections in the state's Constitution.<sup>342</sup> In April 1788, several months before the district court term was to begin, Court of Appeals judges refused to appoint district court clerks, preventing the district courts from operating.<sup>343</sup> They defended their action in a "Respectful Remonstrance of the Court of Appeals," which argued that the 1788 act was an unconstitutional diminution of salary.<sup>344</sup> Along the way, the "Remonstrance" observed that the state Constitution "seems to require" judges of the different constitutional courts to be distinct persons—a principle that the 1792 district court act arguably violated.<sup>345</sup> The judges closed with an appeal to the Assembly for reform—and, failing that, to the people themselves, "whose servants both [the judges and legislators] are."<sup>346</sup>

The *Kamper* court was thus possessed of a friendly precedent. Yet there was disagreement on the bench as to whether "Remonstrance"

339 See *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 21 (1793) (discussing the jurisdiction and powers of the district courts).

340 See VIRGINIA CONST. OF 1776. Virginia was unique in this regard. See GERBER, *supra* note 258, at 61 ("A number of states declared in their respective bills of rights that the separation of powers was a right guaranteed to the people. However, none phrased that right with as much concern for the independence of the judiciary as did Virginia.").

341 See GERBER, *supra* note 258, at 64 ("[T]he District Court Act of January 1788 . . . required existing court of appeals judges to sit on newly established district courts without additional compensation."); ROEBER, *supra* note 311, at 193–201 (discussing Madison's role in court reform).

342 See HAMBURGER, *supra* note 44, at 560. See generally *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135 (Va. 1788).

343 See HAMBURGER, *supra* note 44, at 562.

344 *Cases of the Judges*, 8 Va. (4 Call) at 141.

345 *Id.* at 144. The argument was that General Court judges were made into judges in chancery by the act's grant of injunctive power. See *Kamper*, 3 Va. (1 Va. Cas.) at 22–23 ("This is a motion for an injunction, adjourned from the District Court of Dumfries on the constitutionality of the eleventh section of the district court law, which gives the district court in term time, or a judge thereof in vacation, the same power of granting injunctions to stay proceedings on any judgment obtained \*23 in a district court, and of proceeding to the dissolution or final hearing of suits commencing by injunction, under the same rules and regulations as are now prescribed to the high court of chancery.")

346 *Cases of the Judges*, 8 Va. (4 Call) at 146.

was a proper legal authority at all, since it had not decided a case.<sup>347</sup> As Judge James Henry put it, “the question did not then come before the court in a judicial manner,” but had been “taken up as a general proposition.”<sup>348</sup> “Remonstrance” was, wrote Henry, not an opinion in “an adjudged case, to be considered as a binding precedent,” but instead “an appeal to the people,” which “looked like a dissolution of the government.”<sup>349</sup> To Henry’s eye, “Remonstrance” was not an exercise of proper judicial authority, but an act of resistance producing a sort of governmental shutdown. The “Remonstrance” judges had acted out of a duty to prevent violations of the state Constitution, but this ‘political’ duty differed from the duty of the judicial office.<sup>350</sup> Henry’s caution on this point might be explained by the state assembly’s reaction to “Remonstrance,” which was to strip the Court of Appeals of jurisdiction and to staff an entirely new high court.<sup>351</sup> Judge Henry had sat on the Court of Appeals in 1788 and signed the “Remonstrance;” after the assembly stripped the court of its jurisdiction, he accepted a commission on the General Court, whose judges now had no power to hear appeals. The experience likely encouraged a distinction between freestanding ‘resolutions’ and judicial review in the context of a case.<sup>352</sup>

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347 See HAMBURGER, *supra* note 44, at 559–60 (“In expounding law in resolutions rather than cases . . . the judges of the Court of Appeals stepped outside the realm in which they could expect authority or even independence . . .”); see also Treanor, *supra* note 44, at 513 (“The *Cases of the Judges* were not actual cases.”).

348 *Kemper*, 3 Va. (1 Va. Cas.) at 50.

349 *Id.* at 50, 108.

350 HAMBURGER, *supra* note 44, at 561. But see GOEBEL, *supra* note 87, at 129 (treating “Remonstrance” as an authority for judges to determine constitutionality).

351 See HAMBURGER, *supra* note 44, at 570–71 (“[A]lthough the Assembly left the old Court of Appeals undisturbed, it established a new Court of Appeals, with jurisdiction to hear the cases depending in the old Court of Appeals and all future appeals.”). William Treanor points out that technically the Court of Appeals judges resigned, and insisted that they had done so freely. See Treanor, *supra* note 44, at 514.

352 Judge Tyler also sat on both the “Remonstrance” and *Kemper* courts. While Tyler did not take up the precedential value of the “Remonstrance” expressly, he did write,

I will not in an extra-judicial manner assume the right to negative a law . . . but if by any legal means I have jurisdiction of a cause, in which it is made a question how far the law be a violation of the constitution, and therefore of no obligation, I shall not shrink from a comparison of the two, and pronounce sentence as my mind may receive conviction.—To be made an agent, therefore, for the purpose of violating the Constitution, I cannot consent to.—As a citizen, I should complain of it; as a public servant, filling an office in the one of the great departments of government, I should be a traitor to my country to do it.”

*Kemper*, 3 Va. (1 Va. Cas.) at 61 (emphasis added).

Others on the *Kemper* court, however, disagreed with Judge Henry and thought the “Remonstrance” a binding legal precedent.<sup>353</sup> Judge Tucker observed that “decisions of the supreme court of appeals in this commonwealth . . . are to be resorted to by all other courts, as expounding, in their truest sense, the laws of the land.”<sup>354</sup> He then turned to “the authority of a previous decision of that court, on a similar question”—i.e., the “Remonstrance”—and described it as the outcome of something like litigation in a court of law.<sup>355</sup> He quoted court records, which read, “[o]n consideration of a late act of assembly, . . . after several conferences, and upon mature deliberation, the court do *adjudge* that clerks of the said [district] courts ought not now to be appointed.”<sup>356</sup> Tucker observed that the Court of Appeals could hardly have avoided the issue, since the 1788 act obligated the judges to hire clerks, thereby forcing them to consider the constitutional issues the act raised.<sup>357</sup> The judges “found themselves obliged to decide, whatever temporary inconveniencies [sic] might arise, and in that decision to declare, that the constitution and the act were in opposition . . . .”<sup>358</sup> Such a declaration did not pass beyond conventional judicial powers, since, as the Court of Appeals itself had explained, “when they [i.e., the judiciary] decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law.”<sup>359</sup> Thus, while Tucker could not plausibly argue that the “Remonstrance” had actually decided a case, he could argue that the process resembled adjudication enough to make the “Remonstrance” an authoritative expression of the law.

Tucker’s notion of judicial duty—the duty to expound the law in the course of adjudication—then became the centerpiece of his and Judge Roane’s famous defenses of judicial review. Their defenses are thus best understood as describing institutional contours for that power. Tucker begins with the principal objection to locating this power in courts: the assumption that the Constitution is “a rule to the *legislature only*, and not to the *judiciary*, or the *executive*, . . . [and thus] neither the executive nor the judiciary can resort to it.”<sup>360</sup> This

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353 HOBSON, *supra* note 112, at 45 (arguing that the *Kemper* decision was similar to *Marbury v. Madison* due to the court’s constitutional scrutiny and refusal of additional jurisdiction).

354 *Kemper*, 3 Va. (1 Va. Cas.) at 93.

355 *Id.*

356 *Id.* at 94–95.

357 *Id.*

358 *Id.* at 95.

359 *Id.* at 107.

360 *Kemper*, 3 Va. (1 Va. Cas.) 20, 77 (Va. 1793) (emphasis added).

view, he says, is a concomitant of the English system, in which the Constitution is determined by usage alone, making acts of Parliament constitutive of fundamental law.<sup>361</sup> English courts of law thus have no choice, Tucker says, but to “receive whatever exposition of [the Constitution] the legislature might think proper to make.”<sup>362</sup> American courts of law, in contrast, need not accept the legislature’s view. Since American constitutions are written, they govern judges “on every occasion, where it becomes necessary to expound *what the law is*.”<sup>363</sup> To expound the law, judges have to examine the Constitution, since the Constitution is “the first law of the land.”<sup>364</sup> Indeed, observes Tucker, under the Virginia Constitution’s provision for separation of powers, “the duty of expounding must be *exclusively* vested in the judiciary.”<sup>365</sup> Tucker thus appears to believe that both the judiciary and the executive can “resort” to the Constitution, but only judges “expound” it. Roane makes a similar argument.<sup>366</sup>

The idea of a “case” thus figured centrally in the version of the Standard Justification presented by Tucker and Roane. In contrast, the principles of popular disobedience play at best a subordinate role. Had popular disobedience sufficed to support judicial review, the “Remonstrance” could have stood on its own feet; instead, Tucker had to refashion it as an adjudicated case, somewhat unconvincingly, to show that the judges who issued it had remained within their “line of duty.” In this sense, American practices in the last decade of the eighteenth century came more into line with the English notions of judicial duty that Philip Hamburger has described. But this was the product of institutional reform and politics, not simply an inheritance of English ideas.<sup>367</sup> By intrinsically connecting review to the ad-

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<sup>361</sup> *Id.* at 78.

<sup>362</sup> *Id.* (emphasis added).

<sup>363</sup> *Id.* (emphasis added). For the written character of American constitutions as crucial, see HOBSON, *supra* note 112, at 65.

<sup>364</sup> *Kemper*, 3 Va. (1 Va. Cas.) at 78.

<sup>365</sup> *Id.* at 79 (emphasis added). Notably, Tucker had advanced the same position in 1782, during his argument in the *Case of the Prisoners*. See Treanor, *supra* note 44, at 522–23, 554–55 (“Echoing his argument in the *Case of the Prisoners*, Tucker in *Kemper* appealed to ‘the text of the Constitution, and the spirit of our government.’ He noted that the legislature had repealed statutes that were ‘contrary to the true spirit of the Constitution.’”).

<sup>366</sup> See *Kemper*, 3 Va. (1 Va. Cas.) at 38–39 (Opinion of Roane, J.) (“It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them . . . . In expounding laws, the judiciary considers every law which relates to the subject: would you have them to shut their eyes against that law which is of the highest authority of any . . . ?”).

<sup>367</sup> See HAMBURGER, *supra* note 44, at 283 (“As in England, so in each American state, a constitution made with the authority of the people was part of the law of the land, and the judges had a duty to decide in accord with the law of the land, including the Constitu-

judication of a case, Tucker effectively narrowed the judicial office. Outside the confines of a case, the judge acted only as a citizen—not as a ‘magistrate,’ or officer of the government, the role he had played before the Revolution and in the first decade after. In effect, then, the *forum* was shaping the *office*, the American court of law was creating the American judge.

### C. “Expounding” the Law, and its Variants

By the turn of the century it was widely understood that the core function of a court of law was to decide cases. Deciding cases required courts to “expound” the law. As Marshall put it in *Marbury*, those who apply a legal rule to cases, “must of necessity expound and interpret that rule.”<sup>368</sup> What did it mean, in the late eighteenth century, to “expound” a legal rule?

To “expound” a rule was not merely to state it or describe it. As Philip Hamburger has shown, judges in the English tradition had an authority to *explain* the law,<sup>369</sup> and this idea, which retained currency through the eighteenth century, was sometimes expressed with “expound.” Samuel Johnson’s 1768 and 1792 English dictionaries define “expound” as meaning “[t]o explain; to clear; to interpret,” and “to

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tion. Much was different after 1776, but these basics and what they required of judges remained largely the same.”). Hamburger does acknowledge changes in the practices of American judges, *see id.* at 536–74, but it is unclear how those developments should be understood in light of his basic thesis that judicial review emerges out of “the common law ideals of law and judicial duty . . . taken together . . .” *Id.* at 17. The office of the early American judge was not a strictly judicial office; it was the office of a *magistrate*, and in acting, the American judicial magistrate drew on his political authority and his position as a community leader. *See supra* note 314; NELSON, *supra* note 50, at 12–14. In my view, when reformers sought to position courts of law as checks on popular assemblies in the mid-1780s, the English common-law ideals Hamburger describes—which the elite understood and accepted, even if those ideals did not describe the actual practices of courts—served as a convenient vocabulary for pressing their case.

<sup>368</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>369</sup> *See* HAMBURGER, *supra* note 44, at 219–20 (“At common law, when judges explained their judgments, they reasoned or exercised judgment with the authority of their office.”). The Middle English term from which “expound” derived could connote a sort of public explanation of meaning. *See Expōunen Definitions 1 and 2*, MIDDLE ENGLISH DICTIONARY (2001), available at <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED14979>; *Expounen Definitions 1 and 2*, OXFORD ENGLISH DICTIONARY 317 (2013), available at <http://oed.com/view/Entry/66731?redirectedFrom=expounen&>. The English term came by way of the French “espundre”; the Anglo-Norman Dictionary defines “espundre” as meaning “to explain, interpret,” “to mean, signify,” and “to fulfil [sic].” *Espundre Definition*, ANGLO-NORMAN DICTIONARY (2007), available at <http://www.anglo-norman.net/gate/index.shtml?session=SAB119369T1391560465>. The Latin form “expone,” from which the French derived, had a similar meaning. OXFORD ENGLISH DICTIONARY, *supra*.



examine, to lay open.”<sup>370</sup> Late-eighteenth century American legal sources confirm this usage, in some cases by interchanging “explain” with “expound.” In the notes that lawyer St. George Tucker prepared in 1782 for his argument in *Commonwealth v. Caton*, he asserts that it is “uncontrovertible . . . that the power properly belonging to the Judiciary Department, is, to *explain* the Laws of the Land as they apply to particular cases.”<sup>371</sup> Eleven years later, now on the bench, Judge Tucker reasoned in *Kemper* that the Constitution should be resorted to “on every occasion, where it becomes necessary to *expound* what the law is,” and that “the duty of expounding must be exclusively vested in the judiciary.”<sup>372</sup> Other prominent jurists interchanged the terms, or interchanged “explain” with terms like “construe” or “construct.”<sup>373</sup> Overall, usage was somewhat uneven; but there was, nevertheless, a substantive difference between explaining and merely restating a rule, or simply defining its terms. A court explaining the law might equitably reject an expression’s plain meaning in favor of one suited to the intent of the legislature or the purpose of a legal instrument.<sup>374</sup>

370 See JOHNSON, *supra* note 290, at (defining “interpret”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792). The 1792 dictionary defines “interpret” as meaning “to explain; to translate; to decipher; to give a solution of,” which is largely the same as the 1768 definition.

371 Treanor, *supra* note 44, at 522 (emphasis added).

372 *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78–79 (Va. 1793) (emphasis added).

373 See, e.g., *Turner v. Turner’s Ex’x*, 8 Va. (4 Call) 234, 237 (Va. 1792) (“It is the business of the legislators to make the laws; and of the judges to expound them. Having made the law, the legislature have no authority afterwards to explain its operation upon things already done under it.”). “Explain” might also be used interchangeably with “construe” or “construct.” See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) (“I am under a necessity to give a *construction*, or explanation of the words, ‘*ex post facto law*,’ because they have not any certain meaning attached to them.”); “Brutus” (Jan. 31, 1788), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 189, at 293, 294–295 (“The cases arising under the Constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it. . . . This article vests the courts with authority . . . to explain [the Constitution] according to the rules laid down for construing a law.”). In a later period, John Reid quotes Daniel Webster as describing law as “composed of received rules and received explanations.” REID, CONTROLLING, *supra* note 248, at 39.

374 See, e.g., *Cole v. Clayburn*, 1 Va. (1 Wash.) 262, 264 (1794) (argument of attorney Duval) (arguing that a will could “with propriety receive a different exposition. It is not unusual, in the construction of wills, and even of deeds, to enlarge, or limit the meaning of particular words, so as to fit them to the subject on which they are meant to operate, and to avoid contradiction or absurdity”); “Brutus” (Jan. 31, 1788), *supra* note 373, at 295 (“By [the grant of equity jurisdiction], they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”). Philip Hamburger has argued that expounding in this sense was limited to equitable rules of interpretation. See HAMBURGER, *supra* note 44, at 336–57 (“They [judges] could sometimes avoid minor injustices and inconvenience through mechanisms such as equity and equitable interpretation, [but] they could not hold a government act unlawful for being

Pressed to its limits, explaining was clearly a creative act. As the authors of an open letter criticizing the decision in *Rutgers v. Waddington* fumed, rather than “speak the plain and obvious meaning of the law,” a court could “explain it to mean any thing or nothing.”<sup>375</sup> Similar criticisms were directed at judicial “construction.”<sup>376</sup> In this sense, “expounding” or “construing” or “constructing” the law was not merely restating it or defining its key terms.<sup>377</sup>

Yet expounding the law was also not changing the law. It was consistent with obeying the law. “A Constitution,” said Madison in a late letter, “is to be expounded and obeyed, not controlled or varied.”<sup>378</sup> Delegates at the federal convention repeatedly insisted that “the power of making ought to be kept distinct from that of expounding the laws,” a basic principle in Montesquieu’s version of separation of powers.<sup>379</sup> Outside the convention, as well, reformers argued that the powers to expound and to make law should be placed in different hands.<sup>380</sup> If expounding and its variants were thought to be creative

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unjust, not useful, or otherwise unreasonable.”). This is consistent with Blackstone, but I doubt the practice can be cabined in this way. Whatever the black letter law, the lines separating equitable and common law doctrines of interpretation were historically porous. See Boyer, *supra* note 308, at 71–79 (discussing Coke’s views). Unsurprisingly, then, it is often unclear whether a court is invoking an equitable or common law doctrine of interpretation. See, e.g., *Ham v. McClaws*, 1 S.C.L. (1 Bay) 93 (S.C. Com. Pls. Gen. Sess. 1789); 1 SCHWARTZ, *supra* note 81, at 424–28 (citing the argument of J. M. Varnum in *Trevett v. Weeden*).

375 Melaneton Smith et al., *To the People of New York*. N.Y. PACKET AND AM. ADVERTISER, Nov. 4, 1784, at 1.

376 See, e.g., “Brutus” (Jan. 31, 1788), *supra* note 373, at 300.

377 In this respect, there are obvious similarities between the usage of “expound” and “construct” in the late eighteenth century, and the interpretation-construction distinction so popular today. See Larry B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (claiming that “the difference between interpretation and construction is real and fundamental”). However, the modern thesis that it is a “political task” to construct a text, rather than merely interpret it, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 6 (1999), does not appear to be supported by the late-eighteenth century sources examined here.

378 Letter from James Madison to Charles Ingersoll (June 25, 1831), in 4 ELLIOT, *supra* note 122, at 615, 615. See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Iredell, J.) (“[T]he distinct boundaries of law and Legislation may be confounded, in a manner that would make Courts arbitrary, and in effect *makers of a new law*, instead of being (as certainly they alone ought to be) *expositors of an existing one*.”).

379 5 ELLIOT, *supra* note 122, at 345 (statement of Caleb Strong); see also *id.* at 345 (statement of Elbridge Gerry) (arguing that the proposed Council of Revision “was making the expositors of the laws the legislators, which ought never to be done”). On the origin of this principle in Montesquieu, see GWYN, *supra* note 82, at 105.

380 See, e.g., REID, *supra* note 58, at 32 (“[W]e think it our duty solemnly to protest against . . . the dangerous precedent of one person holding the aforesaid offices, being at the same time a Legislator in New-Hampshire, and Judge of the Federal Court . . . where

acts, then, their creativity operated within certain limits, set by the norms of the explanatory process. That process involved fitting a legal rule into a more comprehensive body of law. “In expounding the laws,” said Judge Roane in *Kamper*, “the judiciary considers every law which relates to the subject.”<sup>381</sup> In this respect, Roane was mimicking Blackstone, who observed at the outset of the *Commentaries* that the “academical expounder of the laws . . . should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities[.]”<sup>382</sup> The seventeenth century common law had aimed merely at local coherence between the present case and earlier decisions, as determined by the judge in deliberation with the parties; but American courts under the influence of Blackstone and then Mansfield became more ambitious and ‘scientific.’<sup>383</sup> They sought to formulate the “principles” behind decisions, and then forced those principles into a kind of system or overarching theory (sometimes organized around a “keyword”), from which an outcome in the present case could be deduced.<sup>384</sup> As Brutus described it, “the court must and will assume certain principles, from which they will reason, in forming their decisions.”<sup>385</sup> Ten years later, in 1798, Jesse Root was even more deductive; he argued that the “principles” and “precepts” of the

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as Judge he may explain and interpret laws which as Legislator he assisted to make . . .” (quoting Jeremiah Smith, Osbourne’s Spy, Jan. 13, 1790)).

381 *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 38 (Va. 1793).

382 1 BLACKSTONE, *supra* note 110, at \*26.

383 On the classical common law, see LOBBAN, *supra* note 309, at 57–58; GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 31–37 (1986). On American jurisprudence, see HOBSON, *supra* note 112, at 34–35; WHITE, *supra* note 307, at 79, 81–82; Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1058–59 (2002). On the institutionalist tradition in which Blackstone wrote, see JOHN LANGBEIN, RENEE LETTOW LERNER ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 839 (2009).

384 See Hulsebosch, *supra* note 383, at 1051 (“Keywords, signifying abstract principles, became the benchmarks of legal reasoning.”); S.F.C. Milsom, *The Nature of Blackstone’s Achievement*, 1 OXFORD J. LEGAL STUDS. 1, 9 (1981) (referencing “abstract principles”); Powell, *supra* note 191, at 965 (“Taylor instead described the Federal Constitution as designed to embody the ‘master principles and comprehensive truths’ of political morality and thereby “to give them practical effect.”) (citation omitted); Treanor, *supra* note 44, at 526 (describing Justice Paterson’s charge in *Vanhome’s Lessee v. Dornance*, which focused on “first principles”).

385 “Brutus” (Feb. 7, 1788), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 189, at 298, 299; accord 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 159, at 451 (statement of James Wilson) (“When [an unconstitutional law] comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.”) (emphasis added).

common law “enable[] us, to explain the laws, construe contracts and agreements, to distinguish injuries, . . . to determine their degree and the reparation in damages which justice requires.”<sup>386</sup> In this context, the rather modest observation that authorities were inconsistent, or mutually “repugnant,” became a matter of central importance, because it served to measure the degree to which legal rules could be regarded as part of the same system.<sup>387</sup> Ultimately this is what distinguished “expounding” the law from making it. Expounding was not stipulating additional law, but explaining how a judgment followed from (and thus was *part of*) existing law, which itself enjoyed republican legitimacy.<sup>388</sup>

Expounding the law thus occupied a middle ground between restating the law and making it.<sup>389</sup> It was neither, but instead a *sui generis* form of creative-deductive explanation. The appearance of this idea complicates, to some extent, our understanding of the transformation in the American common law at the turn of the nineteenth century. According to the leading account of that transformation, associated principally with Morton Horwitz and William Nelson, American courts turned away from a static private-law regime that enforced shared community values, towards an instrumental conception of law that was flexible and relatively tolerant of self-interested conduct.<sup>390</sup>

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386 1 JESSE ROOT, *The Origin of Government and Laws in Connecticut*, in REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS x (1798).

387 See 1 GOEBEL, *supra* note 87, at 141 (“[I]t seems nearly inevitable that the power to expound statutes would be manipulated to encompass constitutional repugnancy. The precedents for judicial interpretation of legislative intent were many of them old and well pedigreed and so much a part of the accepted common law technique of adjudication as to minimize political objection.”); *cf.* Bilder, *supra* note 77, at 512–13, 541–55 (relating repugnancy to judicial review).

388 See *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 96 (Va. 1793) (“[W]hen they [i.e., the judiciary] decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law.”); see also HOBSON, *supra* note 112, at 39 (discussing the need for judges to explain the laws via judicial discretion); Chapman & McConnell, *supra* note 284, at 1748–49 (discussing Kent’s opinion in *Dash v. Van Kleeck* which was based on “legal principle[s]”); *cf.* WHITE, *supra* note 309, at 79 (noting that American legal commentators in the first decades of the nineteenth century “set out . . . to establish themselves as professional guardians of republican principles, persons whose special knowledge of ‘legal science’ enabled them to recast law in conformity with the assumptions of republican government”).

389 See Bilder, *supra* note 54, at 1141–42 (“To expound law suggests interpretation from a particular source—interpretation the way judges do it or the way a judicial tradition understands it.”).

390 See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 7–9, 22–27 (1992) (discussing “[t]he [s]tructure of [c]lassical [l]egal [t]hought”); NELSON, *supra* note 72, at 36–37, 143–44, 163–64 (discussing the changes in law); Hulsebosch, *supra* note 383, at 1051–1052 (“[Nelson and Horwitz] characterize law before that time as static and communal rather than uncreative.”).

Under the former regime, we are told, judges were bound by a strict doctrine of precedent, and their task was merely to *discover* preexisting law; by the turn of the century, a new ideology had emerged in which judges could openly describe themselves as *making* law.<sup>391</sup> Expounding, however, fits into neither of these categories; it was neither discovering the law nor making it. Expounding was creative, but without amounting to an expression of will. It was creative *reason*. A republican judge could not persuade litigants to comply with the court's judgment by *making* public law—his office did not extend so far. He had to show litigants how that judgment was rooted in *their* law, including their fundamental law, in order to give it traction.<sup>392</sup>

The proposition that expounding the law means explaining it makes sense of much of what the Framers said on the topic. First, it makes sense of why the Framers “almost invariably” related expounding to judicial review.<sup>393</sup> As Elbridge Gerry put it, “exposition of the laws . . . involved a power of deciding on their Constitutionality.”<sup>394</sup> The point came up repeatedly at the Philadelphia Convention, as delegates tried to sort through their views on the proposed Council of Revision.<sup>395</sup> The only delegate to deny the connection was John Mercer, who likely rejected judicial review altogether.<sup>396</sup> Outside the convention, as well, the connection between expounding the law and judicial review was drawn, again and again—by Brutus,<sup>397</sup> by Hamilton

391 See, e.g., HORWITZ *supra* note 390, at 9, 23 (discussing judges' responses to the “public purpose” doctrine); NELSON, *supra* note 72, at 19–20, 171–72 (discussing the changing role of judges).

392 In this sense, expounding the law was part of a larger judicial project of serving as the community's “republican schoolmaster.” See generally Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127. I discuss Lerner's important essay further below. See *infra* Part III.D.

393 Corwin, *supra* note 146, at 561; see also BERGER, *supra* note 184, at 55–56 (referencing Corwin).

394 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 97.

395 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 73 (discussing Wilson's argument); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 78 (presenting the arguments of George Mason); cf. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 76 (presenting the argument of Luther Martin) (“As to the Constitutionality of laws, that point will come before the Judges in their proper official character.”).

396 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 298 (documenting the statement of John Mercer disapproving of “the Judges as expositors of the Constitution”); see BERGER, *supra* note 184, at 63 (describing Mercer as against judicial review). See *supra* notes 222–23 and accompanying text.

397 See “Brutus” (Feb. 7, 1788), *supra* note 385, at 299 (“[T]he courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution . . .”).

in *Federalist* 78,<sup>398</sup> and later by Judge Roane in *Kemper*,<sup>399</sup> among many others. In Hamilton's hands it took on a highly 'positive' character; expounding the law became the task of "interpreting conflicting statutes," a label that was, perhaps, easier to swallow.<sup>400</sup> But this point, which is often made, should not obscure Hamilton's description of what a court of law actually does when it interprets a statute. Hamilton says that the court must determine whether the statute can be made to cohere with "the laws," meaning *all* laws, including the Constitution ("fundamental law"), which the court does by describing the statute's "sense."<sup>401</sup> Hamilton's 'interpreting' judge thus does much more than give meaning to the words of a statute.<sup>402</sup> He locates the statute within a state's comprehensive body of law, which forces him to determine whether there is "an irreconcilable variance" between the statute and the Constitution.<sup>403</sup> Only then can he adjudge the lawful outcome in the case. It is this process that, as Gerry put it, "involve[s]" a power of determining whether the statute is constitutional.<sup>404</sup>

Second, this account of expounding the law explains why most Framers associated exposition with courts of law alone, and, in particular, with judges. Here the evidence is considerable, as others have noted.<sup>405</sup> There were three powers of government, said the *Address* of the 1781 New Hampshire constitutional convention: "The legislative, or power of making laws—The judicial, or power of expounding and applying them to each particular case—And the executive, to carry

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398 THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority.").

399 *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 38 (Va. 1793) ("It is the province of the judiciary to expound the laws . . . . It may say . . . that an act of assembly has not changed the Constitution, though its words are expressly to that effect . . .").

400 See, e.g., SNOWISS, *supra* note 46, at 77–78 (discussing Hamilton's arguments in *Federalist* No. 78).

401 THE FEDERALIST NO. 78 (Alexander Hamilton).

402 As Dean Alfange has argued, drawing on Judge Gibson's influential dissent in *Eakin v. Raub*, simply as applying a legal rule to a case need not involve the Constitution at all. Alfange, *supra* note 46, at 424–25 (citing *Eakin v. Raub*, 12 Sergeant & Rawle (Pa. 1825) (Gibson, J., dissenting)); cf. 1 GOEBEL, *supra* note 87, at 111 ("The effect of the declarations that nothing repugnant to the constitution [was] in the law hitherto observed or the common law, as the case might be, was to require the courts to make what amounted to political decisions.").

403 THE FEDERALIST NO. 78 (Alexander Hamilton).

404 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 97.

405 See, e.g., Suzanna Sherry, *The Intellectual Background of Marbury v. Madison*, in ARGUING *MARBURY V. MADISON* 47, 51 (Mark Tushnet ed., 2005) ("There is no dispute, however, that judges' primary role was as expositors of the common law. On this, even Coke and Blackstone agreed.").

them into effect.”<sup>406</sup> The idea became commonplace in the late 1780s. As described above, a principal objection in Philadelphia to the Council of Revision was that it might interfere with a judge’s determination of constitutionality in his capacity as an “expositor[] of the Law[].”<sup>407</sup> Others agreed, but nothing similar was said of the President.<sup>408</sup> In the years that followed, leading jurists repeatedly expressed the view that it was the role of the judiciary to expound the law. The idea appeared in Pendleton: “It is the business of the legislators to make the laws; and of the judges to expound them.”<sup>409</sup> In Roane: “It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them . . . .”<sup>410</sup> In Tucker: “This exposition it is the duty and office of the judiciary to make.”<sup>411</sup> And in Iredell: courts “alone ought to be[] expositors of an existing [law].”<sup>412</sup> Variations on the theme included a judicial duty to “declare the law” or to “construe” it, although the term “declare” might also be used to express older ideas about the judicial discovery of law.<sup>413</sup> The ideas were not limited to Federalists or to supporters of

406 An Address of the Convention for Framing a New Constitution of Government for the State of New-Hampshire 7 (1781).

407 See *supra* notes 211–15, 396–97. The quoted language comes from 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 73 (statement of James Wilson).

408 E.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 98 (statement of Rufus King relating to judges); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 75 (statement of Calen Strong) (“The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.”); *id.* at 79 (statement of Nathaniel Ghorum) (“Judges ought to carry into the exposition of the laws no prepossessions with regard to them.”); BERGER, *supra* note 184, at 61 (“Charles Pinckney ‘opposed the interference of the Judges in the Legislative business . . . .’”) (citation omitted); accord THE FEDERALIST NO. 73 (Alexander Hamilton) (“It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws.”). King again expressed the view that judges were expositors during the debate over Jay’s appointment to head a delegation to England. “[T]he judge in this business on their [the North Carolina senators’] opinion should a new Treaty be made will become a legislator, and on his return will assume the judicial Chair, and be the Expositor and Judge of his own legislation.” CASTO, *supra* note 237, at 89.

409 *Turner v. Turner’s Ex’r*, 8 Va. (4 Call) 234, 237 (Va. 1792) (opinion of Pendleton, J.); see also *Kennon v. McRoberts & Wife*, 1 Va. (1 Wash.) 96, 99 (Va. Ct. App. 1792) (Opinion of Pendleton, J.) (Judges “disclaim all legislative power to change the law, and only assume our proper province of declaring what the law is . . . .”).

410 *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 38 (Va. 1793).

411 *Id.* at 78.

412 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Opinion of Iredell, J.).

413 See, e.g., *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 7 (Va. 1782) (Opinion of Wythe, J.) (“[T]he tribunals, who hold neither [the power of the purse nor the sword], are called upon to declare the law impartially between them.”); *Address of Melancton Smith’s Committee* (1784) in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 90, at 314 (“The design of courts of justice in our government, from the very nature of their institution, is to declare laws, not to alter them.”); Henry

judicial review.<sup>414</sup> In a 1788 letter to James Madison opposing judicial review, Alexander White wrote, “[t]he duty of the judges, men holding office for life and exempt from legislative punishment, was to expound the laws.”<sup>415</sup>

If one thinks of expounding as a kind of deductive explanation, then the logic that gripped this generation of commentators is not hard to understand. Judges heard cases; cases were disputes presented forensically; these disputes were supposed to be resolved neutrally, i.e., without bias or favoritism; expounding the law was a means for the judge to do so, and to publicly demonstrate the fact. By expounding the law, the court could show that its resolution of the case followed from the law of the community, rather than political prejudice, passion or whim. Courts of law were suited to expounding because of the nature of forensic litigation, discussed above;<sup>416</sup> and judges were suited to expounding because, said Oliver Ellsworth, they had “a systematic and accurate knowledge of the Laws.”<sup>417</sup> At least, they were supposed to. That was the aim of reformers in Philadelphia, Virginia, New Hampshire, and elsewhere, who hoped to place trained lawyers on the bench, presiding over courts conducted according to (adapted) common law procedures.<sup>418</sup> In a sense, “expounding” the law was a descriptive claim that embedded within it a series of normative claims—about the way proceedings in a court of

Lee, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), in 5 THE FOUNDERS' CONSTITUTION 136, 138–39 (Philip B. Kurland & Ralph Lerner eds., 1987) (“It is their province [i.e., the federal courts’ province], and their duty to construe the constitution and the laws, and it cannot be doubted, but that they will perform this duty faithfully and truthfully.”).

414 See Powell, *supra* note 191, at 981 (“[T]here was general agreement, over a broad range of political and constitutional opinion, about the special responsibility of the judiciary in constitutional interpretation.”).

415 Letter from Alexander White to James Madison (Aug. 16, 1788), in THE PAPERS OF JAMES MADISON DIGITAL EDITION 232 (J.C.A. Stagg ed., 2010); cf. REID, CONTROLLING, *supra* note 248, at 117 (“[A] jury legally enpanelled is a tribunal independent of the Court, as the Court is of the Jury—each independent in their own department . . . it is the duty of the Court to sum up the evidence, and expound the law to the Jury—that after the Jury return their verdict, the Court have no right to set it aside . . . .” (citation omitted)).

416 See *supra* notes 305–10 and accompanying text.

417 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 73–74.

418 See REID, CONTROLLING, *supra* note 248, at 95–130 (describing the reform movement in New Hampshire and the counter-reform movement based on “common sense jurisprudence”); REID, *supra* note 58, at 122–34 (discussing New Hampshire Judge Jeremiah Smith). For Virginia, see *supra* notes 311–32 and accompanying text (detailing the extensive reform efforts in Virginia). On the expectations of national reformers, see JAY, *supra* note 237, at 60–61 (discussing the reforms considered by the Founders in Philadelphia). However, to the extent that Stewart Jay describes the expectations of those at Philadelphia as growing out of the settled practices of American courts, I disagree with the analysis.



law ought to be conducted, about the role of judges and juries in these proceedings, and about the institutional function of courts within government—each associated with its own movement for reform. The *actual* practices of American courts were, at least in some states, distant from reformer ideals.<sup>419</sup> In jurisdictions like New Hampshire, those opposed to reform drew on deep feelings of anti-professionalism to support what John Reid has called a “common sense jurisprudence,” in which the jury largely determined the law.<sup>420</sup> To the extent that jurors were regularly expected to make substantive judgments about the law—say, because they had received different charges from the different judges sitting in a case—juries could be said to share in the power of expounding the law.<sup>421</sup> This role only atrophied with time.<sup>422</sup>

Even among reformers, expounding the law was not universally associated with judges or courts of law. At Philadelphia, Madison repeatedly used the term to describe the interpretative activity of the President and the national legislature. For example, he observed that judicial independence was important to prevent judges from being “tempted to cultivate the Legislature . . . and thus render the Legislature the virtual expositor, as well as the maker of the laws.”<sup>423</sup> Madison then drew a comparison between the executive and the judiciary: “The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others.”<sup>424</sup> In Madison’s mind, all three depart-

419 See LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 51–59 (3d ed. 2005); Tarr, *supra* note 285, at 652–61. In some cases, reformers would pronounce an independent and strong federal judiciary necessary to protect liberty, while accepting a dependent and weak judiciary at home. See REID, *supra* note 58, at 62, 111, 115–20 (describing the lack of judicial independence in New Hampshire despite reform efforts at the federal level).

420 See REID, *CONTROLLING*, *supra* note 248, at 18–32, 108–10 (discussing “[j]urisprudence of [c]ommon [s]ense”).

421 By another view—the view held by many reformers—juries were not applying legal rules at all, but deciding cases on an ad hoc basis, according to “passion” or “prejudice.” See REID, *supra* note 58, at 24 (preseting the argument that juries followed “their passions and prejudices”); REID, *CONTROLLING*, *supra* note 248, at 32 (arguing that juries decided cases based on impulses).

422 See FRIEDMAN, *supra* note 419, at 19 (discussing how justice evolved over time); HORWITZ, *supra* note 390, at 28–29 (discussing the changing relationships between judges and juries). This may be because the power of the jury to determine the law was regarded by some as a centerpiece of republican government; John Adams is the obvious example here. See, e.g., STIMSON, *supra* note 80, at 78–84.

423 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 150, at 32.

424 *Id.*; see also *id.* at 342 (“Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.”). As

ments expounded the law. This view reappeared in *Federalist 44*, where Madison assured his audience that Congress's ability to extend its power beyond constitutional limits would depend "[i]n the first instance . . . on the executive and judicial departments, which are to expound and give effect to the legislative acts."<sup>425</sup> As a member of the First Congress, during the debate on the President's removal power, Madison argued that "an exposition of the Constitution may come with as much propriety from the Legislature, as any other department of the Government," at least as "it relates to a doubtful part of the Constitution."<sup>426</sup>

It is clear that Madison did not associate expounding with courts alone. He was in the minority in this regard.<sup>427</sup> Still, it should be noted that there is some support for the view that Madison did recognize the distinctive role courts played in *explaining* law, as opposed to its "exposition," which was a matter committed, in Madison's usage, to each of the coordinate departments. As early as the Virginia ratifying convention, for example, Madison observed that it was "a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. . . . There is a new policy of submitting it to the judiciary of the United States."<sup>428</sup> Much later, he connected this explanatory role to the nature of proceedings in a court of law. Madison observed that it was in "the judicial department" that constitutional questions generally found "their ultimate discussion and operative decision," noting that "the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them" over the other departments.<sup>429</sup> Arguably, late in his life Madison connected judicial review to judicial explanation of the law, just as his peers had. By that date, the movements to standardize legal procedure, to professionalize the judiciary and the bar, and to devel-

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Philip Hamburger has noted, in this speech Madison uses "case" to mean something broader than action or litigation. HAMBURGER, *supra* note 44, at 541–43 (discussing Madison's attempt to qualify the meaning of "cases").

<sup>425</sup> THE FEDERALIST NO. 44 (Alexander Hamilton).

<sup>426</sup> 1 ANNALS OF CONG. 461 (1834); see WARREN, *supra* note 229, at 99–102 (discussing early constitutional debates); Corwin, *supra* note 146, at 563–64 (discussing Madison's arguments). The view was not confined to Madison. See Powell, *supra* note 191, at 975–76 (presenting the view of Fisher Ames).

<sup>427</sup> See HAMBURGER, *supra* note 44, at 548–52 (discussing "theoretical explanations for judicial authority").

<sup>428</sup> 3 ELLIOT, *supra* note 122, at 532.

<sup>429</sup> Letter From James Madison (1834), in 4 LETTERS AND OTHER WRITINGS OF MADISON: FOURTH PRESIDENT OF THE UNITED STATES 349–50 (1867).

op a body of ‘scientific’ American legal literature had firmly taken root.<sup>430</sup>

*D. “Expounding” During the Repeal Act Debate*

The proposition that courts decided cases by expounding the law proved to be both a persistent one and a fragile ideal. It played a leading role in the debate over repeal of the Judiciary Act of 1801. Discussants on both sides of the aisle used the idea both to defend the newly created circuit courts from legislative dissolution and to criticize the political conduct of federal judges, especially their extra-judicial activity.

There is little question that most of the congressmen who spoke on the subject of judicial power during the Repeal Act debate thought it was the role of the judiciary to expound the law. Federalists broached the issue as they tried to describe, in lurid detail, the implications of what they regarded as a Republican effort to undermine judicial independence. As Jonathan Mason put it, the federal judiciary had been made independent because it was their duty “to expound and apply the laws.”<sup>431</sup> And it was this duty, said Mason, which implied a power of judicial review: “[T]he duties which they have to perform, call upon them to expound not only the laws, but the Constitution also; in which is involved the power of checking the Legislature.”<sup>432</sup> Thus the basic elements of the discussion at Philadelphia were reproduced. For the most part, Republicans were willing to grant these assumptions,<sup>433</sup> but, at times, they insisted on making express the understanding that expounding and judicial review were limited to the adjudication of cases. Thus, Robert Wright of Maryland

admitted . . . that judges ought to be the guardians of the Constitution, so far as questions were constitutionally submitted to them . . . [but] he had not supposed the judges were intended to decide questions not judicially submitted to them, or to lead the public mind in Legislative or Executive questions.<sup>434</sup>

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430 See REID, *supra* note 58, at 162 (discussing the rise of professional lawyers); WHITE, *supra* note 307, at 154–56 (discussing the development of law in the early nineteenth century).

431 11 ANNALS OF CONG. 82 (1802).

432 *Id.*; see also *id.* at 180–81 (reprinting the statement of Gouverneur Morris); *id.* at 574 (reprinting the statement of John Stanley); *id.* at 788–89 (reprinting the statement of Roger Griswold).

433 See WARREN, *supra* note 229, at 126 (discussing the Republican position); Engdahl, *supra* note 275, at 320 (discussing the common Republican view).

434 11 ANNALS OF CONG. 115 (1802).

A few Republicans pressed further; Jefferson's close ally in the Senate, John Breckinridge, argued for something like legislative supremacy in determining the extent of congressional power,<sup>435</sup> and in the House, John Randolph delivered a characteristically sardonic defense of what might be called Virginia-style 'common-sense jurisprudence,' along with a legislative power to expound the law.<sup>436</sup>

Yet if most Republicans agreed that it was the role of courts to expound the law, including fundamental law, then they ought to be concerned, reasoned Federalists, that repeal would undermine this function by *politicizing* the judiciary. Thus the same institutional vision for the courts was present. James Ross warned that "[i]nstead of an august and venerable tribunal, seated above the storms and oscillations of faction . . . you have a transient, artificial body, without a will or understanding of its own, impelled by your own machinery."<sup>437</sup> Since principled judges would "never consent to become the tools and victims of factions," they would refuse to take office, leaving the federal courts to be piloted by "the dregs of the law."<sup>438</sup> In the House, Bayard took up the point, linking judicial independence to the Framers' effort "to curb the fury of party."<sup>439</sup> "No menacing power should exist," argued Samuel Dana, "to bias [judges'] decisions by the influence of personal hopes and fears."<sup>440</sup> Without judicial independence, there would be little prospect of a neutral exposition of the law, eliminating "the further security [that] the judicial power" provided

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435 *Id.* at 179 ("The doctrine of constructions . . . is dangerous in the extreme. . . . My idea of the subject, in a few words, is, that . . . the construction of one department of the powers vested in it, is of higher authority than the construction of any other department; and that, in fact, it is competent to that department to which powers are confided exclusively to decide upon the proper exercise of those powers: that therefore the Legislature have the exclusive right to interpret the Constitution, in what regards the law-making power, and the judges are bound to execute the laws they make."); see 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 58 & n.1 (1919) (discussing Breckenridge's role).

436 11 ANNALS OF CONG. 654-55 (1802) ("And here permit me to express my satisfaction, that gentlemen have agreed to construe the Constitution by the rules of common sense. This mode is better adapted to the capacity of unprofessional men, and will preclude the gentleman from arrogating to himself, and half a dozen other characters in this Committee, the sole right of expounding that instrument . . . . Indeed, as one of those who would be unwilling to devolve upon that gentleman the high-priesthood of the Constitution, and patiently submit to technical expositions which I might not even comprehend, I am peculiarly pleased that we are invited to exercise our understandings in the construction of this instrument."); accord *id.* at 531-33 (statement of Robert Williams) (arguing for legislative and executive power to interpret the Constitution).

437 11 ANNALS OF CONG. 167 (1802).

438 *Id.*

439 *Id.* at 650 (statement of Rep. Bayard).

440 *Id.* at 920.

beyond elections alone.<sup>441</sup> The point gained momentum as Federalists sought to draw into the debate the logic that had moved delegates at Philadelphia to reject the Council of Revision. A dependent court, they argued, could not fulfill its expository function, and thus, its constitutional function of giving effect to ‘public opinion’ over the passion of the majority.<sup>442</sup> As Benjamin Tallmadge reminded the representatives, “passion and party views too frequently mislead the judgment and obscure the understanding. A sober and dispassionate corrective becomes, therefore, absolutely necessary. Your tribunals of justice afford the necessary relief.”<sup>443</sup>

Almost no one was willing to concede the conclusion. In private conversation, radicals like William Branch Giles might argue that the federal courts should be “political.”<sup>444</sup> In larger gatherings, however, Giles would take the opposite position.<sup>445</sup> And most Republicans responded by turning the argument against the Federalists, pointing with disapproval to the political conduct of federal judges in the crisis of 1798–99.<sup>446</sup> The move was a natural one, since the dominant Re-

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441 *Id.* at 926 (statement of Samuel Dana).

442 *Id.* at 649–50 (statement of Rep. Bayard)

443 *Id.* at 948; *see also* Letter from James Bayard to Andrew J. Bayard (Jan. 21, 1802), *quoted in* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 211–12 (1922) (“A judge, instead of holding his office for life, will hold it during the good pleasure of the dominant party. The Judges will of course become partisans and the shadow of justice will alone remain in our Courts.”); Letter from Theodore Sedgwick to Rufus King (Feb. 20, 1802), *in* 1 WARREN, *supra*, at 213.

444 *See* REID, *supra* note 58, at 107 (discussing Giles’ statements). Reid treats Giles as representative of the Republican view in 1800 of judicial independence, which I think is a serious mistake. *See id.* at 106 (presenting Giles as a leader).

445 Kathryn Turner cites a toast delivered by William Branch Giles after passage of the 1801 Judiciary Act: “The Judiciary of the United States—from the 4th of March next, may the judges lose their political sensibilities in the recollection that they are Judges, not political partisans.” Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 522 (1961) (citation omitted).

446 Indeed, the principal Republican complaint about Federalist judges was that they had become political. *See, e.g.*, BANNING, *supra* note 237, at 255–56 (describing the Republicans’ objection to the Alien and Sedition Acts and the “partisan judiciary” that would enforce the new laws); O’Fallon, *supra* note 272, at 234 (similar). Republicans were angered by judges’ political grand jury charges. *See* CASTO, *supra* note 237, at 128–29 (discussing how Jefferson and his allies grew to dislike the judges’ use of grand jury charges to deliver lectures); WOOD, EMPIRE, *supra* note 77, at 261–62 (noting that Republicans were angered by what judges said in grand jury charges). Republicans were also angered by judges’ actions barring juries from deciding on the constitutionality of the Sedition Act, Engdahl, *supra* note 275, at 297. Similarly, Republicans resented judges’ refusal to allow defendants to call witnesses in defense, CASTO, *supra* note 237, at 166–67; WOOD, EMPIRE, *supra* note 77, at 261 (2009) (noting that Judge Chase badgered defense attorneys and did not allow them to call witnesses). Furthermore, the Republicans were angered by judges invoking the common law of libel, which, unlike the Sedition Act, did not admit truth as a defense, WOOD, EMPIRE, *supra* note 77, at 260 (“Neither truth as a defense nor juries’ de-

publican criticism during the crisis had been that Federalist judges “were partial, vindictive, and cruel,” “obeyed the President rather than the law, and made their reason subservient to their passion.”<sup>447</sup> Here the logic of court reform, which aimed to de-politicize courts of law, would work in favor of Republicans. Federal judges who engaged in politics while on the bench could now expect impeachment.<sup>448</sup> Indeed, avoiding a wave of judicial impeachments was one of Marshall’s primary aims in *Marbury*.<sup>449</sup> His strategy, as others have shown, was to draw a substantive distinction between law and politics, and to limit the domain of the courts to the former.<sup>450</sup> Judicial review was tied to the core task of deciding “particular cases,” i.e., disputes capable of *non-political* resolution, thus reinforcing the narrowed judicial office that emerged from court reform efforts in Virginia, and which was described in *Kemper* by Judges Tucker and Roane.<sup>451</sup>

While the effect of judicial politics on the *Marbury* opinion is well known, what is less appreciated, but just as important, is its effect on the judicial office itself. Indeed, the danger this generation perceived in a politicized judiciary is best evidenced by the fate of so-called “extrajudicial activities,” in which federal judges often assumed an expressly political function.<sup>452</sup> In the period immediately before 1800, the most visible of these activities was the Supreme Court Justices’ practice of delivering “political charges” while riding on cir-

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ciding the law was allowed under the American common law.”); Alfange, *supra* note 46, at 350–51 (discussing that many were disappointed with judge’s invocation of “a federal common law of crimes.”).

447 1 WARREN, *supra* note 443, at 191.

448 This was the Republican theory of the Pickering impeachment, and explains the Republicans’ steadfast denial that Judge Pickering was suffering from some form of mental illness. See REID, *supra* note 58, at 90–109 (discussing trials that Judge Pickering presided over while mentally ill).

449 See J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE* 306 (1989); Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 574–75 (2012) (discussing Marshall’s reaction to judicial impeachment trials).

450 See, e.g., NELSON, *supra* note 50, at 60–67.

451 See *supra* Part III.B (discussing the *Kemper* opinions and the narrowing of the reach of judicial review).

452 The two leading examples of extrajudicial activity that took on political content and function in the late 1790s are political charges and advisory opinions, but there were a variety of other activities as well, including ex officio service. See generally Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 31 (Robert A. Katzman ed., 1988). On the issue of advisory opinions, see JAY, *supra* note 237, at 149–70; Russell Wheeler, *Extra-judicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 144–58 (1973) (“The general understanding during that period was that federal judges, like their English counterparts, were to render advice to the executive and legislative branches.”).

cuit.<sup>453</sup> Political charges were charges delivered to grand juries in which the judge might defend (or criticize) the President's administration, or offer his own views on the political controversies of the day.<sup>454</sup> The practice had a significant history in America. Grand juries had long been used as a bidirectional point of influence: both as a means for government to shape public opinion, and as a means for the leading members of the community to present the government with complaints about its officers' nonfeasance and corruption.<sup>455</sup> The Revolution deepened the government's need for this institution, primarily as a means to convince the people to honor their obligations under law.<sup>456</sup> Yet it also transformed the understanding and practice of political charging, by giving it an *educational* function firmly rooted in republican theory.<sup>457</sup> In Ralph Lerner's memorable phrase, the Supreme Court became a kind of "republican schoolmaster," whose Justices, riding on circuit, were tasked with ensuring that the people understood their rights and duties—knowledge necessary not only to making appropriate choices as voters and jurors, but, ultimately, to ensuring the survival of republican government.<sup>458</sup> Yet the political charge was a delicate task, and it could be badly mishandled by the wrong judge in the wrong circumstances.<sup>459</sup> It required the

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453 See CASTO, *supra* note 237, at 127–29; Lerner, *supra* note 392, at 129–55.

454 See Lerner, *supra* note 392, at 127–31 (“The Justices were quick to see and seize the chance to proselytize for the new government and to inculcate habits and teachings most necessary in their view for the maintenance of self-government.”).

455 See, e.g., ROEBER, *supra* note 311, at 176–77; John D. Cushing, *The Judiciary and Public Opinion in Revolutionary Massachusetts*, in LAW AND AUTHORITY IN COLONIAL AMERICA 168, 168 (George Athan Billias ed., 1965).

456 See David J. Katz, *Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s*, 14 CARDOZO L. REV. 1045, 1056–62 (1992) (“[O]ne might think that the philosophical theme of these grand jury charges would be individual liberty; it was not. The theme which pervades these charges is *duty*.”). This was also true at the state level, as judges used grand jury charges to legitimize proposed or recently ratified state constitutions. See Cushing, *supra* note 455, at 175–76 (discussing the way that judges used jury charges in an obvious attempt to gain support for new state constitutions).

457 See Lerner, *supra* note 392, at 127–32; Katz, *supra*, at 1060–61.

458 Lerner, *supra* note 392, at 127–32 (suggesting that judges regarded themselves as educators whose mission was to “sustain republican government.”); see also Marcus & Van Tassel, *supra* note 452, at 32 (arguing that grand jury charges gave justices “a forum for political discourse.”). As Shannon Stimson has shown, the petit jury also had an educational function in republican theory. People were educated by serving on the jury with their peers—but also had to be educated in order to serve appropriately. STIMSON, *supra* note 80, at 88.

459 Lerner, *supra* note 392, at 155 (“The manner in which the judge performed his duties was of decisive importance. . . . It took high political finesse to use the grand jury charge as a means of political education.”). Even at the height of political charging, grand juries rarely returned responsive indictments, and a Justice could even acknowledge that he expected none. There was a staged quality to the whole affair. See Katz, *supra* note 456, at

judge to “travel[] out of the line of Business,” and to offer remarks that were, in the words of Chief Justice John Jay to one jury, “not . . . very pertinent to the present occasion . . . .”<sup>460</sup> By the late 1790s, it was difficult for nationally minded judges to engage in political charging without stirring the anger of an audience inclined towards Jeffersonian principles.<sup>461</sup> And if the matter was difficult to handle for those with judgment and tact, then *a fortiori* it was impossible to handle for men like Justice Samuel Chase, whose blunderbuss charges resulted in his own impeachment.<sup>462</sup> During the Chase trial, neither party was willing to defend political charging; Chase’s own counsel dutifully announced to the Senators that he was “one of those who have always thought, that political subjects ought never to be mentioned in courts of justice.”<sup>463</sup>

The practice of political charging, then, could not be sustained. It was inconsistent with the emerging understanding of judges and of courts of law in a republic. If judges were duty-bound to decide cases by expounding the law, and if this process was to be a non-political one, then federal judges could not maintain a statesman’s diet of political activity.<sup>464</sup> The same tension led to the demise of other extrajudicial activities with a political character, such as advisory opinions.<sup>465</sup>

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1052, 1055 (“Justice John Blair candidly admitted that did not expect [the grand jury] to indict anyone . . .”).

460 Lerner, *supra* note 392, at 1331; *see also* Marcus & Van Tassel, *supra* note 452, at 32 (“The grand jury charge took [judges] outside the limits of a case or controversy. . .”).

461 To understand why, consider an example of a charge delivered by Justice William Paterson sometime in the 1790s: “What, indeed, can be expected from uninformed and ignorant minds? They know no country; they have no patriotism. Enough, if they know the spot, on which they were born and rocked; that is their country. Enough, if they know and consult the little interests and narrow politics of the neighborhood, in which they live and move; that is their patriotism. . . . Persons, ignorant and uninformed, are easily imposed upon and led astray; they are unable to detect error . . . they are the fit, and, indeed, usual instruments in the hands of artful and aspiring men to serve the purposes of party, and to work out the ruin of a state.” 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 458 (Maeva Marcus ed., 1990).

462 *See* Lerner, *supra* note 392, at 152–55 (discussing Chase’s “frontal attack against Jeffersonian doctrine” and Chase’s resulting impeachment).

463 Lerner, *supra* note 392, at 154.

464 Wood, *supra* note 31, at 165 (“This legalization of fundamental law and the development of judicial review went hand in hand with the demarcation of an exclusive sphere of legal activity for judges. If determining constitutional law were to be simply a routine act of legal interpretation and not an earth-shaking political exercise, then the entire process of adjudication had to be removed from politics and from legislative tampering. After 1800, judges shed their traditional broad and ill-defined political and magisterial roles . . . and adopted roles that were much more exclusively legal.”).

465 *Cf.* Wheeler, *supra* note 452, at 152–53 (describing a similar development in the case of advisory opinions, and concluding, “[t]he advisory relationship for which Washington and Jefferson hoped also threatened the judicial process itself. For one thing, in stating



In these cases and others, judges would have to give up the politics. What they received in exchange was an understanding of their role within republican government that made sense of judicial independence and of the legalization of constitutional dispute. That understanding recognized in courts alone a power to refuse to enforce unconstitutional laws.

#### CONCLUSION

The inquiry into the idea of a “case” and “expounding” the law suggests the following interpretation of the Standard Justification. Premise 1 of the Standard Justification was the proposition that it was the duty of the court to decide cases according to the laws of the state. This included the Constitution, on the grounds that the Constitution was fundamental law. The question was what justification there was for including the Constitution. In brief, the answer is that (1) a court decides cases, (2) deciding cases requires the court to expound the law, and (3) expounding the law involves explaining how the court’s judgment follows from, and thus is part of, state law. The last step requires the court to consider the Constitution, since if the law on which the court’s judgment is based is inconsistent with the Constitution, the court is *making* law, rather than deciding the case in accordance with *existing* law.

This reading of the Standard Justification supports the following three conclusions. First, we cannot modify the Standard Justification as proposed above to support a presidential power of non-enforcement. The President does not decide particular cases, and since he does not, he has no duty to expound the law. Since he has no duty to expound the law, nothing about his office of enforcing ordinary law requires him to consider and give effect to fundamental law. The executive duty of the presidency is a ministerial duty, at least from the perspective of the Federalist era.

Second, while other arguments in support of a non-enforcement power are possible, it seems unlikely that there is a colorable *originalist* argument to that end. As I have argued, there is little evidence that the Framers thought the Standard Justification supported a pres-

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the law extrajudicially, the Court would not be stating the law through the process best designed to secure a true interpretation of it. Courts reach decisions through a process designed to formulate the issues sharply. They are aided by counsels’ debate . . . Absent those arguments, the decisions stood a greater chance of being in error. More important, the Justices thought they would retain a bias toward an opinion once publicly stated.”).

identical power to refuse to enforce unconstitutional laws. The same argument applies to the Article II Vesting Clause, the Oaths Clause, or the Take Care Clause, which are the textual foundations most often recruited to support non-enforcement. The Framers were at least as good as we are at drawing inferences, and if they believed the Vesting Clause (or whatever) supported a power of non-enforcement, they should have concluded so. We have no record that they did. More than that, we have no record that they did despite the evidence that they had reason to draw the conclusion. If the concern that led to the development of judicial review was the politics of ‘passion’ that, at various points during the period, infected the legislature, the executive could have served as a check just as much as the judiciary.

Third, the Standard Justification rests on ideas about the forum of a *court of law*, not about *judges per se*. This is important for understanding how judicial review could emerge in a system that regarded constitutions as a special kind of law—fundamental law—that “differed in kind” from ordinary law, inasmuch as they were an act of the people regulating the government.<sup>466</sup> I have not argued here that the Constitution was legalized because of an English tradition that featured the judge as the repository of fundamental law, which he applied against the sovereign in his common law court (assuming there was such a tradition). American practices were somewhat different. Fundamental law was legalized in the 1780s because of independently held convictions about proper proceedings in a court of law, and about the role courts could and should play in giving effect to ‘public opinion,’ ideas which derived from the political experience of the 1780s and the French Enlightenment, as much as the common law tradition.<sup>467</sup> These ideas pinned the legitimacy of republican government to “*the reason of the public*,” and after the Revolution forensic litigation seemed a natural vehicle in which to determine and apply this reason.<sup>468</sup> Since it was supposed to be the *public’s* reason, not the *court’s*, it was crucial that the judge faithfully expound the law rather than make it. That distinction has proved difficult to maintain.

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466 See Snowiss, *supra* note 46, at 90 (discussing the judicial charge as “agents of a constitutional principle.”).

467 See *supra* notes 304–33, and accompanying text.

468 THE FEDERALIST NO. 10 (James Madison).