Judicial Review, the Long-Run Game: Endogenous Institutional Change at the U.S. Supreme Court

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Duke University 2014
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In this project, I examine why the judicial authority of the United States Supreme Court has increased. I propose a theoretical explanation of endogenous institutional change at the Court whereby the actions of the Court—specifically its decisions and the opinions in which it announces those decisions—have, over the long-run, altered the structures of the American separation-of-powers system. The Court has built up public support for the institution of judicial review to such a degree that its rulings are respected even when opposed by strong political actors—including the public. I evaluate this theory by analyzing three important transitional periods of Supreme Court history. The first case study explores the Court under Chief Justice John Marshall, and examines how the Court established judicial review as the most important means of constitutional interpretation. The second case study explores the Court’s first cases interpreting the three Reconstruction Amendments, and shows that through these decisions the Court established itself as the arbiter of the meaning of these new amendments. The third case study looks at the Court’s decision to hear reapportionment cases and its articulation of the political question doctrine that provided a legalistic method of expanding the political power of the Court. I conclude from these case studies that my theory provides a useful explanation for the expansion of judicial authority.
To Pearlynn, for love and encouragement. To Watson and Ginny, for inspiration.
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Alexis de Tocqueville observed in 1835 that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”\(^1\) More than one hundred-fifty years later Tocqueville’s comment remained accurate as it pertained to one of the biggest, most controversial political questions of the day: healthcare. President Barack Obama had been elected in 2008, in part, based on a promise to reform American healthcare. And after months debate in the halls of the Capitol, the studios of cable television news, and the “tubes” of the internet,\(^2\) President Obama signed the Affordable Care Act (or the “ACA”) into law on 23 March 2010.

This did not settle matters. Politicians and commentators continued to debate the law. Republicans criticized the act as likely to be expensive and ineffective. The most controversial aspect of the bill was the individual mandate, which requires

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\(^1\) Tocqueville (2000, 257).

\(^2\) Speech of Senator Ted Stevens (R–Alaska) during the Senate Commerce, Science, and Transportation Committee’s hearings on the “Communications, Consumers’ Choice, and Broadband Deployment Act of 2006.” (28 June 2006), quoted in Blum (2012). For a defense of Stevens’s description, see, e.g., ibid., 5 (“one thing [the Internet] most certainly is, nearly everywhere, is [sic], in fact, a series of tubes”).
the purchase of health insurance by individuals over a certain income threshold. This mandate was assailed as a burden on citizens’ liberty. Republican politicians continued to decry “Obamacare,” as the law came to be known, and their efforts began to yield electoral success. Republicans were able to gain 63 seats in the House of Representatives in the November 2010 election. The collection of Republicans seeking their party’s nomination for President attacked the ACA with similar vigor. They made the repeal of the ACA one of the principal promises of their campaigns.

But before the future of the ACA could be determined by the political process, the Supreme Court chose to weigh in. At issue in *National Federation of Independent Business v. Sebelius* was the constitutionality of the individual mandate, the linchpin of the ACA. All eyes turned to the Court to see how the justices would rule. A divided Court upheld the mandate, finding it operated as a tax that fell within Congress’s powers to tax and spend. The Court had had its say.

For an outsider familiar only with claims about the strength and vibrancy of American democracy, this was surely odd. The fate of a law that had been thoroughly debated as a major issue in two elections (with a third approaching)—a law that applied equally and placed no special burden on any particular politically disadvantaged class or group—a law that could be changed through ordinary legislative processes (and altered via creative administrative practices)—ultimately rested in the hands of nine unelected judges. How could this be? Was this the democratic republic envisioned by the likes of Washington, Jefferson, Adams, Madison, and Hamilton?

The short answer is “no.” The Supreme Court and the federal judiciary was not intended by America’s founders to play such a prominent role in policy making. Nor did the Court, in practice, insert itself so assertively in decision-making processes

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4 See generally *Sebelius*, 567 U.S. ___ (2012).
early in its history. Rather, the Supreme Court has gradually evolved from a body that lacked its own designated space (and was thus initially relegated to the basement of the Capitol) to an entity with the power to decide not only the fate of national healthcare reform, but also the outcome of a presidential election.\textsuperscript{5}

The puzzle I examine in this project is why the judicial authority of the United States Supreme Court has increased. I propose a theoretical explanation of endogenous institutional change at the Court whereby the actions of the Court—specifically its decisions and the opinions in which it announces those decisions—have, over the long run, altered the structures of the American separation-of-powers system. The Court has built up public support for the institution of judicial review to such a degree that its rulings are respected even when opposed by strong political actors—even the public! In a series of cases studies from important and transitional periods of Supreme Court history, I evaluate this theory and find that it provides a useful explanation for the expansion of judicial authority.

1.1 The Growth of Judicial Authority in the United States

I use the term “judicial authority” to describe the extent to which what a court says is accepted as settling a particular dispute. In this project, I am most interested in the judicial authority of the United States Supreme Court as it pertains to matters of constitutional interpretation. The Court exercises its judicial authority over the Constitution through its power of judicial review. When I say that the judicial authority of the Supreme Court has increased, I mean that the Court’s power of judicial review has grown stronger and/or has expanded to cover new questions.

Judicial review is, by itself, not necessarily a significant power. As we shall see, early Americans widely accepted a form of judicial review much weaker than what

\textsuperscript{5} See \textit{Bush v. Gore}, 531 U.S. 98 (2000) (rejecting a manual recount of Florida ballots, effectively announcing George W. Bush as the winner of the 2000 U.S. presidential election), and the acceptance of this decision by all parties—most importantly the losing candidate, Democrat Al Gore.
we see today. Under this early version of judicial review, if the Supreme Court were forced to choose between the Constitution and a law that was obviously contrary to the text of the Constitution, the Court would side with the Constitution. But this type of judicial review does not mean that the Court’s view of the Constitution controls in the face of competing, plausible interpretations. Yet today we see a Court that possesses strong or meaningful judicial review. When the Court’s interpretation of the Constitution is both different from that of another actor (or there are at least plausible arguments for an alternative interpretation) and the Court’s endorsement of a particular interpretation compels another political actor to act contrary to its preferences, that complies. Thus the judicial authority of the Supreme Court today is such that had the Court struck down the ACA, President Obama would have abided by its decision.

The increase in judicial authority is puzzling given the relative institutional weakness of the judicial branch. The Court lacks any means of affirmatively enforcing its decisions. It relies instead on other actors to comply with or enforce its decisions. Moreover, these other political actors possess real checks on the Court—checks they can, in theory, use or threaten to use to influence the Court’s behavior. Why, then, do we see a Court that is able to annoy, frustrate, and even anger political actors with much more apparent power in the American separation-of-powers system? That is the puzzle that I hope to help solve. My answer is that the Court has been able to operate within the American system of the separation-of-powers in such a way that it has strengthened its original position. In particular, the Court has done an especially good job of accounting for the importance and influence of public opinion on the political competition endemic to the separation-of-powers system. Over time, the way the Supreme Court has played the separation-of-powers game has changed the very rules of the game—and these changes have accrued to the benefit of this “least dangerous branch.”
1.2 The Structure of this Study

This study proceeds as follows. In the next chapter, I outline my theory of endogenous institutional change involving judicial review. This theory synthesizes several existing theories of judicial politics and the American system of the separation of powers. I argue that the Court has cultivated the idea of there being a distinction between “law” and politics, along with the notion that the Court acts legitimately when it does “law.” The public has embraced these claims as well as the belief that what distinguishes law from politics is subject matter—that is, that some topics are inherently questions of law while others are properly understood as political in nature. But this belief is wrong. What actually distinguishes law from politics is process. The Court has been able to gradually expand those questions seen as “legal” matters by applying legal processes to resolve such disputes. If and when early cases involving these questions remain undisturbed, they serve as precedents for later Courts to cite when deciding similar questions. Once a given issue area is viewed by the public as falling on the law side of the law–politics divide, any attempt by another actor to institutionally check the Court’s decision on such a matter will be met with increased public backlash. The higher cost of punishing the Court gives the Court more leeway. And as the Court uses such a process to expand its influence over more and more questions, its overall judicial authority increases.

In the third chapter, I examine the history of the Supreme Court under Chief Justice John Marshall. During this period, the Court established itself as an important player in American politics. Marshall and his Court promoted the law–politics distinction. In addition, the Marshall Court asserted that constitutional interpretation via judicial review involved questions of law rather than politics. The justices’ careful (and modest) exercise of this emerging authority helped create the perception that the Supreme Court was the ultimate arbiter of the meaning of the Constitution.
Although the Court at the end of Marshall’s tenure lacked the power it enjoys today, it was considerably stronger than when he joined the bench. Furthermore, Marshall had provided a blueprint for future expansions of power.

In the fourth chapter, I consider the Court’s early interpretations of the Reconstruction Amendments. History has been unkind to the justices of this period, judging them to have “abandoned” the rights of African Americans in the South. I do not dispute the unfortunate ultimate consequences of the Court’s decisions, but I question the notion that the Court was behaving aggressively. Rather, I suggest that the Court was modestly asserting itself as the proper authority for determining the outer limits of national power under the Reconstruction Amendments. The acceptance of these early decisions, which were largely popular, laid the groundwork for future decisions interpreting those same amendments in far more controversial ways.

In the fifth chapter, I evaluate the twentieth-century Court. I begin by suggesting that the public response to President Franklin Roosevelt’s proposal to increase the size of the Court showed that the Court’s long-term project of acquiring more authority was paying dividends. Even though the public agreed with Roosevelt (and disagreed with the Court) on policy grounds, Roosevelt would have had to pay a steep (possibly impossibly high) price to enact his court-packing plan. I then examine the Court’s decision in *Baker v. Carr* to hear and decide cases involving the apportionment of legislative districts, a type of case the Court had previously described as nonjusticiable because they involved political questions. In *Baker* the Court articulated standards for its “political question doctrine,” thereby claiming for itself the very power to draw the line between law and politics.

Finally, I conclude the project by summarizing my findings. Overall, I find support for my theory explaining the accretion of judicial authority. I explore the implications of this theory for understanding the Court and the American system of the

separation of powers. In addition, I consider potential future projects that might help us better understand how the Court behaves and whether it can and will continue to expand its judicial authority in the face of new political phenomena.
If today’s Supreme Court enjoys greater authority relative to other political actors compared to previous Courts, how was this power acquired? The purpose of this chapter is to set out an explanation of this process. The theory of power acquisition by the Court described herein is largely an integration of existing theories explored in the academic literature wrestling with questions of judicial politics, separation of powers, judicial independence, and constitutional theory. The aim of this chapter is to articulate this integrated theory of judicial authority, to explain the mechanisms whereby the Court can and has expanded its authority, to ground it in formal analytic terms, to distinguish it from the theories it integrates, and to set out the methods by which I will evaluate this theory.

The principal assertion of this theory is that public’s difficulty in articulating and identifying the distinctions between “law” and “politics” provides an opportunity for the Court to impose its influence over American public policy. Any question of policy can be framed as a legal question or a political question. When a sufficient proportion of the public views the Court’s actions as “law,” those actions will be seen as legitimate. Any attempt by another political actor to circumvent or evade
such legitimate actions by the Court will elicit a public backlash. Thus the costs to
actors of institutionally disciplining Court decisions viewed by the public as matters
of law—even if a majority of the public disagrees with the Court—will be high.

But how do political issues come to be seen by the public as matters of law? I
argue that law is largely seen as a process. The legal process is typically characterized
by providing written justifications of their decisions that exhibit neutrality (or at
least disinterestedness) towards the claims before the Court, appeals to some higher
authority (statutes, constitutions, or other sources of law from outside the judiciary),
and consideration of precedent. It is the power of precedent that is central to my
story of increased judicial power. In particular, the method by which the Court has
been able to expand its influence into new areas of policy has been by exercising
its power of judicial review in new areas. Once such precedents are established, the
issue area becomes one of “law” in the eyes of the public.

How does the Court get away with conquering new territories? The principal
defense against judicial encroachment lies with other political actors that possess
the means of institutionally disciplining an overreaching court. But if the basic costs
of such disciplinary actions (even absent anticipated public backlash) exceed the
anticipated benefit, the actor will not exercise its check on the Court and the ruling
will stand. Thus, even when the political actor disapproves of the policy outcome
resulting from the Court’s exercise of judicial review, if the impact of that disapproval
on the actor’s utility is less than the impact of incurring the costs to discipline the
Court, the actor may tolerate the Court’s act. Indeed, if the other political actors
approve of the policy outcome of the Court’s decision, they may even welcome the
incursion into the realm of “politics.” In subsequent cases, the Court can rely on this
precedent as justification that it is properly considering a question of law such that
attempts by the political actors to evade such decisions they disagree with will be
met with public backlash—even if the public agrees with the political actor on the
substance of the policy question.

This pathway to greater judicial influence need not be followed deliberately. In some cases, Courts may have wandered into (or even been invited into) new realms with no long-term agenda, just an intent to resolve an immediate case. But the effect of such decisions has been to redraw boundaries between questions that are perceived as “law” and those that are seen as “politics.” With no clear distinction between the two, such trespasses are likely to happen and ejectment of the Court from its new territories becomes challenging. Nevertheless, the mechanisms described in this chapter suggest a means by which strategic justices might seek to aggrandize their Court’s power, and perhaps some justices have pursued this path.

The rest of this chapter will proceed as follows. First, I will examine the emergence of and rationale for judicial review itself. Second, I will describe the puzzling aspects of judicial supremacy, the existence of which has been asserted by both its advocates and detractors. Third, I will consider how the Supreme Court fits into the American separation-of-powers system. Fourth, I will examine various theories of judicial authority that come from scholars of judicial politics, political economy, and constitutional law. Fifth, I will set out my own integrated theory of judicial authority that attempts to explain the increase in the power of the Supreme Court over the course of American history. And, finally, I will set out the methods by which I will evaluate this theory in subsequent chapters.

2.1 American Judicial Review

Judicial review is a central feature of American democracy. Yet it is described nowhere in the Constitution. Nevertheless, the basic rationale behind judicial review is both easy to understand and compelling—the Constitution trumps all other laws, so judges cannot give force to laws inconsistent with the Constitution’s requirements. But the Constitution is not always clear, so it needs to be interpreted. But, much to
the consternation (but perhaps profit) of lawyers, judges, and scholars, the Constitution is entirely silent on matters of its interpretation. What happens, then, when the courts’ interpretation of a constitutional provision differs from the interpretation given it by some actor? And how do such competitions over interpretation play out in the American separation-of-powers system?

2.1.1 The Logic of Judicial Review

The logic of judicial review is simple. If a written constitution comprises the fundamental and supreme law of a society, then all other laws—in order to be valid—must comply with it. And if judges are asked to enforce laws contrary to the constitution, they must refuse to do so, citing the primacy of the constitutional text. This logic underlies the American institution of judicial review. Although this rationale is easy to comprehend and judicial review seems a key feature of American democracy, the institution did not arrive fully formed. Judicial review—even in its most modest form—developed gradually as Americans worked to realize their goal of a more perfect Union.

The idea that constitutionalism is a necessary component of just governance was a legacy of English law. A constitution recognized the Lockean ideal that legitimate government derives its consent from the will of the governed. As a condition of granting such consent, citizens demanded certain limitations on the powers of the government and protections of specific individual rights and liberties. The English Constitution, though unwritten, served just such a purpose. In casting off their English oppressors, the American revolutionaries thought they were defending and perfecting the English Constitution.¹ The implementation of parliamentary supremacy in the wake of the Revolution of 1688 had been expected to provide stronger protections of such fundamental rights and liberties of individuals. But the American colonists’

¹ See, e.g., Reid (1986, 237).
experiences convinced them that this arrangement was insufficient. Parliament—corrupted by the monarch’s granting of titles and offices—abused its authority by aiding and abetting the tyranny of King George III. Although Americans revered the English Constitution (indeed, because they revered it, they would have argued), they decided that it was in need of institutional reform to better protect the fundamental rights and liberties of men.

To that end, after their successful campaign for independence, the states began to experiment with *written* constitutions, in which the powers of government were explicitly enumerated and limited. Written constitutions, it was thought, would offer better defense against governmental power grabs that might lead to oppression. Initially, judges were not expected to play a significant role in the maintenance of such systems. In fact, judges were viewed rather suspiciously because colonial judges had frequently served as agents of the Crown. Nevertheless, judges in states with written constitutions soon confronted a difficult question of conflicts of law and judicial role: how should they rule when the popularly elected legislature passed a law that contradicted the tenets of the state’s constitution? In *Trevett v. Weeden* (1786), for instance, a Rhode Island court considered the case of an individual being tried under state legislation issuing paper money, criminalizing the refusal to accept such money, and denying jury trials to those accused of said crime. The court

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2 See, *e.g.*, Thomas Paine, arguing in the second section of *Common Sense* that “[i]t is somewhat difficult to find a proper name for the government of England. Sir William Meredith calls it a Republic; but in its present state it is unworthy of the name, because the corrupt influence of the Crown, by having all the places in its disposal, hath so effectually swallowed up the power, and eaten out the virtue of the House of Commons (the Republican part in the constitution) that the government of England is nearly as monarchical as that of France or Spain. Men fall out with names without understanding them. For ’tis the Republican and not the Monarchical part of the Constitution of England which Englishmen glory in, viz. the liberty of choosing an House of Commons from out of their own body—and it is easy to see that when Republican virtues fail, slavery ensues. Why is the constitution of England sickly, but because monarchy hath poisoned the Republic; the Crown hath engrossed the Commons.”

3 See, *e.g.*, Bailyn (1992, 104–110) (discussing colonial reaction to denial of life-tenure to judges in the colonies—contrary to practices in England itself—and concerns about “prerogative” courts filled by those loyal to the royal governors).
accepted the arguments of the defendant’s counsel that a right to a jury trial was a fundamental right guaranteed by the state’s constitution and voided the act.\textsuperscript{4} Other state courts similarly wrestled with such issues.\textsuperscript{5}

Soon an early iteration of the logic of judicial review emerged. One of the first and best articulations of this logic came from future Supreme Court Justice James Iredell concerning \textit{Bayard v. Singleton},\textsuperscript{6} a North Carolina case involving a state confiscation statute. Writing to Richard Spaight, who was representing North Carolina at the Constitutional Convention in Philadelphia (and who had written Iredell a letter concerned that the North Carolina court had exceeded its authority in nullifying the confiscation act as inconsistent with the state’s constitution), Iredell argued that \textquote{\textquote{[t]he Constitution therefore, \textit{being a fundamental Law}, \& a law \textit{in writing} of the solemn nature . . . the Judicial power, in the exercise of their Authority, must take notice of it as the Ground work of that as well as of all other Authority; \& as no Article of the Constitution can be repealed by a Legislature, which derives its whole Power from it, it follows either that the \textit{fundamental unrepealable} Law must be obeyed, by the rejection of an Act unwarranted [sic] or by and inconsistent with it, or you must obey an Act founded on an authority not given by the People, \& to which therefore the People owe no obedience.\textsuperscript{7}}}

\textsuperscript{4} The court’s opinion was not recorded, but an account of the case written by James Varnum, the defendant’s lawyer, survives. See Snowiss (1990, 20-22).

\textsuperscript{5} Snowiss (1990, 17-22) discussing \textit{Commonwealth v. Caton}, 4 Call (Va.) 5 (1782) (a Virginia case considering state legislation transferring the pardoning power to the legislature in which Judge George Wythe declared that if the legislature tried to pass laws contrary to the constitution and such laws came before him, he would declare “here is the limit of your authority; and hither, shall you go, but no further”); and \textit{Rutgers v. Waddington} (a New York case involving a state law providing compensation for property confiscation by the English during the Revolutionary War and that attempted to bar defenses that were largely recognized by the law of nations and enacted treaties).

\textsuperscript{6} 1 N.C. 5 (1787).

\textsuperscript{7} Iredell (2003, 307-308) (emphasis in original). Iredell, truth be told, had served as a lawyer for the aggrieved party in \textit{Bayard} and had written an earlier, anonymous “Letter to the Public” outlining similar arguments (Ibid., 227-231). Snowiss (1990, 46) concludes that Iredell’s letter was seen by Alexander Hamilton and James Wilson and that it informed their subsequent views on
similar circumstances and came to the same conclusion: despite the American commitment to rule by democratically elected legislatures, legislators could not pass laws exceeding the limitations on government power. If a state law was inconsistent with its written constitution, the judges had no choice but to find the law invalid. Constitutions trumped statutes.

As they convened in Philadelphia during the summer of 1787, the framers were aware of these early cases and the emerging rationale for and practice of judicial review. During their debates, the framers considered the matter, but only indirectly. Discussion of how to ensure that state laws would conform to the Constitution—eventually addressed via the Supremacy Clause—prompted consideration of the judiciary’s role in striking state laws contrary to the Constitution.\(^8\) Similarly, debate over James Madison’s proposed Council of Revision (which would have empowered the executive along with the judiciary to strike down laws) included allusions to the notion that the judiciary would possess the authority to void federal laws inconsistent with the Constitution.\(^9\) Judicial review was also discussed during debates over ratification. Alexander Hamilton, writing as Publius in *Federalist* No. 78, championed the concept as a means of keeping the legislature “within the limits assigned to their authority.”\(^{10}\) Among the Anti-Federalists opposing ratification, the writer known as

\(^8\) On 17 July 1787, Gouverneur Morris declared his opposition to the idea of giving the national legislative branch a “negative” over state laws, stating that “[a] law that ought to be negatived will be set aside in the Judiciary department.” (Farrand, 1911a, 28). See, also, Rakove (1997, 1042–1050) arguing that “federalism questions were central to thee origins of judicial review.” (Ibid., 1042).

\(^9\) See, *e.g.*, Elbridge Gerry’s statement of 4 June 1787 that the judiciary’s power included “a power of deciding on [laws’] Constitutionality.” (Farrand, 1911b, 97); and Luther Martin’s statement of 21 July 1787 that “as to the Constitutionality of laws, that point will come before the Judges in their proper official character.” (Farrand, 1911a, 76).

\(^{10}\) *Federalist* No. 78. Hamilton continues in language that foreshadowed John Marshall’s famous argument in *Marbury*, “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between
Brutus was most concerned with the implications of judicial review.\textsuperscript{11} Brutus worried that the Americans’ commitment to rule by democratically elected representatives would be undermined by the Court’s supreme ability to establish the meaning of the Constitution without any legislative oversight.\textsuperscript{12}

Despite such conversations, the Constitution as ultimately drafted and ratified did not explicitly grant the federal judiciary the power of judicial review. It merely vested “[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”\textsuperscript{13}

The best textual support for the power of judicial review comes from Article III, Section 2’s granting of jurisdiction over cases “arising under this Constitution” and Article VI’s supremacy clause.\textsuperscript{14}

\textsuperscript{11} See Slonim (2006) for an extended argument that among early Americans Brutus (whom the author notes is typically thought to have been Robert Yates of New York) uniquely recognized the possibility of the emergence of judicial supremacy. In fact, \textit{Federalist} No. 78 was written in direct response to Brutus’s writing on the subject as an attempt to allay fears about a too-strong judiciary (Ibid., 18–30).

\textsuperscript{12} See “Brutus XV” (20 March 1788) (Ketcham, 2003, 304–309), in which Brutus explains that the British system allows for Parliament to set aside judges’ decisions for error or to pass new laws explaining the old laws (and thereby negating a judge’s interpretation). Such checks against the judiciary were not provided in the proposed Constitution.

\textsuperscript{13} Article III, Section 1.

\textsuperscript{14} “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Article VI. This section more precisely empowers federal courts to review the constitutionality of state laws. Congress applied this authority in Section 25 of the Judiciary Act of 1789, setting out “[t]hat a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a
Members of the federal judiciary found the logic irresistible. Although *Marbury v. Madison*\(^{15}\) is typically cited as the first instance of judicial review, previous cases foreshadowed this result. In *Hayburn’s Case*,\(^{16}\) for instance, the justices refused to serve on pension-evaluation boards pursuant to the Invalid Pensions Act of 1792 because, contrary to Article III, such acts did not amount to judicial duties. Similarly, in *Hylton v. United States*\(^{17}\) the Court considered the constitutionality of a national carriage tax. The Court’s opinion in *Calder v. Bull*\(^{18}\) analyzed whether a Connecticut law affecting a probate matter violated the Constitution’s protection against ex post facto laws; and in *Cooper v. Telfair*\(^{19}\) several justices acknowledged the power of the Court to void legislation inconsistent with the Constitution. Although the Court did not void any laws in those cases, the justices did seem to assume some power to confirm legislation’s conformity with the requirements of the Constitution.

Over the span of a few short decades, judicial review evolved from an impossible-to-imagine concept to a fully realized feature of the American system.\(^{20}\) It seemed

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\(^{15}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{16}\) 2 U.S. (2 Dall.) 409 (1792).

\(^{17}\) 3 U.S. (3 Dall.) 171 (1796).

\(^{18}\) 3 U.S. (3 Dall.) 386 (1798).

\(^{19}\) 4 U.S. (4 Dall.) 14 (1800).

\(^{20}\) Some have located the origin of judicial review in Sir Edward Coke’s decision in *Dr. Bonham’s Case* (1610), which contained the declaration “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.” Indeed, this passage was dug up by early American jurists sympathetic to the idea of judicial review, most notably James Otis (Bailyn, 1992, 176–177). Thorne (1938)
a necessary invention in light of Americans’ commitment to written constitutions. Yet many of the questions and concerns about judicial review raised at the close of the eighteenth century echo still today. Why should the judiciary’s constitutional interpretations hold any more sway than those of other political actors? How should judges interpret the Constitution? How much deference should judges show legislative and executive actions? Does the public possess any rightful influence on the applied meaning of the Constitution? The logic of judicial review is quite easy to explain. What remains quite complicated (and controversial) after more than two hundred years is providing an explanation of just how judicial review should function in practice.

2.1.2 A Not-Quite-Supreme Court?

Part of what makes judicial review attractive as a check on potentially unconstitutional behavior by other political actors is that it is a power exercised by an independent judiciary. Article III attempts to insulate federal judges from improper influence by granting them lifetime tenure and protection from pay cuts. Judges unconcerned with reelection or reappointment, it was thought, would be less susceptible to the temptation to substitute the will of some patron for their considered legal judgment of a case before them. Nevertheless, judicial independence carries with it some danger. If judges are free to decide cases as they see fit, then they are free to decide in a manner out of step with society at large. For a nation dedicated to democratic decision making, the prospect of unelected, life-tenured judges driving rejects this reading of the case, concluding that “Coke’s ambitious political theory is found to be not his, but the work of a later generation of judges, commentators, and lawyers.” (Ibid., 552). See, also, Wood (1988, 1297–1298) (rejecting the notion that the origin of American judicial review can be found in Dr. Bonham’s Case—nor, indeed, in the writings of Enlightenment theorists such as Vatell, Pufendorf, or Burlamaqui—and arguing, instead, that American judicial review is a wholly new institution that developed from Americans’ particular political experiences).

21 Section 1 of Article III reads, in part, “The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”
policy is unsettling—it smacks of aristocracy, the dangers of which early Americans were quite familiar. Thus it is unsurprising that the American constitutional system contains several mechanisms by which the judiciary can itself be held accountable. These institutional checks against the power of judicial review include constitutional amendment, statutory revision, appointment (and even court “packing”), impeachment and removal, jurisdiction-stripping, and outright evasion. Each of these checks has been threatened or used to counteract the Supreme Court.

In fact, the very first constitutional amendment to be ratified after the Bill of Rights was a direct response to the Supreme Court. In *Chisolm v. Georgia*, the Court had ruled that a South Carolinian could sue the State of Georgia in the Supreme Court. Georgia had argued that sovereign states such as itself must give consent in order to be sued in federal court. The Eleventh Amendment directly overturned the Court in favor of Georgia’s preferred arrangement. Since *Chisolm*, four other cases have been overruled by constitutional amendment, including *Dred Scott v. Sandford*, by the Thirteenth and Fourteenth Amendments; *Minor v. Happersett*, by the Nineteenth Amendment; *Pollock v. Farmers’ Loan & Trust Company*, by the Sixteenth Amendment; and *Oregon v. Mitchell*, by the Twenty-Sixth Amendment. Judicial review may enable the Supreme Court to say what the constitutional text means, but Article V establishes procedures for changing this text, which may

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22 2 U.S. (2 Dall.) 419 (1793).

23 The suit was a part of an effort by the citizen to recover debts owed him by the state in connection with the Revolutionary War.

24 The text of the Eleventh Amendment provides, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

25 60 U.S. 393 (1857) (protecting property rights in slaves and denying claims to citizenship by people of African descent).

26 88 U.S. 162 (1874) (finding that the Fourteenth Amendment provided women equal rights to vote).

27 157 U.S. 429 (1895) (ruling income taxes as unconstitutional unapportioned direct taxes).

28 400 U.S. 112 (1970) (denying Congress’s authority to set the voting age at 18 for state elections).
be done if the Court’s interpretation is seen as unfortunate, out-of-date, or simply wrongheaded.

Another reaction to disliked rulings by the Supreme Court has been to revise the statutory language found to be in conflict with the Constitution. For instance, in response to the Court’s ruling in *U.S. v. Lopez*\(^29\) that the Gun-Free School Zones Act of 1990 exceeded Congress’s authority under the Commerce Clause (because not all guns covered by the law were necessarily involved in interstate commerce), Congress altered the law to include the requirement that the gun in question “has moved in or otherwise affected interstate commerce.”\(^30\) Statutory revision does not pose a direct challenge to the Court’s authority under judicial review per se, but it does provide Congress with a method of altering the policy outcome that would occur if the Court ruling remained the last word on the matter.

A more indirect approach to altering the Court’s jurisprudence available to the President (in cooperation with Congress) is to change the personnel of the Court. Article II, Section 2 grants the President the power to appoint members of the federal judiciary with the advice and consent of the Senate. Not surprisingly, presidents have typically selected justices whose views and political leanings resemble their own. Thus a new opening on the Supreme Court offers the President an opportunity to appoint a justice who can be expected (or at least hoped) to shift the Court’s collective thinking on particular matters in a favorable direction. Moreover, under Article III, Congress enjoys near-plenary authority to define the structure of the federal judiciary. This power extends to determination of the size of the Supreme Court. Over American history, the size of the Court has varied—from as few as six to as many as ten. And these changes have occurred in response to fears about or hopes


for how the Court would rule. This “court-packing” approach offers a realpolitik method of harnessing the power of judicial review to do the bidding of the elected branches.

In addition to controlling the Court by adding new members in cooperation with the President, Congress can seek to alter its composition through the power of removal. Although federal judges enjoy lifetime tenure during times of “good behavior”, they—like other federal officers—are subject to impeachment and removal. Just one Supreme Court justice has ever been impeached. In 1805, Justice Samuel Chase was impeached by the Democratic-Republican House of Representatives. Charges were brought against him in response to his many caustic and partisan comments made while sitting on lower federal courts (as Supreme Court justices were required to do at the time). Chase was ultimately acquitted, but chastened. Although no other Supreme Court justices have been impeached, it has been threatened. Justice William O. Douglas twice confronted the possibility of impeachment, and Justice Abe Fortas resigned before proceedings could begin.

Congress can also shape the Supreme Court’s caseload. Again, under its significant authority under Article III to design the federal judiciary, Congress can establish or remove lower federal courts, which can relieve or worsen the burden on sitting judges. Moreover, Congress can define the courts’ jurisdiction, a power which includes the ability to remove jurisdiction from issue areas it does not want the

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31 The Federalists shrunk the Supreme Court to deny incoming President Thomas Jefferson the ability to appoint a justice until two members left. The Radical Republicans similarly shrunk the Court to deny President Andrew Johnson appointments; and then increased the size of the Court again once Ulysses S. Grant was sworn in as President. Perhaps most famously, President Franklin D. Roosevelt and his New Deal Democrats—increasingly frustrated with Court rulings denying the constitutionality of their legislation—announced a plan to increase the size of the Court. The new openings were to have been filled with judges more sympathetic to the New Deal. The unpopular plan failed.


33 See Ellis (1971, 105), writing that the impeachment trial “led to a marked change in Chase’s behavior.”
courts to hear. This power of “jurisdiction-stripping,” as it is known, was acknowledged by the Supreme Court itself in *Ex parte McCardle,* a Reconstruction-era case involving the federal government’s ability to try citizens in military courts. Jurisdiction-stripping is thus an important constraint on the judiciary—if judges cannot hear a case, they cannot decide its outcome.

Perhaps most pointedly, the President and Congress may choose to simply ignore the Court and its rulings. Article III gives the judiciary no ability to enforce its decisions—the Court is dependent on other actors to follow through on its orders. From time to time, political actors have declined to heed the Court’s directives. This principle is illustrated by the showdown between the Supreme Court and the State of Georgia over the state’s authority over lands held by the Cherokee pursuant to treaties with the national government. President Andrew Jackson, no friend of the American Indian, was unwilling to give the Court’s Cherokee-friendly rulings the force of the executive branch. In one instance, Georgia executed a Cherokee man, George “Corn” Tassel, in direct defiance of the Supreme Court. Similarly, Jackson showed no inclination to enforce the Court’s ruling in *Worcester v. Georgia* striking down a Georgia law prohibiting non-Indians from being on Indian lands without a state-issued license. To be sure, the Court’s ruling did not require executive action, but Jackson could have interceded. Thus in an important sense, the Court relies on

34 74 U.S. 506 (1869).

35 In an earlier case, *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), the Court had held that citizens could not be tried in military courts when civilian courts remain open. Angered by this, and anticipating a similar ruling in the habeas corpus proceedings involving William McCardle (a former Confederate soldier who had published articles supporting opposition to Reconstruction), the Radical Republicans passed a law expressly removing jurisdiction from the Supreme Court in such cases.


37 Although Jackson probably never uttered the famous line “John Marshall has made his decision; now let him enforce it!” (see Warren (1922, 219–224)), he did write to the American Board of Missionaries, “The power invested in me has been placed in my hands for the purpose of seeing the laws of the United States justly and impartially administered, and not for the purpose of abusing them, as I most assuredly should do, were I to interpose my authority in the case brought before

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the rest of the political system to see that its decisions are accepted and implemented.

This collection of institutional checks serves a set of tools for other political actors to use to punish and correct disliked judicial actions. Their use may also be threatened to induce desired judicial behavior. That is, the Court may be inclined to deviate from its sincere or most-preferred interpretation in a given case and instead issue a ruling that to it is second best in order to avoid some alternative, lesser-preferred outcome involving some sort of punitive check against judicial authority. Thus understanding judicial review requires grappling with the nature of these institutional checks and their usefulness as means of maintaining judicial accountability while simultaneously respecting judicial independence. Normative debates about judicial review—and the positive inquiries that seek to inform such debates—hinge on the participants’ views of the proper balance between judicial independence and judicial accountability. Those who claim (as I do) that the Supreme Court’s power via judicial review has grown over time are, in effect, arguing that the likelihood or efficacy of the various institutional checks being employed against the Court have diminished over time.

2.1.3 The Puzzle of Judicial Supremacy

At the heart of any debate over judicial review is the question of the proper role of judges in the American political system. Given the Constitution’s silence on the matter, even the existence of judicial review in the American system is somewhat puzzling. Why would a democratic republic tolerate an institution in which unelected, life-tenured judges have the ability to strike down legislation passed by elected representatives of the people? This normative concern has been termed the “countermajoritarian difficulty.”38 Questions about this difficulty—whether it exists,
whether it is a problem, how it can be fixed—have preoccupied scholars of constitutional law and theory for decades.39

This normative inquiry implicates a positive question as well: how is it that the weakest branch of the federal government has come to possess such an important power—a power nowhere defined in the Constitution itself? In part, the simplicity of the logic for judicial review set out above provides an explanation for its existence. After all, if the Constitution says (as it does) “no Bill of Attainder shall be passed,” Congress passes a law depriving a specific person of important rights (i.e., a bill of attainder), and the offended person challenges the law, what is the Court to do? Surely it must give priority to the Constitution, even if that means voiding the duly enacted law. And early Americans’ experience demonstrated the necessity for just such a check. Whereas the newly independent Americans had placed much confidence and power in their democratically elected legislatures, the legislators themselves proved themselves to be susceptible to the allure of power, passing laws exceeding the scope of their enumerated powers and infringing on protected rights of citizens.40

Although there may be consensus about the need for some judicial review to void laws that egregiously contradict the constitutional text as in my bill of attainder example, that does not necessarily require judicial supremacy over matters of constitutional interpretation. Yet the Supreme Court has asserted just such a prerogative in the face of challenges to its interpretations. When Governor Orval Faubus and the Arkansas General Assembly argued that the Court’s interpretation of the Fourteenth Amendment in Brown v. Board of Education41 as prohibiting segregated schools was not binding on them and that they were entitled to follow their

39 See Friedman (2002) for a comprehensive examination of the considerable scholarship wrestling with the countermajoritarian difficulty.

40 See, e.g., Wood (1999, 791–792) (writing that “[b]y the 1780s many Americans concluded that their popular state assemblies . . . had become a major threat to minority rights and individual liberties and the principal source of injustice in the society”).

own interpretation of the Constitution, the Court responded forcefully in *Cooper v. Aaron*. In an opinion signed (unusually) by all nine justices, the Court rejected this argument out of hand, noting that the principle of judicial supremacy over constitutional interpretation could be traced back to the Court of Chief Justice John Marshall and its decision in *Marbury*. *Marbury*, proclaimed the Court, “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”

Congress, too, has faced the wrath of the Court. After the Court’s decision in *Employment Division v. Smith* reduced the level of scrutiny applied to (many) First Amendment Free Exercise claims, Congress passed the Religious Freedom Restoration Act of 1993 (or “RFRA”). RFRA required federal courts to apply a higher standard—strict scrutiny—to Free Exercise claims, essentially overruling *Smith*. The Court struck down RFRA as unconstitutional in *City of Boerne v. Flores*. The Court acknowledged Congress’s power under Section 5 of the Fourteenth Amendment to enforce First Amendment Free Exercise protections against states, but stressed that “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power

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42 This argument had its roots in the nullification doctrines of the early nineteenth century—and before that the Kentucky and Virginia Resolutions of 1798 and 1799.
44 *Cooper*, 358 U.S. at 18.
46 107 Stat. 1488.
47 The standard articulated in *Smith* had itself superseded the Court’s previous standard for Free Exercise cases as set out in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
to determine what constitutes a constitutional violation.” It is the power of the judiciary to define (and to change, it would appear, given the Court’s own reversal in Smith) the meaning of the Constitution. Thus, “[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. . . . When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.”

More recently, President Barack Obama came under attack for daring to question the powers of the judiciary. Speaking about the Supreme Court’s upcoming and highly anticipated decision in National Federation of Independent Business v. Sebelius—in which the constitutionality of his signature achievement, the Affordable Care Act (the “ACA”), was at issue—Obama stated “[u]ltimately I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.” The reaction from conservative commentators was prompt and strident. Did Obama—of all things, a former professor of constitutional law—not believe in judicial review? Hearing a separate challenge to the ACA before the Fifth Circuit Court of Appeals, Judge Jerry Smith (a Reagan appointee) admonished the administration’s lawyer that Obama’s comments had “troubled a number of people who have read it as somehow a challenge to the federal courts or their authority

49 Ibid., 519.
50 See ibid., 524 (declaring that “[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary”).
51 Ibid., 536 (citation omitted).
53 Daly (2012).
or to the appropriateness of the concept of judicial review. And that’s not a small matter.” Judge Smith ordered the Department of Justice to prepare a three-page memorandum stating its position on judicial review. The attorney general complied, and President Obama subsequently clarified his remarks to make clear that he recognized judicial review and would respect the Court’s ruling regardless of the outcome.

If the mere existence of judicial review is nonobvious and raises the specter of the countermajoritarian difficulty, then the emergence of judicial supremacy is even more problematic and difficult to defend normatively. That is, although some judicial role in maintaining the Constitution’s limits on government may be explainable, how do we extend the logic to mean that the Court’s rulings are controlling over all other possible interpretations? The President, members of Congress, and all federal officials are required to take oaths to uphold and/or defend the Constitution. Any action they take, it can be supposed, is consistent with their own interpretation of the Constitution. Why does the Supreme Court get to decide when their interpretations are wrong—especially with regard to difficult questions?

And from the positive perspective, how can we explain the emergence of judicial supremacy? Again, acceptance of modest judicial review may have been an logical consequence of inevitable legislative chafing against constitutional constraints. But why would this power grow over time? Following an approach set out by Knight (1992), we can understand the emergence of institutions as a way of providing a measure of predictability to the distribution of payoffs. And, under this approach, we can expect two results. First, the process of institutional design will be a competition among actors for those payoffs. And second, actors who have greater power at the point in time at which the institutions are designed will succeed in shaping

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54 Palazzolo (2012).
55 Crawford (2012).
institutions that distribute a larger share of the payoffs to them than to weaker actors. Judicial supremacy is a significant power—it amounts to the ability to establish the meaning of the fundamental and supreme law of the land. Given the judiciary’s relative weakness at the time of the founding compared to the legislative branch, executive branch, and even state governments, how did the Supreme Court come to acquire such authority? Why would the other political actors competing for influence permit the Court this power?

This puzzle of the increasing judicial authority of the U.S. Supreme Court is the central puzzle explored in this paper. That is, why has judicial authority via the power of judicial review grown over the course of American history? If the existence of meaningful judicial review is itself counterintuitive, then the fact that judicial authority has increased such that the Supreme Court was allowed to decide a presidential election is all the more vexing. Perhaps judicial review confers some benefits on the political actors, but it certainly acts as a real thorn in their sides at time. The expansion of judicial authority has exacerbated this feature of judicial review whereby the Court thwarts the will of the other branches and the popular majorities who animate their political power. Why has this occurred?

2.2 Explaining the Development of Judicial Authority

The most basic explanations for the expansion of judicial authority come from simplistic statements of behavioralist theories of judging. On one hand is the “legal” model of judicial behavior. With roots in the legal formalism movement, this model claims that judges find the law that applies to the case before them and apply it

56 For another account of institutional development and design stressing the central importance of political power, see Moe (2005).

57 Bush v. Gore, 531 U.S. 98 (2000). Supreme Court justices were also critical in deciding the disputed election of 1876. But the 1877 Electoral Commission upon which five justices sat was created by Congress. In contrast, the Court in 2000 proceeded on its own accord with full awareness that its decision regarding the Florida electoral results would determine the outcome.
neutrally and objectively. Judging under this model resembles a mathematical algorithm. Two judges receiving the same inputs should produce the same output. This view of the judge as automaton is held up by the legal profession as the ideal. Indeed, many judges themselves claim that this is what they do.\footnote{See, e.g. Kozinski (1992), writing that “...there are more or less objective principles by which the law operates, principles that dictate the reasoning and often the result in most cases. I know you are taught to doubt this in law school, as I was; it is nevertheless true.”} According to the legal model, then, if judicial authority has expanded, it has done so only to the extent that the letter of the law has permitted it. Thus the sheer number of laws may have increased the need for judges to resolve legal disputes. Similarly, the content of the laws may have increased the scope of powers for the federal judiciary—in particular, perhaps, laws from the Industrial Revolution on that have increased the size of the national government.

On the other hand, the “attitudinal” model highlights the fact that judges are people, with opinions and biases just like the rest of us.\footnote{The attitudinal model has this in common with the Legal Realist movement of the early twentieth century. See, generally, Llewellyn (1930, 1931).} On this view, judicial decision making can be explained by looking to the policy preferences of the judges.\footnote{See, e.g., Rohde and Spaeth (1976) explaining that a lack of electoral accountability, the impossibility of career advancement, and the absence of any higher or alternative court frees the justices to base their decisions solely on personal policy preferences.} Thus, when it comes to the Supreme Court, “Rehnquist vote[d] the way he [did] because he [was] extremely conservative; [Thurgood] Marshall voted the way he did because he was extremely liberal.”\footnote{Segal and Spaeth (2002, 86).} As a consequence, under the attitudinal model, one might argue that the role of the judiciary has expanded because judges—like all other political actors—seek more power and have issued rulings exercising such power.

Neither the legal model nor the attitudinal model pay much attention to the institutional constraints courts might face. That is, they do not expect that Congress’s...
threats of overriding the Supreme Court can be expected to affect the Court’s decisions. Their reasons for ignoring such institutional factors are quite different, however. The legal model ignores institutional considerations because such factors do not matter to a good judge—she will issue the decision she believes to be correct regardless of the possible consequences. The attitudinal model, on the other hand, acknowledges that a rational judge would take into account the likely actions of other relevant actors, but posits that the danger to the Court posed by threats of reaction are minuscule.\footnote{See, e.g., Segal (1997, 42) focusing on statutory review cases and concluding that “the theoretical evidence combined with the empirical results cast serious doubt on whether the justices vote other than sincerely with regard to congressional preferences, except on the rarest of occasions.”}

This paper rejects both the legal and attitudinal models as explanations for how the American Supreme Court has always operated. That is, I am persuaded that the Court has, at times, considered the likely actions of other political actors and adjusted its rulings to account for such reactions. This approach to judicial decision-making has been termed the “strategic” model.\footnote{See Epstein and Knight (1998) for the most definitive account of the strategic model.} It may be the case that the Court over time has had more or less cause to worry about the institutional constraints it faces (indeed, the central puzzle I am examining has to do with why these constraints have seemingly systematically diminished over time), but the facts are that the Court exercises its power of judicial review in a separation-of-powers system and that other political actors—the Congress, the President, the states, and the people themselves—have the ability to alter the ultimate policy outcome resulting from a series of actions starting with the Court’s initial exercise of judicial review.

\subsection{Institutionalist Theories of Judicial Authority}

In this section, I examine the literature studying the operation of judicial review in a separation-of-powers system. This literature—which almost by definition has
a decidedly institutionalist bent—takes the myriad ways in which different actors, working alone or in collaboration, can attempt to shape judicial behavior as a starting point for understanding the existence of judicial review. That is, scholars have looked for explanations as to why institutional checks are not always applied against the Supreme Court when it makes a ruling that disappoints some actor. I will also consider the literature exploring the connection between judicial behavior and public opinion. The connections between the courts and the people are not always studied from a rational-choice institutionalist perspective, but since the voters give power to the elected political actors who possess institutional checks on the judiciary, the will of these voters seems a relevant consideration for how judicial review works in a democratic separation-of-powers system.

Judicial Review in the Separation-of-Powers System

If judicial review is not necessary and sometimes produces results that irritate other political actors, why does it persist as an institution—particularly when those actors often have means at their disposal to punish the Court? Most institutionalist scholars who have addressed this question give a form of the answer: judicial review, on average, provides more in benefits to such actors than it costs them.

At the most basic level, the Court can help actors achieve particular policy goals. That is, judicial review may make it easier for a particular group to have its preferred policy outcomes enacted and maintained. Graber (1993), for instance, argues that the Supreme Court under John Marshall was able to exercise authority to the extent it could because its rulings tended to promote the interests of the National Republicans. Shipan (2000) and Rogers (2001) argue that judicial review can also serve as a means of improving legislation—the legislators do not know a priori exactly how their policies will be enacted. Meaningful judicial review can allow for varying interpretations of the policy over time to keep outcomes consistent with what the
original legislators would have wanted. Similarly, Whittington (2005, 584) advances an “entrenchment thesis” whereby “[t]he establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.” In subsequent work, Whittington explains that this role of the Court in protecting the preferred constitutional visions of a past regime against current regimes is an especially important aspect of presidential support of judicial review.\textsuperscript{64}

In addition to directly promoting actors’ policy interests, judicial review can also provide indirect protections of those interests. Some scholars focus on judicial review’s role in mediating political competition. True democracy requires political competition, but competition can be fierce. Rivals can be expected to cheat and to seek ways of acquiring long-term advantages. Accordingly, judicial review can provide a way of assuring that agreed-upon rules and settlements are followed,\textsuperscript{65} and judicial review can serve as an important check on any particular party or interest group obtaining sufficient power to become the dominant player.\textsuperscript{66}

Judicial review may also yield dividends for political actors vis-à-vis their voters through a process of blame avoidance. That is, the existence of meaningful judicial review can give elected officials an excuse for failing to satisfy the wishes of their voters—even when they themselves disagreed with the public.\textsuperscript{67} Policy makers may also be able to pass laws they, in truth, dislike or find unwise and rely on the Court to strike. They can claim to voters that they tried to pass the law, but that the Court is to blame for the policy failure.\textsuperscript{68} That the presence of judicial review may

\textsuperscript{64} Whittington (2007).

\textsuperscript{65} See, \textit{e.g.}, Landes and Posner (1975).

\textsuperscript{66} See, \textit{e.g.}, Ramseyer (1994) and Stephenson (2003). See, also, Carrubba and Rogers (2003) for a model explaining support for judicial review by states as a mechanism for monitoring free trade between them.


\textsuperscript{68} Lovell (2003) explores several case studies in which, he asserts, Congress passed undesired leg-
also provide a backstop against imprudent laws also enables legislators to ignore the long-term consequences or constitutional implications of their actions instead of the short-term payoffs.  

Eskridge (1991) spells out how a separation-of-powers model would work in the statutory context. If the Court makes a ruling that is sufficiently distant from the ideal point of Congress (or, more precisely, those committee members who act as gatekeepers in Congress), then Congress will choose to remake policy. Epstein, Knight and Martin (2001) explain what this means for a strategic Supreme Court: if it anticipates being so overruled, it will adjust its ruling and locate the policy outcome instead at the point closest to the Court’s ideal point without prompting some sort of institutional reaction. While articulate statements of this theory abound, empirical support has been harder to obtain. Segal and Westerland (2004) and Segal, Westerland and Lindquist (2011), for instance, find little support for the idea that threats of institutional override drive the Court’s thinking. In contrast, Harvey and Friedman (2006), Clark (2009), and Bailey and Maltzman (2011) have found such evidence. Despite the lack of overwhelming empirical support for the strategic model in studies looking at the contemporary Court, compelling anecdotal stories from American history suggest that the Court has at times acted as if it feels constrained.

islation with the hope that the Court would strike it down.

69 Tushnet (1999, 57–65) calls this “judicial overhang,” something James Bradley Thayer worried about as long ago as 1893, writing that “[n]o doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it” (Thayer, 1893, 155–156). Similarly, Fox and Stephenson (2011) explore the ways in which judicial review encourages “political posturing” among legislators.

70 Specifically, Eskridge looks at changes to Civil Rights statutes (and the interpretation thereof) during the second half of the twentieth century.
Judicial Review and the Public

The Supreme Court lacks any means of enforcing its rulings or of defending them against other actors’ institutional reactions. But the ultimate authority for the U.S. Constitution and all government action taken pursuant to its authority is “we the people.” The voting public elects and reelects politicians to represent them in the legislative and executive branches. Thus the beliefs and preferences of the people are important factors to consider as we examine the authority of the Court in the American separation-of-powers system.

Supreme Court justices are unelected. And their decisions sometimes spark public outcry. Nevertheless, the Court remains the most popular (or perhaps least unpopular) branch of the federal government. Why is this? Why do the Court’s opinions tend to track public opinion? Dahl (1957) explained this phenomenon as a product of the gradual replacement of justices. Those who are appointed as justices are products of the same society as the rest of the public, and their views reflect those of society. Even though the Court is bound to some degree by precedent, those precedents are updated as newly appointed justices attempt to conform them to contemporary views. Beyond this indirect connection between public opinion and the Court’s decisions, scholars have found that—even given constant personnel—the Court follows public opinion. Scholars continue to disagree on what accounts for

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71 Two relatively recent cases that received criticisms from wide swaths of the public include *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010). Somin (2008, 2109) cites polls indicating that 81–95% of respondents opposed the Court’s decision in *Kelo*. Werner (2011, 119) cites polls indicating that the (immediate) response to *Citizens United* was similarly negative, with 80% of respondents opposed to the decision.

72 A September 2013 Gallup poll found that 62% of respondents reported having a “great deal” or “fair amount” of trust in the judicial branch, compared with 51% and 34% for the executive and legislative branches, respectively. Yet only 46% of respondents expressed approval for the Supreme Court itself. (Dugan, 2013).

Friedman (2009) presents a political history of the Court’s relationship with public opinion arguing, contrary to those worried about the countermajoritarian difficulty, that the structure of judicial review means that the Supreme Court (eventually) produces interpretations of the Constitution that are consistent with the views of the people. He argues that the Court and the public seemingly engage in a back-and-forth negotiation over constitutional interpretation. Thus in *Furman v. Georgia*, the Court made a first attempt to limit the death penalty, which public opinion polls suggested was growing unpopular. But the Court’s ruling, which had the effect of outlawing the death penalty, generated its own negative reaction among the public. The Court responded to this public outcry by issuing a new ruling in *Gregg v. Georgia* upholding new death penalty statutes that added some precautions and protections to defendants. According to Friedman, “[i]t is through the process of judicial responsiveness to public opinion that the meaning of the Constitution takes shape. The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public.”

According to Friedman, the public accepts single decisions by the Supreme Court that are contrary to public opinion because they trust that in the long run the Court will get the policy right. A similar argument comes from the work of political scientists looking at the public legitimacy of the Court. The Court will surely take positions in particular cases that lack “specific support,” but in the aggregate the

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74 Giles, Blackstone and Vining Jr. (2008) attribute such correlations to attitudinal change, whereas Casillas, Enns and Wohlfarth (2011) find evidence to suggest that both attitudinal change and a desire to be consistent with public opinion drive change at the Court.

75 408 U.S. 238 (1972).
78 Ibid., 383.
Court enjoys sufficient “diffuse support” (characterized as a “reservoir of goodwill” among the public) to have its decisions accepted.\textsuperscript{79} Relatively recent studies of this phenomenon have concluded that “[t]he U.S. Supreme Court currently enjoys a great deal of institutional legitimacy.”\textsuperscript{80} But what does this mean for the operation of judicial review in the American separation-of-powers system? After all, the public has no means of directly intervening to stop some other political actors from exercising an institutional check on the Court.

Public support for the Supreme Court can be seen as an indirect way for the Court to ensure that its rulings are followed by other political actors. Indeed, there is a growing literature pursuing this line of reasoning. Stephenson (2004) presents a model in which the public can find exercises of judicial review to strike legislation to be a better source of information than legislative enactments with regard to the true quality of popular legislation. Vanberg (2001, 2005) presents a model of judicial review whereby the likelihood that legislative deviations from court rulings will be detected (and subsequently punished) by the public explains judicial authority.\textsuperscript{81} Similarly, Staton (2010) argues that the Mexican Supreme Court selectively promotes its decisions in order to win public support more generally. Carrubba (2009) explains the development of meaningful judicial review as a process whereby a court wins over the trust of the people as a reliable check on attempts by political actors to deviate from agreed-upon rules. And Clark (2009) finds a positive relationship between the number of laws struck by the Supreme Court corresponds to its levels of public support.

This aspect of American judicial review—the degree to which the U.S. public views it as an important part of the Constitution’s system of checks and balances

\textsuperscript{79} See, especially, Caldeira and Gibson (1992).

\textsuperscript{80} Gibson, Caldeira and Spence (2003, 364).

\textsuperscript{81} Vanberg applies his model to the example of the German Federal Constitutional Court, the decisions of which, he explains, are evaded “routinely” (Vanberg, 2005, 7).
and sees the Court as acting as a legitimate check on the other branches—is key for my analysis of the development of judicial review. My central claim is that the Court has acted to win public support in a growing number of issue areas. Once that support exists, the costs to other actors of exercising their checks on the Court increase significantly. This, in turn, gives the Court a greater ability to issue decisions that depart from the preferred policies of the other branches—and even the public.

A Model of Judicial Review

A simple spatial model helps us think about how constitutional review by courts works in a democratic separation-of-powers system. Consider the single-dimension policy space in Figure 2.1. There are three players: the Legislature, the Judiciary, and the People, and their respective ideal points are indicated by points $L$, $J$, and $P$. Point $SQ$ indicates the location of the policy status quo. The Judiciary moves first, and can make a constitutional interpretation that moves policy from the status quo. Next, the Legislature can choose to accept the Judiciary’s interpretation, or attempt to institutionally override the Judiciary and implement its own constitutional vision. Policy outcomes emanating from the Legislature as alternatives to the Judiciary’s prescription require the support of the People to become effective, and point $P$ indicates the ideal point of the pivotal member of the public. This model thus most closely corresponds to a situation in which the chosen institutional response to a particular exercise of judicial review is statutory revision or constitutional amendment.
Figure 2.2: Some Possible Spatial Arrangements of the Judicial Review Model.

Given the spatial arrangement set out in Figure 2.1, the game plays out as follows. Given that the status quo lies to the left of its ideal point, the Judiciary would like to move policy rightward. But any movement away from the status quo and toward the Judiciary’s preferred policy diminishes the Legislature’s utility. If the Judiciary were to offer an interpretation located at its ideal point, then the Legislature could win the People’s support for any proposal between \( P \) and \( J \) (and the same distance to the left of \( P \)). Knowing this, a strategic judiciary would try to maximize the rightward shift of policy subject to this constraint. As a consequence, the Judiciary will offer an interpretation located at \( P \), and the Legislature will not be able to make any counterproposal that will defeat \( P \). Thus, the ultimate policy, \( X^* \), will be located at the People’s ideal point, \( P \).

Figure 2.2 provides some additional examples of the simple spatial model of judicial review in a separation-of-powers system. In Figure 2.2(a), all three players desire a rightward shift in policy from the status quo. But the Judiciary is only able to successfully achieve a shift from \( SQ \) to \( L \)—anything further to the right would enable the Legislature to successfully overturn the Judiciary’s interpretation. Even though \( L \) is to the right of the People’s ideal point, \( P \), it is the final policy outcome because the Legislature has no incentive to offer the People any alternative policy. By contrast, in Figure 2.2(b), the Judiciary can make an interpretation that successfully moves policy from \( SQ \) to the Judiciary’s own ideal point, \( J \). Though this new policy is farther from the Legislature’s ideal point, the Legislature cannot offer any preferred counterproposal that the People would support, given the location of
the People’s ideal point. Finally, in Figure 2.2(c), the Judiciary declines to present a new interpretation, leaving the final policy at the status quo.

The lesson from this simple (and simplistic) model of constitutional review is that the Judiciary’s role as an agenda-setter gives it tremendous influence over the ultimate outcome. When the Judiciary’s ideal point is on the opposite side of the status quo from the ideal points of the People and Legislature, as in Figure 2.2(c), it will refuse to exercise its power of constitutional review, leaving the policy at the status quo. In other instances, when the Judiciary does choose to exercise judicial review, the policy outcome will typically be located at the ideal point of the median player of the Judiciary, the People, and the Legislature.

But this model provides a rather constrained and mundane view of judicial review in the separation-of-powers context. It is analogous to the situation in *Oregon v. Mitchell* when Congress attempted to lower the voting age for all elections (including state elections), the Court ruled that Congress could not set age requirements for state elections, and the issue was settled by the ratification of the Twenty-Sixth Amendment. Far more interesting are the more contentious cases in which political actors seek to override, negate, or evade rulings by the Supreme Court. What makes such struggles compelling is that in them some sort of judicial review is viewed as the norm, and the parties are debating over who deviated from what norm: did the Court’s act exceed the bounds of proper judicial review? Or is the actor inappropriately refusing to recognize the legitimate resolution of an issue?

That such conflicts over judicial review represent a deviation from a norm means that the political actor cannot simply act contrary to the Court. There are costs involved in such reactions to the Court. Vanberg (2008) provides a useful way of thinking about such interactions. In considering why systems of meaningful judicial review persist, he explains that political actors with the power to potentially undo

a system of judicial review cannot pick and choose which aspects of judicial review remain in effect. Judicial review comes as a “package.” If the actor receives some benefits from judicial review, but also sees some disadvantages, the actor must take the bad with the good. The overall attitudes of political actor \( i \) toward judicial review can be captured by looking at the difference between the benefits and costs of judicial review to \( i \). When \( B_i - C_i \geq 0 \), the actor supports the maintenance of a system of judicial review—even if some of the court’s decisions are unsatisfying—because the overall benefits outweigh the costs. In contrast, when \( B_i - C_i < 0 \), the actor would, on balance, like to be rid of judicial review (even if in some cases the court upholds the actor’s political preferences). But simply because an actor dislikes judicial review on the whole, it does not follow that the actor will work to upend the system of judicial review. Instead, the actor must consider the costs of disciplining the court, \( D_i \). If the costs of disciplining the court are sufficiently high, the actor will “grudgingly” “tolerate” judicial review (Vanberg, 2008, 104). If, however, the disciplining costs are relatively low compared to the net cost of judicial review on the actor, the actor will work to remove judicial review. Vanberg’s Fundamental Equation of Court Discipline (for political actors who dislike judicial review) is thus

\[
(C_i - B_i) - D_i = R,
\]

where \( R \) is the payoff from disciplining the Court. When \( R \) is positive, the actor will discipline the court; when \( R \) is negative, the actor will accept judicial review; and when \( R \) equals zero, the actor is indifferent between punishing the court and accepting its decision.

Vanberg’s Fundamental Equation of Court Discipline can inform our thinking about institutional reactions against courts in political systems featuring judicial review. In particular, it prompts us to focus on the costs of overriding or disciplining judicial review. If

\[83\] That is, if \( B_i - C_i < 0 \) and \( D_i \geq C_i - B_i \).

\[84\] That is, \( B_i - C_i < 0 \) and \( D_i < C_i - B_i \).

\[85\] That is, for actors for whom \( (C_i - B_i) > 0 \).
Figure 2.3: Spatial Model with Constant Court-Discipline Costs.

a court for a particular exercise of judicial review. Figure 2.3 presents a theoretical policy space, and identifies the ideal points of a Legislature and Judiciary at L and J, respectively. In our earlier discussions of the spatial model of judicial review, all the action took place in a single dimension. In Figure 2.3, by contrast, the Legislature (but only the Legislature) is operating in two dimensions. The second dimension relevant to the Legislature’s calculus is the cost associated with disciplining the Judiciary. In Figure 2.3(a), the Legislature’s constant cost of disciplining the court is set at $d$. The inclusion of this discipline cost implies the existence of an “impossibility zone” of action for the Legislature. That is, the Legislature is unable to make a proposal as an alternative to the Judiciary’s constitutional interpretation.
without incurring at least cost $d$. The implication of this is that there exists a point in the policy space, $L^*$, at which the Legislature is indifferent between it and the possible proposal of $L$ and its attendant discipline cost, $d$. That is, at point $L^*$, there is no action available to the Legislature that will make it strictly better off.\footnote{Of course the Legislature would prefer any policy outcome between $L^*$ and $L$ (and the corresponding distance in the other direction) to $L^*$, but it cannot get there through its own actions. Thus, I label this the “impossibility zone” because it is impossible for the Legislature to bring about that outcome—but the policy outcome could be closer to $L$ than $L^*$ depending on the actions of the other players.}

The imposition of a court-discipline cost on the Legislature creates the $L^*$ indifference point that allows the Judiciary to receive a higher payoff than a system with no discipline cost. Moreover, the higher the discipline cost, the greater the policy benefit enjoyed by the Judiciary, ceteris paribus. Figure 2.3(b) illustrates that $L^*$ moves closer to $J$ when the discipline cost increases from $d$ to $d'$. Indeed, in some cases, as shown in Figure 2.3(b), the Legislature’s indifference point, $L^*$ may actually be beyond the Judiciary’s ideal point, $J$. In such a case, the Judiciary would be able to achieve a policy outcome located at precisely its ideal point.\footnote{It might be argued further that the court-discipline costs likely increase as the proposed policy alternative moves farther from the Judiciary’s suggested interpretation (which, depending on the spatial arrangement of the judicial review game, may or may not be at the Judiciary’s ideal point, $J$). The effect of this increasing cost would be, ceteris paribus, to move the Legislature’s indifference point, $L^*$, even closer to the Judiciary’s ideal point (considering instances when $L^*$ is located beyond $J$ as essentially moving the Legislature’s indifference point to exactly $J$).}

The upshot of the introduction of the court-discipline cost is that overall, with higher discipline costs, in the separation-of-powers game the final policy will be closer to the Judiciary’s ideal point than would otherwise be the case, even in cases when $L^*$, and not $J$, is the ultimate policy. In the aggregate, higher costs to the Legislature of disciplining the Judiciary result in better policy payoffs for the Judiciary.

In addition to discipline costs, another necessary complication for the simple model is the inclusion of uncertainty. The Judiciary is unlikely to know precisely where the Legislature’s ideal point is (or that of the People), just as the Legislature
Figure 2.4: A Decision-Theoretic Model of Judicial Review in a Democratic Separation-of-Powers System.

is unlikely to know the exact location of the People's ideal point. Let us represent the costs of override and the actors’ uncertainty as to the behavior of the other actors in a simple decision-theoretic model. Figure 2.4 describes a decision-theoretic model of judicial review in a democratic separation-of-powers system. This model of judicial review accounts for the sequential nature of the action, the probabilistic nature of the actors’ views of the behavior of other actors, and the costs associated with disciplining a court that has exercised judicial review. In particular, the model posits that there are instances in which the other political actor will face public backlash toward its disciplining of the court (due to some latent support for the Court).

The sequence begins with a policy status quo (SQ). The Court acts first and
chooses either to uphold the status quo or strike it via the Court’s power of judicial review. If the Court upholds the status quo, it and the Actor receive the utility associated with the status quo’s location in policy space. If the Court instead strikes the status quo, it asserts a new policy at point $C^*$. Then the Actor moves.

The Actor chooses whether to accept the Court’s decision or to discipline the Court. If the Actor accepts the Court’s exercise of judicial review, the game ends and the Court and Actor each receive the utility associated with point $C^*$. If, however, the Actor chooses to discipline the Court, it does so and sets a new policy at $A^*$. The Public then reacts to the Actor’s decision to discipline the Court.

The Public either lashes back against the Actor for disciplining the Court or it accepts the Actor’s disciplining of the Court. In either event, the Court receives the utility associated with its utility function and the ultimate policy outcome, $A^*$. If there is a public backlash against the Actor, it receives its utility associated with $A^*$ subject to a loss of $\beta$. If there is no public backlash against the Actor, the Actor simply receives $U_A(A^*)$.

The Court does not know what the Actor will do. It expects the Actor to discipline the Court’s exercise of judicial review with probability $p$, and thus expects the Actor to accept the Court’s striking of the status quo with probability $(1 - p)$. Similarly, the Actor does not know what the Public will do. The Actor believes there will be public backlash with probability $q$ and no public backlash with probability $(1 - q)$.

The Actor will discipline the Court when its expected utility of doing so exceeds the expected utility of accepting the Court’s ruling at $C^*$. There is thus a threshold value for $q$ at which the Actor will punish the Court.\footnote{Specifically, the condition required for the Actor to discipline the Court is that $q$—the Actor’s belief about the likelihood of public backlash—must be less than $[U_A(A^*) - U_A(C^*)]/\beta$.} Likewise, the Court will strike the status quo when its expected utility of doing so exceeds the expected utility of
upholding the status quo. There is thus a corresponding threshold for \( p \) at which the Court will strike the status quo.\(^{89}\)

This simple model of judicial review does not include the possibility for strategic behavior. To be sure, the Court does not know what the Actor will do and its expectations about the Actor’s behavior will drive its own behavior. Similarly, the Actor’s optimal course of action depends on what the Court did. But the action is sequential and when choosing what to do, the actors take the world as given—the Court is worried about what the Actor will do, but there is nothing the Court can do to try to change the future actions of the Actor beyond not giving the Actor the opportunity to move.

### 2.2.2 Judicial Authority, a Long-Run Game

The parametric decision-making of the model represented by Figure 2.4 can become strategic if the game is repeated. In particular, if we assume that both the Actor’s beliefs about the likelihood of backlash and the public’s willingness to react with backlash depend on previous rounds of the game, then the Court must consider how its actions are likely to affect the actions of the Actor. What we are interested in understanding is the equilibrium of such strategic interactions whereby the judiciary’s rulings are generally complied with. That is, we are looking at the institution of judicial review as an equilibrium of a strategic game.\(^{90}\)

Carrubba (2009) analyzes a similar strategic interaction. In Carrubba’s game, judicial review functions as a mechanism to ensure that various governments comply with a particular regulatory regime. The governments’ publics tolerate certain types of deviation as socially beneficial, but others are seen as selfish abandonment of

\(^{89}\) The conditions for striking the status quo are as follows: (i) when \( [U_C(A^*) - U_C(C^*)] > 0 \), the Court will strike when \( p > [U_C(SQ) - U_C(C^*)]/[U_C(A^*) - U_C(C^*)] \); (ii) when \( [U_C(A^*) - U_C(C^*)] < 0 \), the Court will strike when \( p < [U_C(SQ) - U_C(C^*)]/[U_C(A^*) - U_C(C^*)] \).

\(^{90}\) For more on the equilibrium-as-institution approach to institutionalism, see, generally, Schotter (1981); Calvert (1995); Aoki (2001); Greif (2006).
collective action and thus lead to sanctioning by the public. In Carrubba’s model, there is an equilibrium in which the public comes to fully trust the constitutional court’s adjudication of deviations as legitimate or not. In such an equilibrium, the public always sanctions governments that defy the court. The governments, knowing this, typically comply with the court’s ruling. Thus Carrubba terms this state of affairs the “universal compliance” equilibrium, and explains that such a process may be useful for explaining the development of judicial authority in the American context.

An analogous scenario seems plausible in the extensive form of the judicial review model outlined above. If in the first rounds of play the Court issues decisions that the Actor agrees with and refuses to discipline (or decisions the Public supports), then in subsequent rounds the Public may come to rely on the Court as a dependable arbiter of what laws should and should not stand. This, in turn, may raise both the amount of public backlash against any attempts by actors to discipline the Court and the likelihood that such backlash will occur (which we could expect to increase $q$, the Actor’s belief about the likelihood of such backlash). The result of entering such a phase of “universal compliance” would be to empower the Court to more confidently upset policy status quos in favor of policies closer to the Court’s own ideal point.

This suggests the following path toward greater judicial authority for the Supreme Court. For issue areas the Court is considering for the first time, the Court should

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91 The strategic choice to comply or not can be described as a Prisoner’s Dilemma, and judicial review is used as a means to detect deviation subject to punishment.

92 There may still be instances in which the compliance costs are too high—i.e., they exceed even the costs associated with being sanctioned by the public—and thus the government will still defy the court. See Carrubba (2009, 63).

93 Carrubba (2009, 68) states that his model most clearly applies to the assertion of the Supreme Court’s power of judicial review to control the state governments, but he further suggests that “the development of federal judicial review may be incidental to the development of review over state actions.”
make modest decisions that resist discipline.\textsuperscript{94} If decisions implicating such matters go sufficiently undisturbed, the issue area becomes seen as one that the Court can be relied on to rule properly and thus it becomes perceived by the public as falling within the legitimate purview of the Court. Once judicial authority over the subject matter is so established, the public will support the Court’s rulings in the area even if they are contrary to the public’s own policy preferences. Clark (2009), with his “politics–legitimacy paradox,” advances a similar notion that the Court’s ability to shape policy depends on the “maintenance of the image of the courts as apolitical, legal institutions.”\textsuperscript{95} But for Clark, judicial legitimacy and public support of the Court are tied closely the content of the opinions such that the Court “will be unwilling to stray too far from the broad contours of what will be accepted by the American public.”\textsuperscript{96} I argue instead that this is true insofar as public support aligns with the desire of some political actor to react against the Court regarding an issue area not yet secured as a question of “law”—and once a subject is seen as a legal question, then the Court can actually ignore public opinion with regard to the policy resulting from its decision.

If the Court actively desires to extend its authority over a particular issue area, then it can be expected to have a preference for exercising judicial review and having such actions accepted by the Actor. This suggests that in early cases, the Court should adjust where it locates $C^*$ in order to minimize the likelihood of discipline at the hands of the actor. There is thus a minimum level of utility associated with some point $C^*$ at which the Court is better off striking than upholding the status quo at issue.\textsuperscript{97}

\textsuperscript{94} See Segal, Westerland and Lindquist (2011) for evidence that in constitutional decisions the Court is more likely to strike laws when it is located closer to Congress and the President ideologically.

\textsuperscript{95} Clark (2009, 21).

\textsuperscript{96} Ibid., 22.

\textsuperscript{97} Specifically, as long as $U_C(C^*) > [U_C(SQ) - pU_C(A^*)]/(1 - p)$, the Court is better off striking
I thus describe the development of judicial authority as a process of endogenous institutional change. The very way in which the actors behave alters the incentives they face. In a single-shot court–actor interaction, the likelihood of public backlash against court discipline is a parameter set exogenously. The actors must take it as given and factor it into their expected utility calculations accordingly. But as the interaction is repeated, the players’ very actions change the values associated with this parameter. Specifically, the early acts of the court that garner support (or at least fail to attract discipline) change the likelihood of public backlash against court discipline—and thus the likelihood of court discipline itself—in subsequent rounds.

Greif and Laitin (2004) describe such factors that are parametric in the short run but variable in the long run as “quasi-parameters.” They describe that such quasi-parameters can create a process of “institutional reinforcement” whereby as a quasi-parameter changes (due to play leading to an equilibrium-institution in an early round), that equilibrium-institution persists over a wider range of true parameters.

Figure 2.5 depicts one way to think about the quasi-parameter framework. As a game is played, the players are constrained by the game’s parameters in each round of play. Some of these parameters are determined exogenously and are thus unaffected by the game’s play. Changes to such exogenous parameters can change the player’s rational strategies given a particular set of parameters. Such adjustments mean that significant exogenous “shocks” might upset the game’s settled equilibrium. But for a
game repeated over the long run, some the quasi-parameters may change gradually over time due precisely to the way the game is played. Thus the very history of game play can help to determine the outcomes in the present.

If we treat accepted (and meaningful) judicial review—whereby a court strikes down a law contrary to the preferences of some other political actor and that court ruling is complied with—as an institution, what I am saying is that early occurrences of such accepted, meaningful judicial review make later instances more likely. In those early cases, meaningful judicial review is the equilibrium over a narrower range of parameters (especially the policy preferences of other actors, including the public) than in later cases in which the quasi-parameter of the likelihood of public backlash against challenges to the Court’s authority has increased.

But how, precisely, has the Supreme Court come to enjoy sufficient public support that attempts by other actors to deny its rulings are met with public backlash? Here the persistent but confusing distinction between law and politics becomes relevant. Although it may be impossible to draw a clear line between matters that are “law” and those that are “politics,” I claim that the public nonetheless perceives that some such distinction exists. Furthermore, the public believes that the Court has legitimacy when its actions amount to “law,” whereas when the Court does “politics,” it is improperly exceeding the scope of its power. From the public’s belief in such a law–politics distinction and the inability of anyone to precisely define it, the Court has derived the benefit of increased judicial authority.

Hardly any issue area inherently comes under the area of “law.” More crucially, hardly any question is inherently distinct from law. Any political question can be framed as a legal question. “Law” can be better understood as a process of decision-making rather than a collection of topics. Despite this, the public tends to view “law” in the latter light—as a grouping of substantive questions. Thus when the

98 The exception here may be technical issues of legal procedure.
Court is able to successfully apply legal processes to new issues to the satisfaction of the public, then these issues come to be seen by the public as within the province of “law.”

This raises the further question: what practices constitute legal processes? To answer this question, we might consider the most famous work of the Legal Process movement, the “legal process” teaching materials compiled by law professors Henry Hart and Albert Sacks (and later published in textbook form). Early on, the authors identify “the central idea of law” as the principle of “institutional settlement” whereby members of a society have a duty to follow “decisions which are duly arrived at as the result of duly established procedures . . . unless and until they are duly changed.” The competition between the judiciary and other actors, then, is one about the word “duly.” For a matter to fall on the “law” side of the law–politics distinction, the public must accept that the matter is “duly” settled by the judiciary. But how does this occur?

“Proper” legal adjudication is characterized by several features. The presence of these features in a decision can be critical for a court to win public approval. These features include written justification. That is, the Court does not merely declare a winner and loser; it carefully explains the rationale that makes its conclusions inevitable. Similarly, good judges exhibit objectivity. Suspected bias toward or against a party on the part of the members of a court undermines the legitimacy of their rulings. Legal decisions should also appeal to some higher authority. That is, judges should not been seen as pulling principles out of thin air—they should be applying textual provisions of constitutions and statutes to the facts at hand. And, finally, judges are expected to consider and (usually) follow precedent. If similar cases have been heard before, parties should be able to expect a similar outcome.

100 Ibid., 4.
Herbert Wechsler in his classic article “Toward Neutral Principles of Constitutional Law,” articulated what it meant for a court to do law as opposed to acting as “a naked power organ.”\textsuperscript{101} He argued that what determines the extent to which a decision exhibits a legal quality is the degree to which it is principled. “A principled decision,” he continued, “is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend the immediate result that is involved.”\textsuperscript{102} The presence of any or all of these features of good judging may raise other actors’ costs of punishing the Supreme Court’s exercise of judicial review. But the power of precedent may be the most important feature. Once a matter has been subjected to legal review by the Supreme Court, the Court can cite this precedent as justification for its authority to hear subsequent cases.

This suggests a path by which the Supreme Court can expand its authority. When considering a novel issue or question, the Court can exhibit modesty in deciding the question. If the Court’s ruling satisfies all political actors such that no actor has an incentive to incur the basic costs associated with disciplining the Court (or any backlash costs associated with undermining such a modest judicial decision), then the ruling will stand—even if the matter is one that has previously been seen as a question of politics. But now in subsequent cases involving similar questions, the Court can cite this precedent as justification for its claim to be the appropriate source of institutional settlement. Public backlash against attempts to rein in the Court will be more likely and/or stronger. Thus in these subsequent decisions, the Court enjoys greater freedom to decide the case in a manner consistent with its true views, even if those views are contrary to those of other powerful political actors or the public at large.

On the one hand, this account suggests a path forward for Supreme Court justices

\textsuperscript{101} Wechsler (1959, 19). Wechsler was also associated with the Legal Process movement.

\textsuperscript{102} Ibid., 19.
who would like to expand their institutional standing. In order to extend the Court’s reach to new areas, the justices should select cases carefully such that they can issue opinions in new areas that are unlikely to be overturned. Once the Court establishes a foothold in a subject matter, it can credibly claim the area as one of “law” citing such early cases as precedent for future cases. And the fact that the law–politics distinction is simultaneously impossible to draw and perceived by the public as a real phenomenon means that the public will support this contention by punishing any attempts by other political actors to upset the judicial settlement of the matter.

On the other hand, this description of the development of judicial authority does not depend on justices’ actively seeking a greater long-run role for their Court through these mechanisms. It may be the case that justices have internalized the idealized characteristics of good judging and seek to settle difficult cases in a manner consistent with these principles of legal decision-making. Thus the Court may modestly address a novel issue in the hopes of providing a reasonable resolution (the result of which is that the Court issues a decision in a new area that is safe from the threat of institutional reactions). And in subsequent decisions, the Court may delve deeper into the issue, citing the earlier precedent for authority while considering more complicated and controversial aspects of the subject matter. Alternatively, the members of the Court may simply be attempting to maximize their payoffs in the short run by pursuing their policy preferences subject to whatever institutional constraints may attach. Thus the Court is able to achieve policy outcomes that are largely consistent with the preferences of other actors when it first enters an area, but once the precedent is established, it can pursue its policy preferences even if they are inconsistent with the views of other participants in the political system.

Furthermore, this description of increasing judicial authority also suggests ways in which the Court can lose authority over issue areas. If the subject matter becomes politicized in such a way that the Court cannot make rulings without seeming to
engage in partisan politics, then the public may see such actions more as “politics” and subject institutional reactions to such decisions to less backlash. Along these same lines, other actors may be able to work to reduce the Court’s authority over certain issue areas by undermining the public’s faith that the area is truly one of law.

My suggested mechanism for the Supreme Court’s increased relative power in the American political system is that it has extended the institution of judicial review to increasing numbers of issue areas. The reason the Court has been able to successfully pursue this is because the public believes in the law–politics distinction while simultaneously being unable to explain this difference. A simple heuristic the public relies on to determine whether the Court’s decision is “law” or not is whether the Court has considered such cases before. If so, the public is satisfied that the Court is “doing law” and will punish any attempts by other actors to react against the Court as illegitimate attacks on judicial independence. This, in turn, suggests that the Court’s initial forays into an issue area—those cases that are later viewed as precedent for judicial authority over the subject matter—produce decisions that political actors in possession of checks against the Court accept. Thus in these early cases, the actors possess the means of checking the Court’s intrusion into “politics,” but choose not to exercise these checks; in subsequent cases, if the actors’ attempts to exercise institutional checks on the Court and judicial review carry with them a much higher cost of public backlash.

2.3 Evaluating a Theory of Institutional Change

My account of increasing judicial authority thus integrates ideas from several distinct strands of research into judicial politics and separation of powers. Like Epstein and Knight (1998) and Bailey and Maltzman (2011), I argue that the U.S. Supreme Court is constrained from achieving its preferred policy outcomes by other participants in
the separation-of-powers system. And like Vanberg (2005) and Carrubba (2009), I argue that the Court can use high levels of public support or legitimacy as a way of increasing the costs to other actors of constraining the Court. But unlike Friedman (2009) or Clark (2011), I do not argue that the Court seeks to give the people what they want in terms of policy. Indeed, I argue that what the people want from their Supreme Court is law, not politics. Thus, while we should not be surprised to find correlations between public opinion and the Court’s opinions due to the processes first explored by Dahl (1957), I argue that the public is willing to tolerate rulings that deviate significantly from their desires so long as they perceive the Court as abiding by neutral legal principles and processes. Moreover, I argue that judicial legitimacy differs from issue area to issue area. Some subjects have been clearly established as “law” and the Court can do as it pleases—any attempt to react to such Court decisions would be met with strong public backlash. But other questions are in a no-man’s land between law and politics. The Court must be more careful when it attempts to settle such debates—if its rulings prompt other actors to exercise their checks on the Court, the public backlash may be minimal or nonexistent. Thus, unlike other scholars, I do not treat judicial legitimacy as a set attribute of a particular Court at a particular time. The same Court will enjoy different levels of legitimacy in different areas. The question of judicial authority has to do with how much legitimacy the Court enjoys over how many issue areas.

Obviously, we cannot get inside the minds of the Supreme Court justices, but I hope to show that as the Court has expanded its judicial authority, the justices have collectively acted in a manner consistent with the strategies suggested by the theory above: enter new issue areas modestly by issuing decisions that are unlikely to be overturned by actors who could react against them, and then—as such early cases establish the precedent for judicial settlement of such questions—the Court’s decisions can demonstrate more freedom on the part of the justices due to confidence
that their decisions will not be checked because to exercise such checks the actors possessing them would incur public backlash (and not because the public agreed with the Court, but because the public agreed that it was the Court’s issue to decide).

To evaluate this integrated theory of judicial authority, I will analyze cases from the history of the U.S. Supreme Court. This theory resists statistical analysis because the sample size of cases is so small, especially given the number of relevant variables. The narrative approach allows me to better consider factors such as the political context, the background of the justices, cases and issues not adjudicated, the justices’ analysis of legal issues (especially in connection with how similar issues were evaluated in earlier and later cases), alternative outcomes not realized, and the expected implications of the Court’s rulings.

Specifically, I will look at specific periods in the Court’s history as it entered new issue areas and then established itself within those areas (thereby cultivating a public perception that the issue is one of “law” rather than “politics”). I will consider the content and context of the cases and try to explore alternative cases that might have been heard or alternative arguments that could plausibly have been made. I will then examine the reactions of other political actors—including the public (or at least elite public opinion in the form of newspaper editorials)—assessing how the Court’s expectations about such reactions may have factored into its decision making.

I must not only find support for the theory I offer. I must also find evidence of events and actions consistent with my theory, but that competing theories of increasing judicial authority cannot explain. The most relevant alternative accounts of increasing judicial authority are the two behavioralist accounts and other institutionalist accounts. The first behavioralist account explains increasing judicial authority as an intended consequence of changes in the law. The argument is thus that the Supreme Court has more authority because it has been given more authority to exercise. The second behavioralist explanation argues that the Court has acquired
more authority over time because the justices have sought more authority over time. There are a number of competing institutionalist theories, with a similar explanation for increasing judicial authority: the Court has been granted more authority by other actors because the Court has improved its ability to give those actors what they want. Thus as the Court has gotten better at giving Congress, the President, or the people themselves what they want, they have given the Court more authority. A related account is that an actor particularly advantaged by judicial review (the President, for argument's sake) has enhanced its relative power in the American separation-of-powers system and a secondary result of such power acquisition has been delegation of relatively more authority to the Supreme Court.

As I proceed, I will consider three main periods of the Supreme Court's history. The first period examined is the Court's time under the leadership of Chief Justice John Marshall. The actions of the Marshall Court, I hope to show, established the Court as the arbiter of the meaning of the Constitution in the face of competing interpretations. This did not have to be the case, as recent scholarship on the history of popular constitutionalism shows that many early Americans felt that constitutional controversies should be settled by popular democratic processes rather than in the courts.\textsuperscript{103} The second period of interest is Reconstruction and its immediate aftermath. During this period the Court made a successful claim to the authority to define the three Reconstruction Amendments. Again, other outcomes were possible and even desired by important figures—the enforcement clauses of the amendments suggest that perhaps Congress possesses the right to define the reach of the amendments. And, finally, the third period considered are the years following the Second World War in which the Court reversed course regarding the Constitution's protection of individuals' civil rights, finding guarantees of rights and freedoms that it had previously explicitly denied the existence of. Perhaps the most egregious example of

\textsuperscript{103} See, especially, Kramer (2006).
this comes from the early apportionment cases—a type of question the Court had previously defined as “political” and outside the purview of the Court. Indeed, the Court’s development of a “political question” doctrine tells us about its thinking regarding when and how the Court might intervene in issues of public policy. Together, these three case studies suggest that the Court has been able to enhance its relative standing in the American system by carefully identifying more and more issue areas as falling on the the “law” side of a law–politics divide respected by the public. Once established as one of law, a question—according to the public—can and should be answered by the judiciary and attempts to circumvent such judicial settlement are subject to public backlash.
Capturing the Constitution

The Supreme Court matured as an American political institution during the tenure of Chief Justice John Marshall. When he joined the Court in 1801, it was seen as politically irrelevant. Indeed, Marshall got the job after former Chief Justice John Jay turned down President John Adams’s offer of reappointment. At that time, the concept of judicial review was understood to empower the Court to nullify laws that were repugnant to the Constitution. Thus the Court could be expected to strike down legislation that amounted to obvious bills of attainder, ex post facto laws, or interference with contracts. But what about ambiguous fact patterns implicating these clear limitations? And what about the vaguer power-granting and power-limiting provisions of the Constitution? Did the Court’s power of judicial review include the authority to determine their meaning?

By the end of Marshall’s tenure, the answer to those questions was “yes.” The Court was seen as the legitimate arbiter of the Constitution’s meaning. Over the course of Marshall’s years on the bench, the Court’s legal decision-making had displaced alternative, political approaches to settling questions of constitutional interpretation—approaches that might have placed more emphasis on the views of
the President, Congress, states, or people. And with the acquisition of the authority to define the Constitution, the Court had the ability to check other political actors.\(^1\)

In the process, Marshall had also drafted a blueprint for increasing the Court’s authority. He started small, exercising new powers for the Court in ways that would resist any meaningful opposition—often by winning the support of key players who possessed the power to check the Court. Moreover, the Marshall Court eschewed naked partisanship. By dedicating itself to legal procedures that won approval of key constituencies, the Court gained the public’s trust. The public’s faith in the Court’s commitment to objective, legal truth-seeking trumped any troubles they may have had with the particular outcomes of cases. Tocqueville explained the arrangement as follows: “Americans have therefore entrusted an immense political power to their courts; but in obliging them to attack the laws only by judicial means, they have much diminished the dangers of this power.”\(^2\)

In this chapter, I examine how the Marshall Court was able to expand judicial authority and establish the Supreme Court as the ultimate expositor of the Constitution. The chapter proceeds chronologically. It begins with a history of the Supreme Court prior to the arrival of Marshall. I then give special attention to the political crisis confronting the Court (and the nation) as the United States experienced its first transfer of power following the elections of 1800—a crisis that came to a peaceful conclusion following the Court’s decisions in *Marbury v. Madison*\(^3\) and *Stuart v. Laird*.\(^4\) I then consider the Marshall Court’s series of federalism cases that served to enhance national power at the expense of the states. I conclude by considering how John Marshall and the Supreme Court were able to transform their branch

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\(^1\) Of course after *Marbury*, the Marshall Court never again checked Congress. The states were more frequently at the losing end of the Marshall Court’s rulings.

\(^2\) Tocqueville (2000, 96).

\(^3\) 5 U.S. (1 Cranch) 137 (1803).

\(^4\) 5 U.S. (1 Cranch) 299 (1803).
of government from an afterthought to a major player in the American system of government.

3.1 The Early Years of the Court

In the first years following the ratification of the Constitution, the U.S. Supreme Court was not very influential. Part of this had to do with the institutional weaknesses of the judiciary, characterized by Hamilton as “beyond comparison the weakest of the three departments of power.” In addition, the Court was not very busy. Not until February 1793 did the Court decide its first case. Only a few of the Court’s early decisions are noteworthy for this study, primarily because they implicate the power of judicial review. In *Chisholm v. Georgia*, the Court subjected states to the jurisdiction of federal courts by permitting citizens of one state to bring suit against a different state in federal court. The response was prompt—the day after the decision was announced, a resolution was introduced in the House proposing what eventually became the Eleventh Amendment. And in *Hayburn’s Case* five of the six justices (sitting on circuit courts) expressed concerns about the constitutionality of the Invalid Pensions Act of 1792, which involved the judiciary in the processing of pensions claims. The Act was revised before the Court issued a final decision in the case, but Marshall referred to the matter in *Marbury*. Thus judicial review by the Supreme

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5 *Federalist*, no. 78.
7 2 U.S. (2 Dall.) 419 (1793).
8 2 U.S. (2 Dall.) 409 (1792).
9 5 U.S. at 171 (“It must be well recollected that, in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the Circuit Courts, which act, so far as the duty was imposed on the Courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character. This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list was a legal question, properly
Court was not unheard of before *Marbury*. The Court remained the weakest branch, but some form of judicial review appeared to nevertheless be accepted as within its power.

Although the framers of the U.S. Constitution hoped to avoid the “mischiefs of faction,” it did not take long for the irresistible logic (and necessity) of political parties to take root. On one side was the group that came to be known as the Federalists, led by the likes of John Adams and Alexander Hamilton. On the other side were those who identified with Thomas Jefferson and his sidekick James Madison. This group called themselves Republicans, but they became the modern Democratic Party (I will refer to them as the “Democratic-Republicans” or “Jeffersonians”). Due to the determination of Presidents Washington and Adams to appoint justices loyal to the national government, the Supreme Court tended to be loyal to Federalist causes and thus itself came to be implicated in partisan politics. The Court’s decisions in *Ware v. Hylton* and *Hylton v. United States* only exacerbated this phenomenon, by making rulings that angered the Democratic-Republicans.

As partisan conflict intensified, the Federalists in power passed what are collectively described as the “Alien and Sedition Acts” in 1798. The Alien Enemies determinable in the Courts, although the act of placing such persons on the list was to be performed by the head of a department.”).

10 See, especially, *Federalist*, no. 10.

11 See, *e.g.*, Schattschneider (1942, 1) (“modern democracy is unthinkable save in terms of political parties”).

12 See Aldrich (1995, 68–96) explaining that the Federalists and Democratic-Republicans (though lacking many of the goals and features of modern political parties) emerged as a response to unstable legislative majorities.

13 George Washington and John Marshall, among others, were also associated with the Federalists.

14 See Casto (1995, 247–248), stating further that “[t]he Court sought to support the political branches of the new federal government, not to oppose them.”

15 3 U.S. (3 Dall.) 199 (1796) (invalidating a Virginia law that—contrary to a national treaty—confiscated debts owed by Virginia citizens to British subjects).

16 3 U.S. (3 Dall.) 171 (1796) (upholding a federal tax on carriages).

17 Ellis (1971, 14).
Act permitted the President, in times of war, to arrest and expel any citizens or subjects of a hostile country; the Alien Act was farther reaching and gave the President power to declare any alien at any time (including in peacetime) a danger to the United States; and the Sedition Act outlawed false and defamatory statements about the government. The Federalists within the federal judiciary enforced these laws aggressively against Democratic-Republicans. Indeed, Casto (1995, 249) argues that “there was a unique harmony of interest between the early Supreme Court and the political branches that was never to be repeated in the next two hundred years.”

The courts were thus drawn into partisan politics and became a central issue for the incoming Jefferson administration. The Democratic-Republicans plotted methods for constraining the Federalist influence of the bench. Some even began to question the legitimacy of judicial review.

The Federalists likewise looked at the judiciary as a means of protecting and promoting their political goals. When the magnitude of their 1800 electoral defeat became clear, the lame-duck Federalists went to work shoring up the judiciary. They passed the Judiciary Act of 1801 in the final weeks of the Congress, which addressed long-standing needs of expanding lower federal courts and relieving Supreme Court justices of their circuit-riding duties. But the Act also included provisions that were unquestionably designed for partisan advantage—simultaneously creating many new positions for outgoing President Adams to fill and reducing the size of the Supreme Court (which meant that two justices would have to leave before Jefferson would get an appointment). The Democratic-Republicans complained bitterly. Jefferson

19 See, e.g., Bair and Coblentz (1967, 373); Ellis (1971, 14).
20 Ellis (1971, 16) identifies the “judiciary issue” as “the issue around which the meaning of the ‘revolution of 1800’ was to be defined.”
22 See, e.g., Ellis (1971, 15).
seethed that the Federalists had “retreated into the Judiciary as a stronghold.” The Federalist play for the judiciary intensified Democratic-Republicans’ suspicions about the third branch of government. As they assumed power in March 1801, they sought ways to minimize the ability of the Federalist judges to exercise influence over public policy.

3.2 Saving the Court from Itself

When John Marshall was appointed Chief Justice by President John Adams, he faced a long-term project in enhancing the power and prestige of the Supreme Court. But he faced a more immediate challenge, as the judiciary was caught up in partisan battling between the Federalists and Democratic-Republicans. The personnel of the federal judiciary was predominantly Federalist, thanks in no small part to the outgoing Federalists in Congress, who had packed the courts with a Federalist appointees as a final attempt to preserve some power. The newly appointed Marshall had the immediate task of preserving the independence of the Court. To do so, Marshall and his Court had do two things. First, they had to convince the rest of the republic that their rulings would be consistent with their considered legal opinions. Second, they had to avoid taking actions that might anger President Jefferson and his party such that they would seek to radically remake the judiciary, thereby setting a precedent that the composition of the judicial branch should—as much as for the executive or legislative branches—depend on the outcome of elections. Figure 3.1 provides a timeline of the events discussed in this section.

3.2.1 The Arrival of Marshall

John Marshall was a Federalist lawyer from Richmond. He had served in the Revolutionary War, where he had grown close with George Washington. He had worked

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with James Madison to achieve ratification of the Constitution in Virginia. He and
Thomas Jefferson were distant cousins. He was elected to the House of Representa-
tives and, while in Washington, was selected by Adams to be Secretary of State. He
was appointed Chief Justices when Oliver Ellsworth resigned due to illness.

On the Court, Marshall sought to eliminate partisanship within the federal ju-
diciary. He was himself a moderate Federalist who had earned the enmity of the
so-called “High Federalists” in part for his opposition to the Alien and Sedition
Acts.24 Federalists in the Senate actually delayed the vote on his confirmation in
the hopes of persuading Adams to nominate Justice William Paterson of New Jersey
instead.25 Marshall sought to restore to the Court a somber, serious professionalism.
In contrast to the elegant, colored robes of his colleagues, Marshall wore a simple
black robe.26 Marshall also sought to unite the justices behind the collective identity
of the Court. He began a practice of having all the justices stay together in the same
boardinghouse.27 He also encouraged his brethren to abandon the practice of issuing
individual opinions seriatim, preferring instead that the justices speak unanimously
as a Court.28 Marshall also steered the Court to moderate decisions compatible with
the wishes of the new Jefferson administration in two cases involving ships captured
as prizes during the quasi-war with France.29

For his own part, Thomas Jefferson sought to bridge the divide riven by the elec-

27 Ibid., 286.
28 See, e.g., ibid., 292–293 (noting that Marshall appeared to have adopted the practice from
Edmund Pendleton on the Virginia court of appeals).
29 The two cases were Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) and United States v. Schooner
Peggy, 5 U.S. (1 Cranch) 103 (1801). See Graber (1998a), arguing that Schooner Peggy represents
an important indication of the weakness of the early Marshall Court and evidence that Marbury
cannot be understood as establishing meaningful judicial review because the Court lacked the power
to force Jefferson to do something he did not wish to do.
tions of 1800. In his 1801 inaugural address, he declared, “We are all Republicans, we are all Federalists.”

He had asked Chief Justice John Marshall—a personal rival—to administer the oath of office. But he was irritated by Federalist’s machinations regarding the federal judiciary and by actions of Federalist judges. Nevertheless, he tried to chart a moderate course of action—accepting some, but not all Federalist appointments to the judiciary. In this latter group was William Marbury, whose commission as a justice of the peace for the District of Columbia had been signed and sealed by the outgoing Adams, but never delivered by then-Secretary of State John Marshall. The newly inaugurated Jefferson instructed his own Secretary of State (James Madison) to withhold these commissions for Adams’s “midnight judges.” As a result, Marbury and three others brought a motion before the Supreme Court in December 1801 asking Madison to explain why the Court should not issue writs of mandamus compelling him to deliver the commissions. Madison did not appear before the Court, nor did he give instructions to Attorney General Levi Lincoln, who was there on other business. After hearing no argument from the administration, Chief Justice Marshall issued a show cause order to Madison requiring him to explain

Figure 3.1: Timeline of Jeffersonian Conflict with the Judiciary.

30 Thomas Jefferson, First Inaugural Address, (4 March 1801).
33 The other, forgotten would-be justices of the peace were Dennis Ramsay, Robert Townsend Hooe, and William Harper. (See Marbury v. Madison (syllabus)).
why he refused to deliver the commissions. Arguments were scheduled for the fourth
day of the next term.\textsuperscript{34} Marshall’s audacity enraged Jefferson, causing the President
to back the efforts of more radical Democratic-Republicans to repeal the Judiciary
Act of 1801.\textsuperscript{35}

\subsection*{3.2.2 The Repeal Act}

In early January 1802, debate began on what would become the Repeal Act. Al-
though the Federalists’ maneuvering with regard to the judiciary had outraged all
Democratic-Republicans, some moderate Democratic-Republicans questioned the
prudence (and even the constitutionality) of repealing the Judiciary Act of 1801.
Federalists charged that the proposal constituted an attack on judicial independence
and the principles of constitutionalism. Nevertheless, the Federalists found them-
selves without the votes necessary to oppose the bill. The Repeal Act passed the
Senate on 13 February and the House on 3 March.\textsuperscript{36} The federal judiciary—and thus
Federalist presence in the national government—was reduced.

With the passage of the Repeal Act, Federalists called on the Supreme Court
to strike it down as unconstitutional. After all, federal judges were to serve for
life, and the elimination of positions already created and filled violated that guaran-
tee of judicial independence. In response, some Democratic-Republicans questioned
judicial review, a heretofore accepted (though limited) power of the judiciary.\textsuperscript{37} To
undercut the efforts of the Federalists, the Democratic-Republicans canceled the next

\textsuperscript{34} Ellis (1971, 43–44).

\textsuperscript{35} Ibid., 44.

\textsuperscript{36} See, \textit{e.g.}, ibid., 45–51.

\textsuperscript{37} See Warren (1999, 215–218). Warren argues that rather than these challenges, rather than
expressions of deeply held constitutional philosophies, represented politically motivated thinking.
\textit{“The right of the Judiciary to pass upon the constitutionality of Acts of Congress had not been
seriously challenged until the debate in 1802 on the Circuit Court Repeal Act. Prior to thereto
it had been almost universally recognized, and even in 1802, it was attacked purely on political
grounds....”} (Ibid., 256).
two Supreme Court terms. The Court would be adjourned from December 1801 to February 1803.\(^{38}\)

Federalist politicians searched for a counterstrike. They suggested to Chief Justice Marshall and Justice Chase that the Supreme Court justices refuse to ride circuit.\(^{39}\) Marshall found the proposal vexing and initiated a series of letters with his fellow justices to discuss the plan. On the one hand, it seemed to him that “the constitution requires distinct appointments and commissions for the Judges of the inferior courts from those of the supreme court.”\(^{40}\) But on the other hand, he felt an obligation to defer to the practice (under the original Judiciary Act of 1789) of those who came before him.\(^{41}\) He resolved to follow the will of a majority of the Court. Ultimately the justices agreed to abide by the repeal and ride circuit.

The Federalists also supported a series of test cases challenging the constitutionality of the Repeal Act. They challenged the authority of a circuit court in Hartford, Connecticut on which Justice Bushrod Washington was sitting in September 1802. But Washington and district judge Richard Law denied their action.\(^{42}\) A similar argument was made in *Stuart v. Laird* before a circuit court on which Marshall sat. Marshall, like his fellow judges, rejected the argument, and the decision was appealed to the full Supreme Court.

\(^{38}\) This was a bit of legislative genius. The Judiciary Act of 1801 had altered the Supreme Court’s calendar, moving the Court’s two terms from February and August to June and December. The Repeal Act would have, of course, required a return to the old schedule, but it did not take effect until 1 July 1802. So the Court’s next term was scheduled for June 1802. The Democratic-Republicans thus passed legislation in April 1802 that canceled the new June and December terms, but replaced them with only the old February term. Ellis (1971, 59).

\(^{39}\) See ibid., 60–61.


\(^{41}\) Ibid.

\(^{42}\) Ellis (1971, 62–63).
3.2.3 Marbury v. Madison and Stuart v. Laird

By the time the Court reconvened in February 1803, two politically charged cases sat on its docket. In *Marbury v. Madison*, the Court was to consider the legality of Jefferson’s order to withhold the commissions of some of Adams’s “midnight judges.” And in *Stuart v. Laird*, the Court was asked to rule on the constitutionality of the Repeal Act. The outcomes of each case would disappoint Federalists who had hoped that Marshall and the Supreme Court would fight their battle.

Marshall’s celebrated opinion for the Court in *Marbury* began by acknowledging the “peculiar delicacy of the case.” To proceed, the Court considered three questions, in order: first, did Marbury have a legal right to the commission?; second, if such a right had been violated, was Marbury entitled to a legal remedy?; and third, if he was entitled to a remedy, was a writ of mandamus from the Supreme Court the appropriate remedy?

With regard to the first question, the Court looked to the Constitution on presidential appointments and to legislation describing procedures for such granting such commissions. The relevant texts required nothing more than the affixing of the seal of the United States by the Secretary of State on the commission documents previously signed by the President. Each of those steps had been taken in the cases at hand. What had not occurred was delivery of the signed and sealed commission by the Secretary of State. But the Court rejected the notion that formal delivery was a legal requirement for the commission. Marbury’s commission, then—because it

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43 5 U.S. (1 Cranch) 137 (1803).
44 5 U.S. (1 Cranch) 299 (1803).
45 *Marbury*, 5 U.S. at 154.
46 Ibid.
47 See ibid., 162, “It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.”
was not revokable at the will of the President—gave him a vested legal right. And the denial of this commission violated that right.\textsuperscript{48}

On the second question, Marshall cited Blackstone for the proposition that a legal remedy must exist any time a legal right is withheld.\textsuperscript{49} “The government of the United States has been emphatically termed a government of laws, and not of men,” declared the Court. “It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”\textsuperscript{50} To address the idea of Marbury’s legal rights, the Court considered in greater detail the idea that the delivery of the commission was a part of the executive branch’s political powers. It rejected this notion. “The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case.”\textsuperscript{51} The president was thus without any authority to deny Marbury his legal rights, and he had “the privilege of asserting them in like manner as if they had been derived from any other source.”\textsuperscript{52} Marbury was entitled to a legal remedy of President Jefferson’s violation of his legal right.

This left the Court with its third question: was Marbury entitled to the remedy he sought—namely, a writ of mandamus from the Supreme Court? The Court asserted that it would never attempt to tell the head of an executive department what to with regard to matters within the president’s discretion. “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive,

\textsuperscript{48} Ibid., 162.
\textsuperscript{49} Ibid., 163.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid., 167.
\textsuperscript{52} Ibid., 167.
can never be made in this court.” That is, the Court deals with law, not politics. But the question at hand was a legal one—the Secretary of State was not operating within the sphere of the President’s discretion. He was required to deliver Marbury’s commission, to which the latter had a legal right. “This then, is a plain case for mandamus, either to deliver the commission, or a copy of it from the record,” declared the Court.

The problem was that the writ of mandamus could not come from the Supreme Court. The Court noted that the Constitution limited its original jurisdiction to cases and controversies “affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.” In all other cases, the Court acquired jurisdiction through a process of appeals. Yet the act under which Marbury sued for relief authorized the Supreme Court to issue writs of mandamus to officers of the United States—and apparently granted it original jurisdiction. The Court argued, “If Congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original—and original jurisdiction where the constitution has declared it shall be appellate—the distribution of jurisdiction, made in the constitution, is form without substance.” The Court raised a final inquiry: can the Court issue a writ of mandamus to which a person, like Marbury, is legally entitled, when its jurisdictional basis is contrary to the Constitution?

In the remainder of the opinion, Marshall outlined a theory of judicial review (though he never used that term). Marshall began by identifying the American commitment to the idea that the people themselves possess an “original right” to establish certain “fundamental” principles that they believe “shall most conduce to

53 Ibid., 170.
54 Ibid., 173.
55 Ibid., 174.
56 Indeed, the term “judicial review” appears to have been coined by Edwin Corwin in 1910. Wood (1999, 789).
their own happiness.” This “original and supreme will” sets up the government and places limits on that government. And “that those limits may not be mistaken, or forgotten,” declared the Court, “the constitution is written.” Thus, unless written constitutions are to be considered “absurd attempts” to limit the government, legislative acts that are “repugnant to the constitution” must be void.

What does all this mean for the courts? “It is emphatically the province and duty of the judicial department to say what the law is,” declared Marshall for the Court in perhaps the most famous sentence of the opinion. Continuing, the Court reasoned that “[t]hose who apply the rule to particular cases, must of necessity expound, and interpret that rule.” The “essence of judicial duty” is thus to determine whether the Constitution or a law in conflict with the Constitution should be followed. The Constitution, obviously, must control—to do otherwise would “subvert the very foundation of all written constitutions.” According to the Court, those who would have the Court ignore questions of constitutionality “are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.” Thus, “[t]he judicial power of the United States is extended to all cases arising under the constitution.”

In the immediate case, the Supreme Court ruled that Section 13 of the Judiciary Act (which conferred original jurisdiction upon the Court with regard to writs of

57 Marbury, 5 U.S. at 176.
58 Ibid.
59 Ibid.
60 Ibid., 177.
61 Ibid.
62 Ibid.
63 Ibid., 178.
64 Ibid.
65 Ibid.
66 Ibid.
mandamus) was unconstitutional. Thus the Court could not provide Marbury with relief, which, in turn, provided Jefferson and the Democratic-Republicans with the result they wanted. In the eyes of later scholars, lawyers, and judges, Marshall’s opinion was a masterstroke.\footnote{See, e.g., Bickel (1962, 1) ("[T]he institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the case of \textit{Marbury v. Madison.}"); McCloskey (2005) ("The decision is a masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another"). But compare O’Fallon (1992), claiming that the \textit{Marbury} decision is mostly defensive and conciliatory and attributing the passages most annoying to the Jeffersonians to the influence of Samuel Chase.} It was the beginning of meaningful judicial review. Prior to \textit{Marbury}, it may have, indeed, been the “province and duty” of the judiciary to say what the law is. But afterward, that province and duty included saying what the Constitution is. That is, Marshall was claiming judicial authority to interpret the Constitution, not just laws. It would be one thing for the Court to refuse to give effect to laws that clearly contradicted some unambiguous provision of the Constitution—ex post facto laws, bills of attainder, a provision trying to permit someone younger than thirty-five years old to be president—or even of interpreting vague laws as running afoul of clear constitutional limits. It would be something else for the Court to assert the ability to define the meaning of unclear constitutional provisions.\footnote{See, e.g., O’Fallon (1992, 259) (arguing that “Marshall and the Federalists were unable or unwilling to see that there was a difference between a legislature that had the final word on constitutional issues, and a legislature unchecked by constitutional restraints.”); Van Alstyne (1969, 23) (writing that Marshall’s “argument blurs the distinction between \textit{ordinary} judicial review and substantive \textit{constitutional} review” (emphasis in original)).} Yet that was just what Marshall did in \textit{Marbury}, providing a rather tortured interpretation of the Article III jurisdiction provisions in order to strike down the Judiciary Act and rule against Marbury.\footnote{See Van Alstyne (1969, 30–33) for a critique of this part of the \textit{Marbury} decision.}

Marshall’s decision angered Thomas Jefferson and sparked some editorials criticiz-
ing the Court. But any backlash against the Court’s decision focused on Marshall’s language—unnecessary to his legal conclusions—that Marbury had been wronged and was entitled to some sort of legal remedy. The Court’s statements about judicial review were largely ignored. Differences about the legitimacy of judicial review was not at the heart of the animosity between the Democratic-Republicans and the judiciary. The Court’s ruling in Marbury may have thus prevented an escalation of conflict, but it failed to repair relations between the branches of the federal government.

If the Court’s decision in Marbury was all bark and no bite, the Court’s decision in Stuart v. Laird suggested the Court was rolling over. In Stuart, the Court upheld the Repeal Act, affirming Marshall’s circuit court decision. Thus the federal judiciary would be shrunk. In an opinion written by Justice Paterson, the Court acknowledged Congress’s Article III power to set up the judiciary as it wishes. Furthermore, the Court noted with regard to the practice of Supreme Court justices riding circuit, the “practice and acquiescence under [the Act] for a period of several years” amounted to a “contemporary interpretation of the most forcible nature.” In Marbury, the Court had staked its claim to the power to strike unconstitutional laws by striking

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71 See, e.g., Van Alstyne (1969, 7), writing that the “question of the Court’s jurisdiction” should have been the first issue considered by the Court, and that it was “improper for Marshall to begin as he did.”

72 Indeed, Clinton (1994) and Knight and Epstein (1996) use game-theoretic models to examine the strategic interactions between the factions led by Jefferson and Marshall and conclude that the results of the game suggest that Jefferson was amenable to judicial review. See, also, Warren (1999, 255–268).

73 Marshall even received some praise from his political opponents. The Aurora, a solidly Democratic-Republican outlet, wrote of him in April 1803 “The weight of your authority . . . calmed the tumult of faction, and you stood, as you must continue to stand, a star of the first magnitude.” (Quoted in Smith (1996, 325)).

74 5 U.S. (1 Cranch) 299 (1803).

75 Ibid., 309.
part of the 1789 Judiciary Act; in *Stuart*, it found it unnecessary to exercise that power because the Repeal Act was constitutional.

The *Marbury–Stuart* combination was important for Marshall’s defense of the judiciary and its power of judicial review. As seen above, judicial review was under threat due to the Democratic-Republican’s (justified) suspicion of Federalist judges. If the Federalists had indeed “retreated to the judiciary as a stronghold,” then judicial review would have provided a potent way of frustrating Democratic-Republican governance. In *Marbury*, Marshall and the Court explained the need for judicial review in a republic governed by a written constitution (even if its definition of judicial review encompassed more than a check on obviously and unambiguously unconstitutional acts). And it exercised this power by striking federal legislation—though not any legislation that had been advanced by the Jeffersonians. *Marbury* thus established the Court’s authority for striking acts like the Repeal Act unconstitutional, but in *Stuart* the Court applied its powers of review to the Repeal Act and found it acceptable. In an important way, the *obiter dicta* of *Marbury* that was so objectionable to Jefferson and his allies was necessary. It demonstrated that the Court—as Jefferson *et al.* suspected—was solidly opposed to what had been done to the judiciary politically and believed that some acts by the Democratic-Republicans had even been illegal. Marshall and the Court were thus clear about where they stood politically. Nevertheless, in exercising the Court’s power of judicial review, Marshall and his Federalist friends declined to align their legal conclusions with their political predilections. Under Marshall’s Court, rather, the power of judicial review would be used to do law, which was somehow distinct from politics. Accordingly, the *Marbury* decision might best be understood not as an acquisition of new authority, but as a defensive maneuver designed to retain power the Court already possessed. The Court had exercised judicial review, but not in any way that demonstrated that the Court possessed any power to force Jefferson to do anything contrary to his preferences.
Nevertheless, this exercise of judicial review—accepted as it was by the prevailing regime—set a precedent for future cases involving constitutional interpretation.

3.2.4 Judicial Impeachments

Although the Court’s decisions in *Marbury* and *Stuart* escaped any sort of institutional retaliation from the Jeffersonians, the judiciary remained a target. In particular, Democratic-Republicans looked to the power of impeachment to bring Federalist judges in line. Weeks before the Court announced its decisions in *Marbury* and *Stuart*, Jefferson had sent evidence of misbehavior by Judge John Pickering, a district judge from New Hampshire. On 2 March 1803—the same day the Court’s decision was announced in *Stuart*—the House of Representatives voted to impeach Pickering. The Senate convicted Pickering of all charges and he was removed from office the following March.

Pickering was a Federalist whose declarations from the bench irritated Democratic-Republicans. But he had also struggled with mental-health and substance-abuse issues that led even Federalists to question his fitness for office. If any federal judge exhibited sufficiently bad behavior to warrant removal, it was he. But the Democratic-Republicans were not finished. They next set their sights on the Supreme Court and Justice Samuel Chase.

Chase was a Federalist firebrand. He had openly campaigned for Adams and against Jefferson. His actions on the bench were, however, what landed him in trouble. While riding circuit in 1800, Justice Chase had presided over three trials for sedition. In each, Chase’s brusque personality was in full effect, and Democratic-

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76 Ellis (1971, 71).

77 Pickering had actually been removed from office under a provision of the Judiciary Act of 1801, but its repeal restored him to the bench. Ibid., 70.


79 The three defendants were Thomas Cooper, John Fries, and James Callender. The Cooper trial was not mentioned in the articles of impeachment, nevertheless “Chase’s conduct at the trial greatly
Republicans detected a distinct bias in favor of conviction. Chase’s behavior toward two grand juries further fueled the Democratic-Republican’s angry objections. In 1800, Chase had refused to discharge a grand jury in New Castle, Delaware that had not returned any indictments for sedition. And in 1803, Chase delivered instructions to a grand jury that contained an impassioned critique of the Repeal Act. His partisan rants played into the fears of the Democratic-Republicans regarding the judiciary.

Democratic-Republicans in Congress, led by John Randolph of Virginia, indicated their intention to prosecute Chase throughout 1804. But his trial only began in January 1805. The combination of a capable defense and an unprepared prosecution led to Chase’s acquittal on 1 March 1805. Chase’s victory came at a time after the Democratic-Republicans had secured their political standing in the elections of 1804 and the temperate decisions of the Marshall Court had eased concerns about the judiciary’s role in partisan politics.

After Chase’s acquittal tensions between the Jeffersonians and the Supreme Court relaxed. Though Marshall was not seen by the Jeffersonians (especially Jefferson himself) as a friend, he had shown that his Court would not serve as a Federalist government-in-exile. He and his fellow justices had acceded to the Repeal Act’s requirements that they resume riding circuit. His *Marbury* decision left intact Jefferson’s decision to deny some Federalist appointees their offices. The caution and modesty of the early Marshall Court had restored Americans’ faith in the judiciary. The justices’ restraint exhibited a commitment to taking no part in the partisan rancor that had rapidly spread through the elected branches of government: the federal

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81 See Bair and Coblentz (1967, 377–378); Perlin (2010, 737–740).

82 See Ellis (1971, 96–102).
courts were a place for law and not politics. And Marshall had begun his project of asserting that one aspect of law is interpretation of the Constitution. The Court had not yet issued any decision involving both constitutional interpretation and an order that some political entity take an action contrary to its wishes. But that would change with the Court’s early federalism decisions upholding national power at the expense of the states.

3.3 Judicial Review of the States

Ellis (1971, 104) attributes Chase’s acquittal, in part, to a growing split in the Democratic-Republican party. On one side were the radicals, who feared large government and industrialization and who sought greater power for states. On the other side were the moderates, who were friendlier to stronger centralized power. The nation was entering an extended period of one-party rule, but the Marshall Court was able to exploit divisions within the party of Jefferson, Madison, and Monroe to expand the power of the federal government and to establish itself as the primary interpreter of the Constitution. In the opinions supporting its decisions in United States v. Peters, Fletcher v. Peck, Martin v. Hunter’s Lessee, McCulloch v. Maryland, and Gibbons v. Ogden, the Marshall Court not only asserted the supremacy of the national government but also its own prerogative to interpret the Constitution. For summaries of Marshall Court decisions implicating questions of federalism, see Table 3.1.

83 9 U.S. (5 Cranch) 115 (1809).
84 10 U.S. (6 Cranch) 87 (1810).
85 14 U.S. (1 Wheat.) 302 (1816).
86 17 U.S. (4 Wheat.) 316 (1819).
87 22 U.S. (9 Wheat.) 1 (1824).
Table 3.1: Important Federalism Decisions of the Marshall Court.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Summary of Important Holdings</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. v. Peters</td>
<td>1809</td>
<td>States cannot annul and must follow rulings by federal courts.</td>
</tr>
<tr>
<td>Fletcher v. Peck</td>
<td>1810</td>
<td>State laws must be constitutional and are subject to judicial review.</td>
</tr>
<tr>
<td>Martin v. Hunter’s Lessee</td>
<td>1816</td>
<td>State courts must follow the Supreme Court on matters of federal law.</td>
</tr>
<tr>
<td>McCulloch v. Maryland</td>
<td>1819</td>
<td>National laws are supreme; states cannot interfere with national legislation.</td>
</tr>
<tr>
<td>Cohens v. Virginia</td>
<td>1821</td>
<td>National laws are supreme (but national lottery not intended to reach Virginia).</td>
</tr>
<tr>
<td>Gibbons v. Ogden</td>
<td>1824</td>
<td>National power to regulate interstate commerce includes regulating navigation.</td>
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<tr>
<td>Willson v. Black-Bird Creek Marsh Co.</td>
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</tr>
<tr>
<td>Worcester v. Georgia</td>
<td>1832</td>
<td>State criminal proceedings on Indian lands, contrary to treaties, are void.</td>
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</table>

3.3.1 Establishing National Supremacy

In United States v. Peters, the Supreme Court evaluated events stemming from an earlier federal court decision involving the distribution of funds acquired through the sale of a prize ship captured during the quasi-war with France. The Commonwealth of Pennsylvania had sought to defy the Court order, even passing legislation entitling the executive branch to proceed in a manner contrary to the federal court order. Marshall, writing for the Court, declared, “If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumental-ity of its own tribunals.”  

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Pennsylvania had argued that the Eleventh Amendment

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88 Peters, 9 U.S. at 136.
had eliminated the federal courts’ jurisdiction over the matter. Marshall dismissed this argument, interpreting the Eleventh Amendment to merely prevent suits being brought against states in federal court by citizens of other states. Given the federal court’s earlier ruling, Pennsylvania had no claim on the property at issue—a resolution that Pennsylvania was obligated to follow.

Pennsylvania did not concede, and the court did not give in. The governor even called on the state militia to prevent the execution of the order in the face of which the lower court judge stood his ground. During the standoff, the Pennsylvania governor appealed to President James Madison to bring the judge in line. Madison refused. Indeed, he provided a strong statement of support for the federal judiciary, declaring: “The Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it.” The state backed down, and the militia commander was even later convicted. The Court had won the backing of the president in a direct confrontation with an obstinate state.

In *Fletcher v. Peck*, the Supreme Court for the first time struck down state legislation as unconstitutional. Corrupt Georgia legislators had sold large amounts of state-owned property from the Yazoo lands (in what is today Alabama and Mississippi).

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89 See ibid., 139 (“The right of a State to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals in one of the courts of the United States is not affected by this amendment, nor can it be so construed as to oust the Court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State where a State is not necessarily a defendant.”).

90 See ibid., 141.


92 Ibid., 386 (quoting 21 *Annals of Congress* 2269).

93 Smith (1996, 386).
sippi) at a discount to speculators who had bribed them. A subsequent legislature sought to revoke the corrupt act, but the property had already been re-sold under the original grant. Two parties to a land-sale contract that was executed under the disputed title filed suit. Marshall’s opinion for the Court was sympathetic to the goals of the Georgians who sought to correct the situation. He also expressed respect for the prerogatives of state legislatures—especially the power to repeal and revise previous legislation. “The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case,” declared Marshall. “The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.” But the Constitution was clear that no state could pass laws that impair the obligations of contracts. Marshall interpreted “contracts” in the Constitution to include public contracts such as those at issue. “In this case the Legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable,” wrote Marshall for the Court. “But the grant, when issued, conveyed an estate in fee simple to the grantee, clothed with all the solemnities which law can bestow.” The concerns about legislative violation of fundamental rights and liberties that motivated the constitutional language trumped concerns about imprudent or even corrupt legislation.

94 Newmyer (2001, 225–226) points out that this was a collusive suit that was designed to avoid problems raised by the Eleventh Amendment. The two parties—who each wanted to see the sale upheld—were able to come into federal court via diversity jurisdiction and challenge the constitutionality of Georgia’s rescission.

95 Fletcher, 10 U.S. at 128.

96 Ibid., 134.

97 See ibid., 137–138 (“Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in
Graber (1998b) notes that the Yazoo claim had been before the Court a year before, but that Marshall had delayed the decision because the Court was, at the time shorthanded. Marshall nevertheless forecasted the ultimate decision—suggesting to the parties that the Court was inclined to find the repeal unconstitutional. Graber (1998b, 256) speculates that in doing so Marshall may have been sending a “trial balloon, testing whether political forces would acquiesce in an eventual judicial ruling favoring the Yazoo claimants.” When no one moved to counter the Court’s likely decision, Graber suggests, Marshall and the Court could confidently issue their ruling. In any event, the Court’s decision in *Fletcher* satisfied the Madison administration by settling a question that had been debated for years.98 The Court, for its part, had established precedent that its authority reached state laws.

Marshall was not the author of all the Court’s opinions on such matters. Justice Joseph Story—a Jefferson appointee—wrote the Court’s opinion in *Martin v. Hunter’s Lessee*. Marshall had recused himself given his financial interest in the land at issue. In *Martin*, the Court considered a decision of the Court of Appeals of Virginia asserting that it was not subject to the authority of the U.S. Supreme Court, and that Section 25 of the Judiciary Act of 1789 (which authorized review of state courts by the Supreme Court) was unconstitutional.99 Story notes that the Constitution obligates Congress to vest the judicial power of the nation in federal courts. He argues that this is a duty to vest the “whole judicial power” in the federal courts.100 The Constitution also requires the establishment of a Supreme Court with appellate jurisdiction over cases implicating the federal judicial power, placing the

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99 See *Martin*, 14 U.S. at 323–324.
100 Ibid., 330 (emphasis added).
Court at the top of the judicial hierarchy with respect to cases and controversies over which federal courts have jurisdiction.\textsuperscript{101}

Story notes that the Constitution contemplates consideration of “cases within the judicial cognizance” of the federal government by state courts and obligates them to follow the “supreme law of the land”—the Constitution, as well as national laws and treaties.\textsuperscript{102} The states are thus bound to obey the Constitution. Story then asserts that “[t]he courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity.”\textsuperscript{103} The implication of this is clear: “Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.”\textsuperscript{104} State courts, the Court thus asserted, must follow the Supreme Court’s interpretations of the Constitution.

Perhaps the most famous Marshall Court decision after \textit{Marbury}, \textit{McCulloch v. Maryland} involved the Second Bank of the United States, chartered by Congress in 1816. Many had blamed the bank for a financial panic that took place in 1818, and, in response, many states had tried to restrict the bank’s ability to function. Among those states was Maryland, which placed a heavy tax on all banks not chartered by the state legislature. The manager of the local branch of the national bank refused to pay the state taxes and had been convicted in state court. The Court considered two principal questions: (1) did Congress have the authority to create the Bank; and (2) did Maryland have the authority to tax the Bank? The Court answered the first inquiry in the affirmative, under a broad reading of the Necessary and

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\footnotesize
\textsuperscript{101} See ibid., 330-340.
\textsuperscript{102} Ibid., 340.
\textsuperscript{103} Ibid., 344.
\textsuperscript{104} Ibid.
\end{flushright}
Proper Clause. Writing for the Court, Marshall recognized that the Constitution created a federal government of with limited, enumerated powers. But, he asserted, “the Government of the Union, though limited in its powers, is supreme within its sphere of action.”\textsuperscript{105} Even though the Constitution never explicitly grants Congress the authority to establish a national bank, Marshall asked that people be practical about what was needed for governance, declaring, “we must never forget that it is a Constitution we are expounding.”\textsuperscript{106} The establishment of such a bank could be seen as a legitimate action of a Congress in pursuit of its actually enumerated powers of laying and collecting taxes, regulating commerce, paying federal debts, paying for armies and navies, and borrowing money. Marshall and the Court thus rejected a restrictive reading of the Necessary and Proper Clause in which an act was a necessary condition of executing an enumerated power in favor of a more “elastic” interpretation: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.”\textsuperscript{107}

With regard to the second question, the Court cited the Supremacy Clause for the principle that states are subject to the Constitution and federal laws. But “the power to tax involves the power to destroy.”\textsuperscript{108} Placing a tax on a bank puts a burden on that bank that destroys a part of its value. The people of Maryland would be perfectly within their rights to tax Maryland banks, because they would be destroying their own property and could oversee decisions about that destruction. But by taxing the national bank, the voters of Maryland were unilaterally placing a burden on the

\textsuperscript{105} McCulloch, 17 U.S. at 405.
\textsuperscript{106} Ibid., 407 (emphasis in original).
\textsuperscript{107} Ibid., 421.
\textsuperscript{108} Ibid., 431.
rest of the nation. Such a scenario is contrary to American principles of democratic self-government and suggests one of the rationales behind the creation of the federal government. In any event, the state tax was unconstitutional as contrary to supreme national law.\textsuperscript{109}

Marshall’s decision for the Court in \textit{McCulloch} was generally well received.\textsuperscript{110} The principal exception to this support was the opposition of the “Richmond Junto”—a group of radical Democratic-Republicans from Virginia. One of their number, Judge Spencer Roane, wrote a series of attacks on Marshall’s interpretation of the federal-state balance. Marshall felt compelled to respond.\textsuperscript{111} Despite a few lines about “judicial usurpation,” the content of the critiques had focused on Marshall’s constitutional interpretation rather than the legitimacy of the Court offering its views on the meaning of the Constitution. The Court’s opinion in \textit{Cohens v. Virginia}\textsuperscript{112} offered the Court another opportunity to consider the questions of national supremacy. Virginia had banned the sale of out-of-state lotteries—a measure directed at blocking a national lottery established by Congress. In \textit{Cohens}, the Court reasserted its reasoning from \textit{McCulloch} while nonetheless finding that the lottery created by Congress was never meant to extend beyond the District of Columbia.\textsuperscript{113}

Like \textit{McCulloch}, \textit{Gibbons v. Ogden} involved questions of the federal government’s power to regulate matters of interstate commerce. The State of New York had passed laws regulating steamboats operating in its waterways, which the Court determined was contrary to national laws, striking the state regulatory scheme. That the state

\textsuperscript{109} Ibid., 436.

\textsuperscript{110} See Smith (1996, 446) (writing that the opinion “drew substantial support” in the North and East, and noting additional—if less enthusiastic—praise from the South and West).

\textsuperscript{111} See ibid., 447–456.

\textsuperscript{112} 19 U.S. (6 Wheat.) 264 (1821).

\textsuperscript{113} Note that Graber (1995) argues that \textit{Cohens} involved substantively the same legal principles as \textit{McCulloch}, and that the Court made a “highly implausible” reading of the federal legislation to permit Virginia’s affront to federal authority. The Court’s assertion of national supremacy within the \textit{Cohens} opinion was thus ultimately toothless.
law had applied only to New York waters did not matter. Marshall and the Court interpreted the Commerce Clause broadly: “the sovereignty of Congress, though limited to specified objects, is plenary as to those objects.”\(^{114}\) Thus navigation fell within Congress’s authority if it “in any manner connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes.’”\(^{115}\) New York’s attempt to restrict Congressional licensed vessels from using its waters was contrary to federal law and was accordingly superseded by it. *Gibbons*, notes Graber (1998b, 258), “is universally understood to be the most popular decision the Marshall Court handed down.” As with *Peters*, *Fletcher*, *Martin*, and *McCulloch*, the decision in *Gibbons* not only established the supremacy of the national government, it also asserted the Court as the appropriate mediator for disputes between states and the national government on matters of constitutional interpretation.

### 3.3.2 The Jacksonian Challenge

As the Era of Good Feelings came to a close, so did the period of cooperation between the Court and the executive branch. Andrew Jackson and his brand of Democrats were hostile to the National Republican-Whig program with which the Marshall Court had been aligned. But differences between the Marshall Court and the Jackson administration were most pronounced on issues involving American Indians. Jackson is, of course, famous for his hostility to American Indians and interests (and ultimately successful efforts) in displacing them from their lands. In a series of cases from the late 1820s and early 1830s, the Supreme Court confronted disputes between tribes and the governments of the states in which their lands were located. Given the president’s indifference to the rights and claims of American Indians, the Court’s rulings in favor of the tribes often lacked the full backing of the executive

\(^{114}\) *Gibbons*, 22 U.S. at 197.

\(^{115}\) Ibid.
branch. The results of these cases reveal a Court that remained institutionally weak in important ways even as it had successfully established the practice of constitutional interpretation by judicial review.

The tensions between the Marshall Court and Jackson regarding states rights played out in a series of three cases involving the Cherokee Indians in the state of Georgia. Georgia continually insisted on exercising its authority over Cherokee lands, contrary to a federal treaty with the Cherokees. The first case involved a situation in which Georgia had sentenced to death a Cherokee man named George “Corn” Tassel for a murder committed within Cherokee territory. Corn Tassel’s attorneys sought and received a writ of error from the Supreme Court, signed by Marshall himself. Georgia disregarded the Court’s order and executed Tassel.116 In a second case, *Cherokee Nation v. Georgia*,117 the Cherokees brought a case directly before the Supreme Court seeking the Court’s declaration that Georgia could not apply its laws to the Cherokee. Marshall opened his opinion by declaring that “if Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.”118 The trouble was that the Court lacked jurisdiction. The Court rejected the Cherokee tribe’s argument that they should be considered a foreign nation for purposes of meeting the Article III requirements of the Court’s original jurisdiction. The Court ruefully concluded that “[i]f it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.”119

The Court’s jurisdictional requirements were met in the subsequent case, *Worces-

117 30 U.S. (5 Peters) 1 (1831).
118 Cherokee Nation, 30 U.S. at 15.
119 Ibid., 20. But Marshall broke from his practice of seeking unanimity on the bench when he encouraged dissenting justices Johnson and Story to contribute an opinion explaining why their sympathies laid with the Cherokee tribe’s claims. See Burke (1969, 516–518).
ter v. Georgia. Worcester, a white Christian missionary, had been arrested for violating Georgia’s requirement that white men obtain a state license to enter Cherokee territory. This time the Court’s decision provided a strong rebuke of Georgia’s practices. The Court found that “[t]he whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the Government of the United States.” Thus Georgia’s attempts to regulate Cherokee lands were unconstitutional and void. Although the Court’s order obligated Georgia to release Worcester, it did not call on President Jackson to do anything. Nevertheless, the opposition press (and historians) condemned Jackson for not doing more to ensure Georgia’s compliance with the Supreme Court’s ruling. Martin Van Buren even estimated that Jackson’s inaction cost him eight to ten thousand votes in New York. Eventually even Georgia relented and released Worcester, the matter having become an embarrassment to the state. And, in the face of the Nullification Crisis of 1832 (in which South Carolina insisted it possessed the power to nullify a national tariff), President Jackson stood firmly behind the power of the national government, delighting John Marshall. The Court remained weaker than the President—especially a President as popular as Andrew Jackson—but by its savvy and careful practice of interpreting the Constitution, it was enhancing its ability to influence political outcomes, even in the face of hostile opposition.

120 31 U.S. (6 Peters) 515 (1832).
121 Ibid., 561.
122 See Burke (1969, 525–526) for a description of the problems surrounding the execution of the order absent cooperation from Georgia.
123 See, e.g., ibid., 527–529.
124 See ibid., 529.
3.4 Constitutional Interpretation and the Court

The signature achievement of the Marshall Court was the establishment—in the eyes of the public—of the Court as the legitimate, final arbiter of the meaning of the Constitution. The institution of judicial review had emerged and been accepted earlier in American political history. Americans of all political stripes appreciated that courts, when confronted with a choice between a written constitution and an ordinary piece of legislation, must always follow the constitution. This basic logic of judicial review was obvious and compelling. But what the Marshall Court was able to accomplish was a series of precedents in which the Court interpreted the text of the Constitution. This began in *Marbury* as the Court chose (over competing, plausible interpretations) an interpretation of Article III that excluded the right of Congress to expand the Supreme Court’s original jurisdiction. It continued in the Court’s famous federalism cases. In many cases the political outcomes resulting from these interpretations were the very outcomes desired by critical political actors. Thus these interpretations went largely unchallenged. And so did the Court’s authority to interpret the Constitution. Over time, the Court’s repeated acts of stepping up to interpret the language of the Constitution established a precedent. The Supreme Court came to be seen as the proper forum for resolving disputes about constitutional interpretation, displacing other potential venues—especially the political realm—in which the meaning of the Constitution might be debated.

3.4.1 Rejecting Other Modes of Constitutional Interpretation

The Constitution, of course, does not declare the Supreme Court to be its interpreter. Counterfactual and theoretical though they may be, there are plausible interpretive regimes that could have emerged from the constitutional text. These alternative schemes for determining the meaning of the Constitution lost out to the
Court and judicial review during Marshall’s tenure. But throughout his time on the Court—especially early on—these competing modes of constitutional interpretation had their advocates. In contrast to legalistic judicial review, these competing theories located the authority for the settlement of constitutional disputes in political processes. Thus every political actor could be understood to have a seat at the table in matters of constitutional interpretation. Some have argued for a “departmentalist” theory of constitutional interpretation whereby presidents, legislators, and states could legitimately make claims that the Constitution should be read to support their views—and that any differences should be settled by political competition. Others have placed a special emphasis on the role of the people in determining the content of fundamental law—an approach that has been described as “popular constitutionalism.” But departmentalism and popular constitutionalism each lost considerable ground to judicial review during the time of the Marshall Court. Despite having strong advocates for their merits and legitimacy, the greater weight of public opinion came to accept judicial interpretation as the best means of resolving questions about the meaning of the Constitution.

**Political Processes**

The “departmentalist” theory of constitutional interpretation held that every political entity has the right to interpret the Constitution. Moreover, no entity’s interpretation (say, that of the Supreme Court) is said to possess more authority than that of any other actor. The departmentalist approach to constitutional interpretation looks instead to political competition to resolve constitutional disputes. Whichever interpretation is thus able to win out over competing interpretations in the political marketplace is given effect until it is overturned in subsequent competitions. The departmentalist theory of constitutional interpretation enjoyed considerable support

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early on, but the Marshall Court’s role as a trusted mediator of political competition over constitutional meaning transformed attitudes about the process of determining constitutional meaning. The Court came to be seen as the actor with the special abilities and authority to ascertain and establish the correct meaning of the Constitution rather than a participant in a political process open to a wider array of players.

Departmentalism accepts the ambiguity of the Constitution and the necessity for interpretation of certain provisions. This does not suggest some post-modern, relativistic approach to constitutional meaning. The Constitution can still be understood to put clear limits on political actors. Thus departmentalism is consistent with judicial review as originally understood. The Court can legitimately strike laws and political acts that violate the clear meaning of constitutional limits. But when more than one plausible reading of the Constitution is possible, departmentalism maintains that the various actors are entitled to act in a manner consistent with their preferred plausible interpretation. In reviewing laws or actions consistent with legitimate but competing (to its own) interpretations, the Court should apply a highly deferential standard. This so-called “doubtful-case rule,” articulated by Thayer (1893), requires the Court to play a more modest role in the maintenance of the American constitutional system.

Departmentalist thinking has been behind assertions of states rights. In issuing the Virginia and Kentucky Resolutions, those states asserted a right to follow their own interpretation of the Constitution in resisting the Alien and Sedition Acts. Similarly, New England Federalists at the Hartford Convention claimed the ability to declare the 1807 Embargo Act unconstitutional. And southern states dominated by more radical elements of the Democratic-Republican party promoted an alternative view of the Constitution—especially regarding the powers of the national government. Jefferson subscribed to this view of constitutional interpretation throughout
his political career. Early on, Madison shared this perspective, but relaxed his views as he came to align more closely with the National Republicans branch of the party.

The Marshall Court never denied the appropriateness of departmentalist theories. Indeed, their rulings can be seen as entirely consistent with this approach. The Marshall Court seemed to accept claims that constitutional questions were to be subjected to political processes for their resolution. But the Court joined this competition in a thoughtful way. Graber (1998b, 233) stresses that “in the vast majority of politically salient cases, the Court ruled in favor of the most politically powerful force interested in the decision.” The Court’s rulings—though they never satisfied everyone—resisted any official, institutional reactions because they were supported by enough political actors. And the modesty of the Court’s decisions, coupled with its careful legal reasoning that was announced in unanimous decisions for the Court, established a perception that the Court could be a trusted mediator of constitutional debates. After a sufficient amount of time following such a practice, significant elements of American political society came to see the settlement of constitutional disputes as one of the Court’s duties. There was never an express rejection of departmentalism in favor of judicial review (or, perhaps more accurately, judicial supremacy), but the Marshall Court’s artful exercise of judicial review facilitated the displacement of political competition by judicial review for matters of constitutional interpretation.

Popular Constitutionalism

According to some scholars, particularly Snowiss (1990) and Kramer (2006), the authority to resolve disputes about constitutional interpretation among the various

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departments of government was originally understood to rest with the people. This notion of “popular constitutionalism” emphasizes that constitutions were understood to be something distinct from ordinary laws—not just the supreme law. This idea, they argue, came from English constitutionalism. The unwritten English constitution comprised the fundamental laws limiting the authority of the sovereign in order to protect the rights and liberties of citizens. These requirements of the constitution were to be enforced (and changed) via political processes driven by popular will.

Thus Kramer (2006, 24) argues that the people, rather than judges or legislators, were intended to be responsible for interpreting and enforcing the fundamental law. Kramer (2006, 31) asserts that early Americans distinguished between ordinary and fundamental law. “Problems of fundamental law—what we would call questions of constitutional interpretation—were thought of as ‘legal’ problems, but also as problems that could authoritatively settled only by ‘the people’ expressing themselves,” he declares.

Kramer describes the process by which fundamental, constitutional law came to be blurred with ordinary law as gradual—as courts repeatedly considered cases involving constitutional questions and subjected them to legal processes, they encouraged the popular belief that part of the courts’ job was to settle constitutional disputes. Kramer (2006, 150) points to the “modesty” of the early practice of judicial review as promoting this process—because it “enabled courts to build the practice and make it seem commonplace while drawing a minimum of political fire. Judges did not typically intervene unless the unconstitutionality of a law was clear beyond doubt, which as a practical matter left questions of policy and expediency

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129 Kramer further argues that the “means of correction and forms of resistance were well established and highly structured.” (Ibid., 25). They included the right to vote, the right to petition, use of the militia, the use of juries, and even mobbing. (See ibid., 25–27).

130 Ibid., 31.

131 Ibid., 149.
to politics.”

Snowiss (1990) similarly argues that Marshall achieved a “legalization” of the fundamental law of the Constitution. She argues that early in the history of the American republic, fundamental law was understood as distinct from ordinary law. Whereas ordinary law “bound individual action,” fundamental law “was the attempt to bind sovereign power.”132 And unlike ordinary law, fundamental law could not be enforced in courts, but via electoral or political action—or even revolution.133 The process of legalization, according to Snowiss, “was achieved by application of ordinary law technique to the Constitution and by public acceptance of judicial application and interpretation of the Constitution.”134 That is, Marshall applied legal processes to the Constitution to recreate it as “supreme ordinary law.”135

If popular constitutionalism ever described the American system, it came to be displaced by judicial review. The Marshall Court did not accomplish this via a frontal attack on popular constitutionalism. Rather, the Court’s constitutional interpretations—both the processes of interpretation and the ultimate interpretations themselves—satisfied sufficient proportions of the public that they endorsed the Court and its decisions. In repeated iterations of judicial review, the Court showed itself to be a reliable indicator of what the public would have pursued via the tools of popular constitutionalism—or at least close enough to resist any kind of effort to overturn the Court. Over time the Court acquired more leeway, and even convinced the public that interpretation-by-Court was the natural order of the U.S. Constitution such that its anti-majoritarian decisions came to be seen as a feature rather than a bug of American constitutionalism.

132 Snowiss (1990, 5).
133 Ibid.
134 Ibid., 197.
135 See, e.g., ibid., 195.
John Marshall and the Supreme Court he led purported to draw a line between law and politics. The Court’s power and duties all lay on the law side of the divide. If early Courts had trespassed on territory reserved for politics, they were mistaken. In its early actions—especially its decisions in *Marbury* and *Stuart*—the Court convinced political majorities that it could resist the lures of politics.\textsuperscript{136} Although partisan politics had captured the rest of the American political system, judges could be trusted to decide cases according to the particular facts and applicable legal principles and precedents, and not based on political platforms or logrolling.

The next step the Court took was to use its power of judicial review to interpret the Constitution and not just apply its plain, unambiguous meaning. The Marshall Court’s interpretations challenged state actions, reversed state courts, and struck state laws. In the process, questions of constitutional interpretation came largely to be seen as falling on the law side of the law–politics divide. Popular majorities came to see the settlement of constitutional disputes as one of the principal purposes of the Supreme Court. Those who refused to give effect to the Court’s constitutional rulings would have to pay an increasingly high price associated with the violation of this emerging norm.

Marshall was able to win support for the Court by writing opinions that conformed to the public’s ideals of what legal decision-making should look like. Thus he could make a plausible claim to be doing “law” rather than politics. But the very assertion of authority to answer such questions was an act implicating institutional power. In arguing that questions of constitutional interpretation should be subject to the Court’s review, Marshall was doing “politics.” But Marshall’s initial forays

\textsuperscript{136} See, also, Nelson (2000, 8) (“in *Marbury v. Madison*, Chief Justice John Marshall drew a line, which nearly all citizens of his time believed ought to be drawn, between the legal and the political—between those matters on which all Americans agreed and which therefore were fixed and immutable and those matters which were subject to fluctuation and change through democratic politics”)}
into new territory were modest. He and his Court’s first attempts to resolve difficult constitutional puzzles produced outcomes that avoided any institutional reaction against the Court—their rulings satisfied those actors who could have otherwise opposed them. In the process, the Court established a precedent that it was the proper body to settle matters of constitutional interpretation. This state of affairs came to be accepted by sufficient elements of the American public that appeals to alternative approaches to constitutional interpretation—approaches that had been displaced by judicial review—were met with criticism as illegitimate and opposed to the genius of the American system of constitutional government.

Although the Marshall Court’s constitutional rulings came to enjoy the force of law, we must remind ourselves that the reach of the Court’s authority was much less than it is today. The Marshall Court interpreted the Constitution as imposing constraints on the states. The national government—when acting within its broadly construed enumerated powers—was supreme. And certain policies implicated national powers were outside the scope of state authority. But the Marshall Court did not extend its investigation of constitutional matters into questions of the rights of individual citizens protected by the Constitution. Later Courts, however, would use the precedents established by the Marshall Court, along with new constitutional texts, to begin just such a project.
Denying the Reconstruction Amendments

The judicial determination of constitutionality is an exercise in defining the limits of what is commonly understood as “politics.” That is, legislation upheld by the Court lies within the legitimate bounds of ordinary, day-to-day politics, whereas acts determined by the Court to be unconstitutional attempt to reach beyond the proper scope of politics. Within the realm of politics, the Court defers to the discretion of the elected branches. If the Congress wishes to establish a Bank of the United States, so be it—Article I, Section 8 permits it (but does not require it).\(^1\) The choice of whether to establish a bank is a question of politics. But if Congress tries to expand the Supreme Court’s original jurisdiction beyond the limits set out in Article III, then the legislature is acting outside the bounds of ordinary politics.\(^2\) Such acts implicate constitutional questions, which the Marshall Court had established were properly understood as legal rather than political in nature. The critical question for the Court, then, is where to draw the line setting the outside limits of politics.

The Supreme Court established its authority to determine these limits of politics

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\(^1\) See, \textit{e.g.}, \textit{McCulloch v. Maryland}.  
\(^2\) See, \textit{e.g.}, \textit{Marbury v. Madison}.  

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under Chief Justice John Marshall—especially with respect to the limits on the several states. The determination of the limits of politics as set out in the Constitution was a legal question to be answered by the judiciary. As Marshall famously declared in his opinion for the Court in *Marbury*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Despite this claim to power (and his earlier experience as a land surveyor), Marshall did not spend his days on the Court carefully measuring, defining, and recording the full extent of politics as it related to the U.S. Congress. *Marbury* remained the one and only instance in which the Marshall Court voided federal legislation as unconstitutional. But the Marshall Court did exercise the power of judicial review to define constitutionally mandated limits on the states. The Court had effectively eliminated the possibility of political competition between the states and federal government by declaring the states’ claims invalid. The states lacked the political discretion to pursue such policies because the policies they wanted went beyond the limits of politics, according to the Court.

The Marshall Court was largely successful in its acquisition of the authority to define the reach of politics. In a few instances the losing side evaded the Court’s decisions to varying degrees of success, but for the most part the Court’s rulings controlled. The Marshall Court won support for its contention that one of the Court’s important tasks was to interpret the Constitution’s limits on politics. The Court achieved this by (eventually) forswearing partisanship during the rancor surrounding the judiciary following the election of 1800 and with the avoidance of confrontational constitutional rulings that would have activated efforts to undermine the Court. The public came to accept the Supreme Court’s role as the definer of the constitutional limits of politics such that efforts to contradict the Court would have met with public backlash.

3 *Marbury*, 5 U.S. (1 Cranch) 137, 177 (1803).
The Court, led by Marshall’s successor, Chief Justice Roger Taney, endangered their institution’s hard-won influence. Due in part to the Court’s strong standing, the political branches hoped to throw to the Court the political hot potato that was the question of if and how slavery would be expanded. The Court’s decision in *Dred Scott v. Sanford* was not the modest and moderate (even judicious) ruling the near-warring parties had hoped for. Instead, Taney’s controlling opinion gave a decisive win to slavery’s supporters. And for the first time since *Marbury* the Court had struck down congressional legislation as unconstitutional, finding that the federal government lacked the power to deny a state the ability to institute slavery. Rather than tempering hard feelings on both sides of the issue, the *Dred Scott* opinion intensified the debate that ultimately turned into violent conflict. Nevertheless, the American political system was unable to generate a peaceful alternative to the Court’s decision in *Scott*.

The question of slavery was ultimately decided by the North’s victory in the Civil War. The Union would remain, but the South would need to establish a new economic system—one not based on owning people. The Reconstruction Amendments were then added to the Constitution to make this resolution wrought by violence a permanent feature of the U.S. Constitution. The Reconstruction Amendments fundamentally altered the American political system by giving federal recognition to certain individual rights and thereby limiting the prerogatives of states to create civil society as they saw fit.

The Reconstruction Amendments, in particular the Fourteenth Amendment, presented both a challenge and an opportunity for the Supreme Court. The constitutional amendments required a redrawing of the limits of politics. One interpretation of the Reconstruction Amendments—rooted in the intentions of the Radical Republicans behind the amendments, justified by precedent, and concordant with thinking about the Court’s proper role—gave Congress plenary authority to pass
legislation in pursuit of the goals of the amendments. An alternative view of the amendments was more limited. Under this approach the Thirteenth, Fourteenth, and Fifteenth Amendments provided limited correctives to specific problems: the Thirteenth Amendment eliminated slavery, the Fourteenth Amendment overruled Dred Scott’s citizenship holding and outlawed the South’s “Black Codes,” and the Fifteenth Amendment guaranteed the right of black men to vote in all elections. But the amendments, according to this view, did not remake the American political system such that the federal government could engineer racially equal civil societies contrary to the wishes of individual states.

The Republican-dominated Supreme Court was sympathetic to the goals of the amendments’ framers. But the expansive view of the Reconstruction Amendments threatened the Court’s role as the definer of the limits of ordinary politics by effectively eliminating any limits to politics. In addition, deference to any and all legislation crafted by the Radical Republicans meant that the judiciary would have to enforce these laws in court, subjecting the courts and judges to intense criticism—including, most damaging of all for the Court’s authority, charges of partisan bias. Ultimately, the Court adopted a more limited interpretation of the Reconstruction Amendments. The Court’s rulings imposed limits on Congress’s authority under the amendments, and—perhaps more importantly—maintained the Court’s status as the arbiter of such limits. The Court’s decisions exploring the new edges of ordinary congressional politics established by the Reconstruction Amendments frustrated efforts for racial equality, but did not negate, nullify, eviscerate, or emasculate the Reconstruction Amendments to the extent lawyers, judges, and scholars have asserted.4

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4 See, e.g., Kaczorowski (2005, 188) (“The racism, economic self-interest, partisanship, and liberal ideology that characterized the political order of the 1870s promoted a callous disregard among Northern Republicans toward Southern violent oppression of black Americans. The Supreme Court reflected this political order in emasculating the Reconstruction civil rights program in the 1870s.”); McCloskey (2005, 80) (“the national civil rights acts were emasculated by the holding that the ‘enforcement clause’ of the Fourteenth Amendment did not authorize Congress to legislate against
What these decisions did accomplish, however, was the establishment of a norm that debates about the limits of federal authority under the Reconstruction Amendments would be held in federal courtrooms rather than in the halls of Congress.

In this chapter, I explore the ways the Court used the adoption of the Reconstruction Amendments to increase its role in American policy making.

4.1 The Court and the Civil War

Such was the respect enjoyed by the Court in the mid-nineteenth century that both Abraham Lincoln and Stephen Douglas suggested that the Court might be the body best suited to settling the issue of slavery in new territories. But the Court’s decision in *Dred Scott v. Sandford* was widely criticized. Rather than resolving debate, the Court’s decision helped to ignite the passions of the two sides on the path to a deadly civil war. The damage the Court had done to its standing is clear from the first Inaugural Address of President Abraham Lincoln—himself a strong proponent of the rule of law. “[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court,” Lincoln declared, “the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to transgression by private persons on the rights of individuals, Negro or white.”); and Powe (2009, 146–147) (“After slavery was gone, the *Civil Rights Cases* showed how far the Court would go to ignore the changed constitutional regime. The Republican justices had adopted the traditional Democratic skepticism about exercises of federal power—when it came to protecting Negroes.”); and Urofsky and Finkelman (2002, 479) (“The Republican Congresses of the war and Reconstruction era had attempted to write some statutory as well as constitutional safeguards to protect the former slaves, but the Supreme Court nullified nearly all this work”). For further citations, see Brandwein (2011, 1, note 2).

5 See Kutler (1968, 9).

6 60 U.S. (19 How.) 393 (1856).

7 See, e.g., Warren (1922, 300–319). And the criticism has not ended. For a summary of more contemporary denunciations from scholars and thinkers from a wide variety of intellectual perspectives, see Graber (1997, 271–273) (who uses *Dred Scott* as a starting point for critiquing contemporary constitutional theories).
that extent practically resigned their Government into the hands of that eminent
tribunal."

The Court remained a thorn in the side of the Republicans during the Civil War
and the early years of Reconstruction afterward, particularly with regard to the
detention of suspected saboteurs. In response, President Lincoln and the Radical
Republicans of Congress exploited the institutional weaknesses of the judiciary to
deny it influence. In *Ex parte Merryman*, for instance, prominent Marylander John
Merryman was arrested by military officers and charged with various acts of treason.
Merryman’s attorneys filed a petition for a writ of habeas corpus with Chief Justice
Taney in his capacity as a circuit court judge, which he ordered issued. But the
military officers refused to turn over Merryman, citing President Lincoln’s suspension
of the writ of habeas corpus. Taney, in response, wrote a scathing opinion denying
the President’s authority to suspend the writ and calling on Lincoln to respect the
requirements of the Constitution by presenting Merryman to the court. Lincoln
denied Taney—who, of course, had no ability to enforce his ruling—and the military
continued to hold Merryman.10

Taney, who died in 1864, was ultimately vindicated somewhat by the Supreme
Court in its 1866 decision in *Ex parte Milligan*. The facts of the case were similar—
suspected agitators with Confederate sympathies were tried and found guilty in a
military court. The Court ruled, in part, that “[m]artial rule can never exist where

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8 Graber (2000) attributes the seeming activism to the fact that the Court “moved by standing
still.” That is, “[t]he Chase Court’s willingness to declare more major federal laws unconstitutional
than had previous tribunals is best explained by the willingness of the Republican/Whig/National
Union coalition to take far more constitutionally controversial actions than previous national offi-
cials.” (Ibid., 34).

9 17 F. Cas. 144 (C.C.D. Md. 1861).

10 See, generally, Downey (2006), who notes that Merryman—though indicted for treason—was
able to post bond and was quietly released. The case against him was not brought to trial, and the
charges were ultimately dropped. (Ibid., 276).

11 71 U.S. (4 Wall.) 2 (1866).
the courts are open and in the proper and unobstructed exercise of their jurisdiction,” and thus that the defendants had been entitled to trial in civilian courts.\textsuperscript{12} \textit{Ex parte Milligan} signaled the Court’s views on matters of habeas corpus. When a similar case involving William McCardle wound its way through the courts—a case that would have given the Supreme Court an opportunity to review the constitutionality of the Military Reconstruction Act—Congress passed a bill denying jurisdiction to the Court in such cases. In \textit{Ex parte McCardle},\textsuperscript{13} the Court acknowledged Congress’s power to restrict its jurisdiction in just such a manner.\textsuperscript{14}

Wary of the ability of the Supreme Court to interfere with its Reconstruction plans, the Radical Republican-controlled Congress, which was also engaged in political struggles with President Andrew Johnson, shrunk the Court. Johnson was thus denied an opportunity to appoint new members to the Court. With the election of Ulysses S. Grant, the Court’s size was increased back to nine. This “court-packing” corresponded with the Court’s hearing of a new case to reconsider the matter of paper money. Whereas the Court had struck down the Legal Tender Act in \textit{Hepburn v. Griswold},\textsuperscript{15} the newly constituted Court (with its two Grant appointees) reversed itself and upheld the Act in the \textit{Legal Tender Cases}.\textsuperscript{16}

Thus the Court in the 1860s was accustomed to exercising its power of judicial review, but it did not necessarily enjoy sufficient authority to have its decisions

\textsuperscript{12} 71 U.S. (4 Wall.) at 127.
\textsuperscript{13} 74 U.S. 506 (1869).
\textsuperscript{14} Kutler (1967) argues that \textit{Ex parte McCardle} should be interpreted in its historical context of the Court’s decision in \textit{Ex parte Yerger}, 75 U.S. (8 Wall.) 85 (1869) (acknowledging the restrictions to the 1867 habeas corpus bill at issue in \textit{McCardle}, but affirming the Court’s ability to issue a writ of habeas corpus under previous habeas corpus legislation) and other (unsuccessful) attempts by Republicans to limit the Court’s power. For an even narrower legal interpretation of \textit{McCardle}, see Van Alstyne (1973). See, also, Epstein and Walker (1995), who look at the \textit{McCardle} case from a game-theoretic perspective and argue that the decision offers an example of a strategic court deviating from its immediate preferences to preserve its long-term interests.
\textsuperscript{15} 75 U.S. (8 Wall.) 603 (1870).
\textsuperscript{16} 79 U.S. (12 Wall.) 457 (1871).
enacted and respected. Attempts by the Court to constrain the actions of the executive and legislative branches had been met with court-packing, jurisdiction-stripping, and outright evasion. But the signature achievement of the Radical Republicans—the ratification of the three Reconstruction Amendments—provided an unanticipated opportunity for the Supreme Court to reconstruct its own standing in the American separation-of-powers system.

4.2 Passing the Reconstruction Amendments (and Related Civil Rights Legislation)

Slavery had been at the heart of the disputes that led to the Civil War. And as the conflict came to its conclusion, the Republicans who dominated the Union government sought to put an end to the institution of slavery in the United States. To that end, they proposed and passed the Thirteenth Amendment, which was ratified in December of 1865. The Thirteenth Amendment, simply stated, prohibited slavery and involuntary servitude in the United States, and gave Congress the power to enforce this requirement. To aid in this effort, Congress also created the Freedmen’s Bureau in 1865 and gave it primary responsibility for helping the former slaves’ transition to free citizenship.

Southern states nevertheless sought to continue to subjugate their African American populations. For one, state legislatures passed a series of laws known as the “Black Codes” which nominally defined rights of freed black citizens, but also sought to keep them available as cheap plantation labor. The states also passed laws lim-

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17 The official name of the agency was the Bureau of Refugees, Freedmen, and Abandoned Lands.
19 See, e.g., Foner (1988). These laws provided that the state would enforce labor contracts, included strict punishments for vagrancy, placed limitations on the abilities of African American citizens to rent land, and established apprenticeship laws whereby white employers would take charge of black orphans (who had often been separated from their parents by the slave trade). (Ibid., 199–201).
iting the ability of black citizens to sit on juries, take advantage of public facilities and social welfare programs, participate in militias, or to attend public schools.\footnote{See ibid., 203–208.}

Organized, collective violence and intimidation against freed black citizens (and Republicans) was also common as the Ku Klux Klan grew across the South.\footnote{For a description of Klan violence in Mississippi, see, \textit{e.g.}, Oshinsky (1997, 22–29) (noting at 26 that “[a]mong the Klan’s favorite targets were Northern white teachers who had traveled south to instruct black children about the rights and responsibilities of freedom”).}

The enactment of the Black Codes, along with stories of violence against freedmen, motivated Northern Republicans to call for more.\footnote{Foner (1988, 225–226). Additionally, the Republicans were concerned that the South was on the path to reestablishing the status quo ante bellum, with the same people who had fought the Union serving as elected officials in the new state governments. (See ibid., 275–276).}

Accordingly, Senator Lyman Trumbull of Illinois introduced two bills: one to extend support to the Freedmen’s Bureau (both in terms of time and resources), and a Civil Rights bill. The Civil Rights Act of 1866 would eventually define national citizenship, identify rights of national citizenship, and provide federal guarantees against the deprivation of such rights by state officials.\footnote{14 Stat. 27–30. The first section of the Act read as follows (note the similarities to—and differences from—Section One of the Fourteenth Amendment): “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”}

But President Andrew Johnson surprised the Republicans by vetoing both bills.\footnote{See Foner (1988, 247–250) (stating that “[f]or Republican moderates, the Civil Rights veto ended all hope of cooperation with the President”).}

Although Congress overrode Johnson’s veto of the Civil Rights Bill, there was a growing consensus that more was needed than ordinary legislation.

Republican leaders thus sought to make the protections of the 1866 Civil Rights
Act a part of the Constitution itself as the Fourteenth Amendment. The first section of the amendment established that all people born in the country held national citizenship and protected citizens’ privileges and immunities against the states while simultaneously guaranteeing all persons against deprivations of due process or denials of equal protection.\textsuperscript{25} In addition, Republicans were looking for a solution to a looming problem: with the abolition of slavery, the Three-Fifths clause was moot and African-American citizens were counted for congressional representation purposes. This meant that the Southern states would be entitled to more representation while retaining the ability to exclude the freedmen from voting. The second section of the amendment thus reduced the congressional representation due a state in proportion with the percentage of men twenty-one and older denied the franchise. The third section of the amendment forbade any Confederate officers from serving in the federal government (unless approved by two-thirds of each House of Congress). The fourth section guaranteed debt incurred by the Union while denying federal responsibility for Confederate debt and renouncing any and all claims of losses due to emancipation. The fifth and final section empowered Congress to enforce the amendment’s provisions through “appropriate legislation.”

The elections of 1866 marked a defeat for President Johnson’s National Union movement and a victory for the Radical Republicans.\textsuperscript{26} The Radical Republicans pursued a program to readmit the Southern states that culminated in the Reconstruction Act of 1867. The Act placed the South under military rule and gave African American citizens the vote (but only in the South).\textsuperscript{27} Republicans hoped that black suffrage would help them hold the South, and such cynical partisan moti-

\textsuperscript{25} See Aynes (1993) for an examination of the intentions of Congressman John Bingham of Ohio, the principal framer of Section One of the Fourteenth Amendment (and discussion of the considerable literature previously rejecting Aynes’s conclusions).

\textsuperscript{26} Foner (1988, 261–271). See, also, Maltz (1990, 124) (writing that “the [Republican] party as a whole was clearly more radical than it had been at the beginning of the Thirty-ninth Congress”).

\textsuperscript{27} Foner (1988, 276–281).
vations attracted strenuous protests among white southern Democrats. Following Republican wins in the election of 1868, there was greater energy behind extending black suffrage nationally via a constitutional amendment. This effort culminated the Fifteenth Amendment, which guaranteed that no man’s right to vote in federal or state elections could be limited because of his color. The language of the Fifteenth Amendment, however, did not expressly forbid the use of poll taxes, property requirements, literacy tests, or other methods employed to limit voting rights.

To counteract Southern oppositional violence and intimidation of African American citizens, Congress passed three Enforcement Acts—one in 1870 and two in 1871. The first two acts empowered the federal government to take action against state officials interfering with voters on the basis of race, and the third Enforcement Act outlawed private acts of violence and empowered the military to intervene to protect African American citizens against conspiracies to deny them equal rights and protection of the law. Under the authority of these acts, the Department of Justice led prosecutions against hundreds of individuals. Although this represented a small proportion of the total number of Klansmen who engaged in legal behavior, by 1872, the federal government’s evident willingness to bring its legal and coercive authority to bear had broken the Klan’s back and produced a dramatic decline in violence throughout the South.”

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28 See Maltz (1990, 132).
29 See, e.g., ibid., 131–145 (writing at 142 that the elections had created an “ideal climate” for resolving the issue of black suffrage).
30 The third Enforcement Act is also called the Ku Klux Klan Act.
31 See Foner (1988, 455) (arguing that the second act was “designed with Democratic practices in Northern cities more fully in mind than conditions in the South”).
32 Ibid., 454. See Zuckert (1986) for an argument that votes on the third Enforcement Act demonstrated Congressional support for an interpretation of the Fourteenth Amendment that empowered Congress to act in the face of state failure to protect fundamental rights of national citizenship—including punishment of individuals.
passed in 1875 as the Republicans were leaving power enjoyed much less success.34

Ever since the ratification of the Reconstruction Amendments, Americans have debated their meaning. Some have argued that the Reconstruction Amendments amounted to a wholesale remaking of the American system. According to this view, the Reconstruction Amendments radically rebalanced the power between states and the federal government. The first section of the Fourteenth Amendment established those fundamental rights and liberties of a free democratic society as national rights and the amendments’ enforcement clauses gave Congress the power to protect those rights against anyone who would infringe them.35 The opposite view has been that the Reconstruction Amendments preserved the federalist system, and merely provided federal guarantees that the states themselves would not deny any citizen equal access to the rule of law. According to this approach, citizens belong to the civil societies created in their states. The nature and content of those rights is up to the citizens of each state, and the federal government simply ensures that whatever rights are granted are distributed equally and fairly.36

34 At the time the Civil Rights Bill was passed, the New York Times criticized it: “There seems to remain no ground of support of the constitutionality of the civil rights legislation except this—that the fourteenth amendment, having declared who are citizens of the United States, Congress may declare what rights, privileges, and immunities go with that citizenship. We shall not consider this claim of power in Congress further than to say that, if assented to, it is limitless. If it is good for one right it is good for all, and puts States in the same relation to the General Government that municipalities hold to State Governments. The State of New-York would, according to such a construction, be as much subject to national legislation as the City of New-York is now subject to the legislation in Albany. No one has yet seriously made this claim for the fourteenth amendment, and there is no probability that it would be entertained for a moment by the Supreme Court; yet what other defense is there for Federal legislation regulating the business of inn-keepers and common carriers?” (“A Worthless Law.” New York Times, p. 4 (5 April 1875)).

35 See Curtis (1986) for an extended argument that the Fourteenth Amendment’s Privileges and Immunities Clause was intended to apply the Bill of Rights in its entirety to the states. This argument was, as we shall see, rejected by the Court in the Slaughter-House Cases. Only later have the Bill of Rights been incorporated piecemeal as applying to the states via the Fourteenth Amendment’s Due Process Clause.

36 For a vigorous defense of this view, see, e.g., Berger (1977); Fairman (1949). For a more moderate take, see Maltz (1990) (arguing that the support of conservative Republicans was required to pass the Reconstruction Amendments and associated legislation and that “[i]t is inconceivable that conservative Republicans would have supported a general grant of authority to the federal
While the substantive debate about what the Reconstruction Amendments do and do not require has received the most attention, a secondary—but perhaps ultimately more important—question was settled early on. Who has the authority to decide what the Reconstruction Amendments mean? As with other parts of the Constitution, the Reconstruction Amendments do not explain how they are to be interpreted. And also like other parts of the Constitution, the Reconstruction Amendments have come to be interpreted by the Supreme Court. I argue that this was not a necessary result and that the history of the Supreme Court during Reconstruction and its immediate aftermath explains how the Court came to assume this interpretive authority, which, in turn, provided it with the means to expand its ability to influence policy outcomes in the American system of government.

4.3 The Justices

For the most part, the justices who heard the first cases implicating the Reconstruction Amendments had been appointed and confirmed by the same Republican politicians who championed the amendments. Andrew Johnson had been denied any appointments to the Supreme Court. Thus, with the exception of Nathan Clifford, every justice from the time of the Slaughter-House Cases to the Civil Rights Cases had been appointed by a Republican president. Table 4.1 provides some details about the Reconstruction justices.

The two chief justices of the period were different. Salmon P. Chase was a politician. He famously coveted the presidency. Despite his flirtations with the Democratic Party, Chase had spent his political life as an advocate for equal rights for African-Americans (and for women). Chase was an unsurprising choice as Chief Justice following the death of Taney—he was well known, generally popular, and coveted the job. As Chief Justice, Chase made a trip to the South to advocate for black government to guarantee equality.” (Ibid., 157).
Table 4.1: Members of the U.S. Supreme Court from the *Slaughter-House Cases* to the *Civil Rights Cases*.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Appointing President</th>
<th>Oath Taken</th>
<th>Service Terminated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blatchford, Samuel</td>
<td>Arthur</td>
<td>April 3, 1882</td>
<td>July 7, 1893</td>
</tr>
<tr>
<td>Bradley, Joseph P.</td>
<td>Grant</td>
<td>March 23, 1870</td>
<td>January 22, 1892</td>
</tr>
<tr>
<td>Chase, Salmon Portland*</td>
<td>Lincoln</td>
<td>December 15, 1864</td>
<td>May 7, 1873</td>
</tr>
<tr>
<td>Clifford, Nathan</td>
<td>Buchanan</td>
<td>January 21, 1858</td>
<td>July 25, 1881</td>
</tr>
<tr>
<td>Davis, David</td>
<td>Lincoln</td>
<td>December 10, 1862</td>
<td>March 4, 1877</td>
</tr>
<tr>
<td>Field, Stephen Johnson</td>
<td>Lincoln</td>
<td>May 20, 1863</td>
<td>December 1, 1897</td>
</tr>
<tr>
<td>Gray, Horace</td>
<td>Arthur</td>
<td>January 9, 1882</td>
<td>September 15, 1902</td>
</tr>
<tr>
<td>Harlan, John Marshall</td>
<td>Hayes</td>
<td>December 10, 1877</td>
<td>October 14, 1911</td>
</tr>
<tr>
<td>Hunt, Ward</td>
<td>Grant</td>
<td>January 9, 1873</td>
<td>January 27, 1882</td>
</tr>
<tr>
<td>Matthews, Stanley</td>
<td>Garfield</td>
<td>May 17, 1881</td>
<td>March 22, 1889</td>
</tr>
<tr>
<td>Miller, Samuel Freeman</td>
<td>Lincoln</td>
<td>July 21, 1862</td>
<td>October 13, 1890</td>
</tr>
<tr>
<td>Strong, William</td>
<td>Grant</td>
<td>March 14, 1870</td>
<td>December 14, 1880</td>
</tr>
<tr>
<td>Swayne, Noah Haynes</td>
<td>Lincoln</td>
<td>January 27, 1862</td>
<td>January 24, 1881</td>
</tr>
<tr>
<td>Waite, Morrison Remick*</td>
<td>Grant</td>
<td>March 4, 1874</td>
<td>March 23, 1888</td>
</tr>
<tr>
<td>Woods, William Burnham</td>
<td>Hayes</td>
<td>January 5, 1881</td>
<td>May 14, 1887</td>
</tr>
</tbody>
</table>

*Served as Chief Justice.

His successor, Morrison R. Waite was much lesser known. Indeed, Waite was not President Ulysses Grant’s top choice. He was a business lawyer from Ohio who had never argued before the Supreme Court and never been involved in politics. Opinions of his tenure vary, but he is generally viewed as having been at least competent. Chief Justices Chase and Waite led Supreme Courts that were full of Lincoln and Grant appointees. The justices of these Courts were not Radical Republicans, but they were—for the most part—moderate Republicans and largely sympathetic to the broader aims of the Republican Party, including efforts to protect black citizens against official state discrimination.

Other important figures on the Reconstruction Court included Samuel Miller, Stephen Field, Joseph Bradley, and John Marshall Harlan. Samuel Miller of Iowa

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38 Compare Schwartz (1993, 162), writing of Waite, “a humdrum, pedestrian lawyer, he remains a dim figure in our constitutional history,” with Umbreit (1938, 295), claiming that “there has been no period during which the Supreme Court has functioned with greater general satisfaction than the fourteen years during which Waite presided over it.”
was educated as a medical doctor, but turned to the legal profession in his thirties. He was a nationalist Republican and was appointed to the Court by Lincoln in 1862 having never held political office (unlike most of his brethren). Lincoln appointed Miller upon receiving recommendations from Iowa Republicans and Democrats. With regard to slavery and the plight of African Americans, Miller’s pre-Court views mirrored those of many other Republicans: he opposed the expansion of slavery, but he did not support full equality for African Americans.

Miller was a force on the Court and in his decision making, he tended to tap into his diverse experiences and an interest in striking balances that would permit future flexibility. Stephen Field, a loyalist California Democrat, was appointed by Lincoln in 1863. Like Chase, Field was politically ambitious, even seeking the Democratic nomination for president in 1880. He was not especially considered with questions of political equality—in fact, he was rather protective of states’ rights. Field was also an early proponent of the theory—the adoption of which characterized the Lochner Court of the early twentieth century—that the Fourteenth Amendment’s Due Process clause protected economic rights such as the right to contract.

Joseph P. Bradley, a New Jersey Republican, was appointed by President Grant in 1870. Bradley had gained national prominence as an attorney for railroads and insurance companies. His appointment was surrounded by political intrigue. Congress had increased the size of the Supreme Court to nine from eight, and Justice Robert Grier resigned.

40 Ibid., 1013–1014.
41 Ross (2003, 74–77).
42 See ibid., 52. Like many other Republicans, Miller’s views evolved over time and he came to see a need for greater protection of the rights and freedoms of African Americans. (Ibid., 164–165).
43 Gillette (1969, 1015).
44 See Kens (1997, 186–188).
45 See ibid., 157–166.
Bradley (and fellow new appointee William Strong) was a second choice.\(^{47}\) Bradley was nominated the same day the Court announced its decision striking the Legal Tender Act in *Hepburn v. Griswold*,\(^ {48}\) fueling speculation that Bradley was given the nomination in exchange for a promise to reverse the Court’s decision (which, of course, the newly constituted Court did do).\(^ {49}\) Bradley became a leading figure on the Court, especially as a proponent for federal power. When John Marshall Harlan of Kentucky was nominated by President Hayes, there were questions about his loyalties to the Republican Party and its ideals.\(^ {50}\) Indeed, though he had opposed secession, Harlan had bitterly criticized the Emancipation Proclamation\(^ {51}\) and had a history of racially insensitive comments.\(^ {52}\) But while on the bench Justice Harlan became known for his insistence that the Constitution provided for and protected equal political and civil rights for citizens of all races.\(^ {53}\)

The biographies of the justices who served during the period of interest suggests that their collective views placed the Supreme Court as a whole in the moderate Republican camp. Thus, although the Court lacked a strong Radical Republican voice that might push for the most extreme interpretations of the Reconstruction Amendments, the justices of the Court were (with exceptions, most notably Justice Field) largely sympathetic to the obvious goals of the Reconstruction Amendments to

\(^{47}\) Grant’s first two choices had been Edwin Stanton, who had died two days after his confirmation, and Attorney General Ebenezer Hoar, whom the Senate had rejected. (Ibid., 1185–1186).

\(^{48}\) 75 U.S. (8 Wall.) 603 (1870).

\(^{49}\) Friedman (1969, 1185–1187).


\(^{51}\) See ibid., 55–64.

\(^{52}\) See ibid., 138–145.

\(^{53}\) This view of Harlan comes most directly from his dissenting opinions in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). But for a more complicated perspective on Harlan’s views on race, see Przybyszewski (1999, 81–117), arguing that Harlan’s strong identification with his own Anglo-Saxon heritage explains his support for legal equality while nevertheless recognizing practices that kept racial identities distinct (such as the Court’s opinion in *Pace v. Alabama*, 106 U.S. 583 (1883)—which Harlan joined—upholding an anti-miscegenation law).
prevent the reinstitution of state-sponsored denigration of African-American citizens.

4.4 The Supreme Court Weighs In

In the 1870s and early 1880s, the Supreme Court heard a series of cases that called upon it to interpret the Reconstruction Amendments and congressional acts passed pursuant to the amendments. In this section, I will consider five key cases from this period. The *Slaughter-House Cases* involved a Louisiana law establishing a monopoly that was challenged as infringing citizens’ privileges and immunities of citizenship (as well as denying them both due process and equal protection). *United States v. Reese*, *United States v. Cruikshank*, and *United States v. Harris* all involved federal criminal prosecutions under legislation designed to protect African-American citizens from actions infringing their newly established rights under the Reconstruction Amendments. In the *Civil Rights Cases*, the Court considered federal legislation enacted pursuant to the enforcement clauses of the Fourteenth Amendment and that required public accommodations to admit persons of all races. As we shall see as we consider each case in turn, the overall effect of the Court’s rulings was to establish limits on the degree to which the federal government could establish and maintain a fair society, even with the new language of the Reconstruction Amendments. But we shall also see that the justices’ motivations for such rulings can be better understood as establishing their Court as the arbiter of the meaning of the Reconstruction Amendments than as an attempt to deny African Americans an equal place in civil society.

4.4.1 The Slaughter-House Cases

On 8 March 1869, the Louisiana state legislature chartered the Crescent City Live-Stock Landing and Slaughter-House Company and granted it a monopoly over the slaughter of livestock in New Orleans. A coalition of local butchers challenged the
company, arguing that the monopoly offended sections of the Thirteenth and Fourteenth Amendments. The case made its way to the Supreme Court and marked the first instance in which the Court would interpret these Reconstruction Amendments.\textsuperscript{54} The Court acknowledged the importance and novelty of the case, stating, “[w]e do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.”\textsuperscript{55}

The majority likewise acknowledged that the Reconstruction Amendments marked a significant change to American constitutionalism. In the “history of the times,” Justice Miller wrote for the Court, “it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights, additional powers to the Federal government; additional restraints upon those of the States.”\textsuperscript{56} These words suggest an expansive view of the Reconstruction Amendments. A new bargain had been struck, it seems. The “people of the States,” rather than the States themselves, were seen as the ultimate source of constitutional authority. Moreover, the Reconstruction Amendments served to increase the powers of the national government at the expense of state governments.

Nevertheless, the Court’s majority upheld the state’s monopoly. The history that motivated the Reconstruction Amendments, according to the majority, was the history of slavery, its abolition by the Civil War, and the subsequent treatment of

\textsuperscript{54} \textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{55} Ibid., 67.
\textsuperscript{56} Ibid., 67–68.
freed slaves. “Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government,” according to the Court, “were laws which imposed upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.”

That was not to say that the Reconstruction Amendments applied only to African-Americans, but the Court insisted that “in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished as far as constitutional law can accomplish it.”

Protecting butchers from monopolies was not the purpose of the Reconstruction Amendments.

The butchers, however, argued that the Privileges or Immunities Clause of the Fourteenth Amendment protected their right to slaughter animals. The justices in the majority found it important that the text of the Fourteenth Amendment prevents states from abridging the “privileges or immunities of citizens of the United States.” The Court reasoned that there must be a distinction between the privileges and immunities of a citizen of the United States and the privileges and immunities of a citizen of a state. And the language of the Fourteenth Amendment protects only the former. The privileges or immunities of the citizens of the states, therefore, “must rest for their security and protection where they have heretofore rested”—with the states themselves.

The majority, quoting Justice Bushrod Washington, identified the privileges and

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57 Ibid., 70.
58 Ibid., 72.
59 Ibid., 74–75.
immunities of citizens of states as those “fundamental” rights that belong “to the citizens of all free governments” and that fall into the following general categories: “protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety.”\(^{60}\) The Constitution, the majority continued, left the protection of these fundamental rights to the states, subject to a few restrictions.\(^{61}\) The butchers’ argument suggested that the Fourteenth Amendment “transfer[red] the security and protection of all the civil rights which we have mentioned, from the States to the Federal government,” and claimed that Section 5 “[brought] within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States.”\(^{62}\)

The majority rejected this result. The Court found that neither the amendment’s framers nor the state legislatures that ratified it intended such an interpretation that “radically changes the whole theory of the relations of the State and Federal governments to each other and of both of these governments to the people.”\(^{63}\)

The majority also rejected claims that the Fourteenth Amendment’s Due Process or Equal Protection Clauses provided the butchers the relief they sought. The Court declared that “under no construction of that provision [(the Due Process Clause)] that we have ever seen, or any that we deem admissible” was the monopoly problematic. Similarly, the justices of the majority stated that when it came to the Equal Protection Clause, “[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”\(^{64}\)

\(^{60}\) Ibid., 76 (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823)).

\(^{61}\) In particular, these restrictions on states include the Constitution’s Ex Post Facto Clause, the Bills of Attainder Clause, and the Contract Clause. See Slaughter-House Cases, 83 U.S. at 77.

\(^{62}\) Slaughter-House Cases, 83 U.S. at 77.

\(^{63}\) Ibid., 78.

\(^{64}\) Ibid., 81.
The majority opinion concluded by again acknowledging that the resolution of the Civil War and Reconstruction Amendments were designed to correct the “true danger” of the original Constitution: “the capacity of the State organizations to combine and concentrate all the powers of the State, and of the contiguous States, for a determined resistance to the General Government.” Nevertheless, this important reworking of American constitutionalism did not eradicate state sovereignty. “[O]ur statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights the rights of person and of property was essential to the perfect working of our complex form of government.”

In closing, the Court opined on its own special role in the American system of government, declaring “whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts.”

Four justices dissented. In a decision joined by Justices Bradley, Swayne, and Chief Justice Chase, Justice Field stated the question of the case: “whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation.” Like the justices of the majority, the dissenting justices declined to find protection for the butchers in the Thirteenth Amendment, focusing instead on the Fourteenth Amend-

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65 Ibid., 82.
66 Ibid.
67 Ibid., 89 (J. Field dissenting).
ment as its “supplement.”

Unlike the majority, however, the dissenting justices interpreted the Fourteenth Amendment as an important reworking of the American constitutional system. “A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.” If the Fourteenth Amendment did nothing more than recognize previously existing rights of United States citizens spelled out in the Constitution, the dissenters reasoned, then “it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage.” The better interpretation, according to Justice Field et al., was that though the Fourteenth Amendment created no new privileges or immunities, it did protect citizens’ fundamental rights from abridgement by the states.

Field’s dissenting opinion compared the Fourteenth Amendment’s Privileges or Immunities Clause to the Privileges and Immunities Clause of Article IV, which prohibits discrimination by states against citizens from other states. “What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.” Monopolistic charters offend this sense of fair play, and thus the dissenting justices would have struck the Louisiana act as contrary to the Fourteenth

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68 Ibid., 93 (J. Field dissenting).
69 Ibid., 95 (J. Field dissenting).
70 Ibid., 96 (J. Field dissenting).
71 Ibid., 100–101 (J. Field dissenting).
Justices Bradley and Swayne wrote additional dissenting opinions to emphasize some of the considerations driving their conclusions. Justice Bradley remarked that the Fourteenth Amendment increased the authority of federal courts by providing for “National security against violation by the States of the fundamental rights of the citizen.” 72 Prior to the Fourteenth Amendment “the protection of the citizen in the enjoyment of his fundamental privileges and immunities . . . was largely left to State laws and State courts.” 73 He observed that the work of the Supreme Court and the rest of the federal judiciary would likely increase their caseload as they defined the limits of state legislation, but further claimed that this increase in activity would be temporary. Once the limits were well defined, a new equilibrium would be reached.

Justice Swayne wrote separately to emphasize the important changes wrought by the Reconstruction Amendments. Indeed, he wrote, “these amendments may be said to rise to the dignity of a new Magna Charta.” 74 To the objection that his interpretation would bring about radical change to the American system, Justice Swayne asserted that such change was knowingly and deliberately made. “It is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact all are entitled to enjoy.” 75

The majority’s approach to the rights of national citizenship received praise. The New York Times (at the time a Republican newspaper) noted that the Court’s decision in the Slaughter-House Cases was “very important,” because “[i]t is calculated

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72 Ibid., 122 (J. Bradley dissenting).
73 Ibid., 121 (J. Bradley dissenting).
74 Ibid., 125 (J. Swayne dissenting).
75 Ibid., 129 (J. Swayne dissenting).
to throw the immense moral force of the Courts on the side of rational and careful interpretation of the rights of the States and those of the Union. It is calculated to maintain, and to add to, the respect felt for the Court, as being at once scrupulous in its regard for the Constitution, and unambitious of extending its own jurisdiction. It is also a severe, and we might almost hope, a fatal blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution.”

The Nation, similarly, lauded the majority’s ruling, declaring that “…the Court is recovering from the war fever, and is getting ready to abandon sentimental canons of construction. In the principal case there is, indeed, this drawback—that it is rendered by a divided bench; but no impartial lawyer, we fancy, will hesitate to say that the strength of the Court, as well as of the argument, was on the side of the majority….”

Praise was not confined to the press. The American Law Review declared that “[t]he line which separates the federal government from the states, and which of late years has trenched on what are called the reserved rights of the latter, was never so precisely defined as to make trite or tiresome new descriptions of its position; and the interpretation of the thirteenth, fourteenth, and fifteenth amendments to the constitution of the United States, which was called for by attempts to apply their letter, if not their spirit, to new states of fact not contemplated by the Congress nor the legislatures that made them, is the latest and one of the most important acts of government, growing out of the war.” In a later law review article, William L. Royall


78 American Law Review 7: 732 (1873). The writer (Fairman (1971, 1370) argues it is Arthur G. Sedgwick) seemed especially sensitive to states’ rights, continuing by saying, “[i]t is noteworthy that, while the executive department keeps Casey in New Orleans, and sends its soldiers to regulate
criticized the Court, arguing that the Privileges and Immunities Clause protected citizens against just the types of laws represented by the “odious privileges” granted by Louisiana,79 but, given his later writings, Royall seems unlikely to have been concerned with the decision’s possible implications for the rights of black citizens.80

The Slaughter-House Cases decision can be seen as minimalist. In it, the majority refused to find in the Reconstruction Amendments a general constitutional prohibition on states’ impinging on the fundamental rights of citizens. Indeed, the Court declined to act, allowing the state law to stand. At the time, the Court’s decision was seen as thoughtful and giving the proper interpretation of the Fourteenth Amendment. In subsequent decisions considered here, the Supreme Court affirmatively struck down laws passed by Congress subject to the Reconstruction Amendments. With these precedents in hand and its prerogative to interpret the meaning of the Reconstruction Amendments well established, subsequent Courts were willing to reconsider the questions raised in the Slaughter-House Cases and find the Fourteenth Amendment’s Due Process Clause contained a constitutional constraint on the ability of states to burden citizens’ fundamental rights.

4.4.2 United States v. Reese and United States v. Cruikshank

In 1876, the Supreme Court decided two cases involving the Reconstruction Amendments and the Enforcement Act of 1870. United States v. Reese81 came out of Kentucky, where an African-American citizen had been prevented by local election officials from paying a poll tax required for voting. The second case, United States v.

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79 Royall (1878, 581).

80 See Fairman (1971, 1373–1374) noting Royall’s later criticism of Court decisions guaranteeing black defendants juries that did not exclude black jurors. Fairman also questions Royall’s motives, identifying him as “an advocate and politician” rather than an academic. (Fairman, 1971, 1374).

81 92 U.S. 214 (1876).
Cruikshank,\textsuperscript{82} came out of federal prosecutions of participants in the bloody Colfax Massacre of Louisiana. Each case was decided in a way that not only denied relief to the African-American victims of the underlying injustices but also struck federal laws designed to protect the rights of citizens under the Reconstruction Amendments. The Court framed its rulings as the unavoidable results of procedural failings and legislative inexactitude. But later scholars have pointed to these decisions as part of the Court’s abandonment of Reconstruction and black citizens.\textsuperscript{83}

Reese

\textit{United States v. Reese}\textsuperscript{84} involved the indictment of Kentucky officials whose actions prevented an African-American citizen from voting. Citizens were required to pay a capitation tax to be eligible to vote. African-American citizen William Garner tried to pay the tax, but tax collector James F. Robinson refused to accept it because of Garner’s race. When he attempted to vote, Garner presented an affidavit explaining his attempt to pay the tax, but local elections officials refused to accept it. Garner was denied the vote.

The two election inspectors were then indicted under the Enforcement Act of 1870, federal legislation designed to enforce the Fifteenth Amendment’s guarantee of suffrage to African-American men.\textsuperscript{85} That the legislation was also known as the First

\textsuperscript{82} 92 U.S. 542 (1876).

\textsuperscript{83} See, \textit{e.g.}, Kaczorowski (2005, 178), writing of the two decisions that “[t]he Supreme Court’s handling of the Fourteenth, and, apparently, Fifteenth Amendments suggests its decisions were a calculated effort to reverse the constitutionally centralizing thrust of the Civil war and Reconstruction.”

\textsuperscript{84} 92 U.S. 214 (1876).

\textsuperscript{85} The charges were made under Sections 3 and 4 of the Act, the full text of which are as follows: “Sec. 3. And be it further enacted, That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and
Ku Klux Klan Act suggests that its primary purpose was to combat attacks upon the suffrage rights of African American citizens by private groups such as the Ku Klux Klan, in addition to preventing interference with such rights by state officials. The majority found fault with the construction of the legislation. According to the majority opinion written by Chief Justice Waite, the Fifteenth Amendment protected the equal rights of African-Americans—it did not create a general federal authority to oversee elections. Although the first section of the act declared that citizens be entitled to vote regardless of their race, color, or previous condition of servitude, those sections spelling out the punishment for official action denying such equal suffrage were not limited to cases of discrimination on the basis of race. Therefore, despite the fact that the law would have been constitutional had it been limited to actions of the type underlying the dispute, the Court ruled the act unconstitutional in its entirety—it was not “appropriate legislation” under Section 2 of the amendment.

Subsequent Courts would reject the Reese Court’s analysis of the question of sev-
erability. In *United States v. Raines* the Court refused to engage in consideration of hypothetical applications of statues, declaring “if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality.” Indeed, the Supreme Court in *Raines* explicitly overruled *Reese*, stating “to the extent *Reese* did depend on an approach inconsistent with what we think the better one and the one established by the weightiest of the subsequent cases, we cannot follow it here.” Nevertheless, in *Reese* itself the Court denied the will of Congress, striking a law that was constitutional as applied to the facts at hand.

The Court’s narrow construction of the statute and its sections seemed to be motivated by concerns about its role in American policymaking. Cognizant of the law–politics divide, and unwilling to cross it, the Court worried that by reading the law more broadly, it would create a “dangerous” condition in which “the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” Such an arrangement would “substitute the judicial for the legislative department of the government.”

In a tortured concurring opinion, Justice Clifford agreed that the indictment was not pleaded properly and would have also thrown out the conviction. But rather than find the Enforcement Act unconstitutional, Justice Clifford insisted that the

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87 Ibid., 24–25.
88 Ibid., 24.
89 It is important to note that the Court did not foreclose the possibility of future federal legislation protecting the right to vote. In declaring the Court’s holding, the majority wrote, “[w]e must therefore decide that Congress has not as yet provided by ‘appropriate legislation’ for the punishment of the offense charged in the indictment.” *Reese*, 92 U.S. at 221 (emphasis added).
90 *Reese*, 92 U.S. at 221.
91 Ibid.
pleading did not make it clear that Garner had met all the local requirements to be allowed to vote.

Justice Hunt dissented from his colleagues. Justice Hunt argued that the predicament of citizen Garner was just the sort of case Congress was trying to prevent when it passed the Enforcement Act. Indeed, Justice Hunt argued that the text of Sections 3 and 4 of the Enforcement Act were clearly within the scope of the Fifteenth Amendment’s “appropriate legislation” because both Sections 1 and 2 contained the language “without distinction of race, color, or previous condition of servitude,” and both Section 3 and Section 4 cited these clauses via the words “as aforesaid.”

Moreover, Justice Hunt articulated a very deferential standard for considering the constitutionality of congressional acts. He cited the United States Bank Cases, the Legal Tender Cases, and Gibbons v. Ogden, as instances in which the Court

92 The full text of Sections 1 and 2 are as follows: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

SEC. 2. And be it further enacted, That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens and opportunity to perform such prerequisite, or to become qualified to vote, is shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.” 16 Stat. 140.

93 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), upholding Congress’ power to establish a national bank and denying states’ power to tax said bank, and Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), following McCulloch and requiring an Ohio State Auditor to return funds seized from the federally established bank under a state tax.

94 79 U.S. (12 Wall.) 457 (1870), upholding the establishment of paper money.

95 22 U.S. (9 Wheat.) 1 (1824), striking under the Supremacy Clause a New York licensing law
recognized the principle that “it was for Congress to determine whether the necessity had arisen which called for its action.” Similarly, he pointed out that the Court had been very deferential of congressional attempts to enforce the Constitution’s Fugitive Slave Clause in cases such as *Prigg v. Pennsylvania* and *Ableman v. Booth*—“[i]t was said to be a necessary conclusion, in the absence of all positive provision to the contrary,” he wrote, “that the national government is bound through its own departments, legislative, judicial, or executive, to carry into effect all the rights and duties imposed upon it by the Constitution.” The Court recognized that “the right to legislate on the subject belongs to Congress *exclusively*” despite the fact that the Fugitive Slave Clause lacked an “appropriate legislation” provision. Thus, Hunt concluded, “Courts should be ready, now and here, to apply these sound and just principles of the Constitution,” and uphold the Enforcement Act and affirm the validity of the indictments.

Justice Hunt also dismissed an argument (which was not made in the majority opinion) that the Enforcement Act was unconstitutional because it applied to state elections and the Fifteenth Amendment applied only to the “right of citizens of the United States to vote.” Recall the Court’s distinction in the *Slaughter-House Cases* between the privileges and immunities of “citizens of the United States,” and the privileges and immunities of “citizens of the states.” The *Reese* Court could have conceivably made the same distinction and struck the act as reaching beyond the rights of U.S. citizens.

The majority’s decision in *Reese* hewed closely to the *Marbury* mold for a proper “legal” decision. The justices could only express sympathy for the injustice suffered inconsistent with federal legislation.

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96 *Reese*, 92 U.S. at 253 (J. Hunt dissenting).
97 Ibid., 256 (J. Hunt dissenting).
98 Ibid., 256 (J. Hunt dissenting, emphasis added).
99 Ibid., 256 (J. Hunt dissenting).
by the plaintiff—their professional obligations required that they strike down the
law due to a technicality. And what else is law but carefully and objectively noting
and following the written requirements of higher authorities? As with Marbury, the
restrained decision in Reese had the added advantage of striking down a federal law
no one was prepared to defend. The Court’s declaration of impotence to deal with
the underlying injustice was accompanied by a subtle assertion of power. The Court
exercised its authority via judicial review and used the Reconstruction Amendments
to establish limits to congressional power—all without worrying about the prospect
of an inter-branch battle over such limits. Reese was another case that built public
support for judicial authority.

Cruikshank

The Colfax Massacre in Louisiana’s Parish has been described as the “bloodiest single
act of carnage in all of Reconstruction.” Following a disputed local election, black
Republicans and white Fusionists in April 1873 engaged in a pitched battle focused
on the Colfax Parish Courthouse. The whites set fire to the occupied courthouse and
executed black prisoners. The black death toll has been difficult to ascertain due to
unreliable reports from both sides. Lane (2008, 265–266) estimates a range of 61 to
81; Keith (2008, 109) concludes that the “most conservative” estimate is 71, noting
that “the most morbidly diligent white veteran historian of the massacre” accepted
a count of 165. The white death toll—three—is not subject to dispute. Ultimately
two of the white participants in the violence were brought to federal court under
charges of interfering with the rights of their African American victims under section
6 of the Enforcement Act of May 31, 1870.

100 Foner (1988, 530).

101 “Sec. 6. And be it further enacted, That if two or more persons shall band or conspire together,
 or go in disguise upon the public highway, or upon the premises of another, with intent to violate any
 provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent
 or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the

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The resulting case, *United States v. Cruikshank*,\(^{102}\) made its way to the Supreme Court. In a decision written by Chief Justice Waite, the Supreme Court did not find any violation of any constitutionally protected right and, moreover, found the charges “too vague and general,” making conviction impossible.\(^{103}\) For the Court, the matter was one of legal procedure than of right and wrong. The federal government’s case against the defendants was flawed. Regardless of the reality of the horrific crimes that spawned the case, therefore, the case against them must be dismissed.

The prosecution had certainly tried to build a strong case, bringing sixteen counts against each of the defendants.\(^{104}\) The defendants were accused of interfering with their victims’ First Amendment rights to peaceably assemble; Second Amendment rights to bear arms; rights under the Fourteenth Amendment’s Due Process, Equal Protection, and Privileges and Immunities clauses; Fifteenth Amendment rights to vote; as well as a general interference with the “free exercise and enjoyment” of all rights and privileges of national citizenship.\(^{105}\) The Court rejected each in turn.

The majority’s ruling, along with its explanation of complicated federal system that subjected citizens to “two governments,” made clear that the Court—consistent with its decision in the *Slaughter-House Cases* (which it cited)—did not believe that the Reconstruction Amendments had effected a radical change to the constitutional

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\(^{102}\) 92 U.S. 542 (1876).

\(^{103}\) Ibid., 559.

\(^{104}\) There was a repetition of counts: eight were preceded by an assertion that the defendants “banded together”, the next eight were the same with the words “combine, conspire, and confederate together” used in place of “band together.” Ibid., 544–545.

\(^{105}\) Ibid., 544–545.
system such that the Bill of Rights were incorporated against the states.\textsuperscript{106} The First and Second Amendments, wrote the Court, did not confer rights upon citizens. The rights to peaceable assembly and bear arms are “attributes of citizenship under a free government.”\textsuperscript{107} The Amendments merely restricted Congress from infringing these rights—it placed no restriction on the states. Accordingly, when such rights of individuals are violated, they could find redress only from their states.\textsuperscript{108} The majority found the due process claims “even more objectionable.”\textsuperscript{109} Protecting the life, liberty, and property of their citizens is the “very highest duty of the States.”\textsuperscript{110} For the Court to find that the Fourteenth Amendment’s Due Process clause gave the federal government the power to punish the conspiratorial acts of individuals to impinge on the life, liberty, and property interests of another citizen would violate state sovereignty; “[i]t is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.”\textsuperscript{111} The Due Process clause offered citizens protection against state action—it did not provide a cause of action against other individuals.

Similarly, the Court stated that the Equal Protection clause did not “add any-

\textsuperscript{106} See ibid., 549–551.
\textsuperscript{107} Ibid., 551.
\textsuperscript{108} See ibid., 552 regarding the First Amendment (“The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States.”) and at 553 regarding the Second Amendment (“This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called, in The City of New York v. Miln [citation removed], the ‘powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,’ ’not surrendered or restrained’ by the Constitution of the United States.”).
\textsuperscript{109} \textit{Cruikshank}, 92 U.S. at 553.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid., 553–554.
thing to the rights which one citizen has under the Constitution against another.”

The federal government cannot use that provision to protect individuals against each other, “[t]he only obligation resting upon the United States is to see that the States do not deny the right [to equal protection of the laws].” The Court suggested that a cognizable claim could have been made under the Civil Rights Act of 1866—passed after the Thirteenth Amendment in order to protect the fundamental rights of all citizens regardless of race, color, or previous condition of servitude—but because there was “no allegation that this was done because of the race or color of the persons conspired against,” the question was not raised.

The Court cited Reese for the proposition that the Fifteenth Amendment did indeed provide citizens with a new constitutional right—protection against discrimination with regard to voting rights. But, again, the prosecutor’s counts against the defendants were improperly pled. Nowhere in the counts was an allegation that the defendants’ intent was to prevent the victims from voting because of their race. “We may suspect that race was the cause of the hostility,” acknowledged the Court, but “[e]verything essential must be charged positively, not inferentially.”

The final charges that the defendants had interfered with the victims’ “free exercise and enjoyments of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States” also failed to describe a legally cognizable offense. The charges should have specified which particular rights were being interfered with. As written, the counts failed due to vagueness.

Unlike the Reese decision, the Court’s opinion in Cruikshank did not strike any
federal law. Indeed, the Cruikshank decision can be seen as especially modest—the Court explicitly rejected a reading of the Reconstruction Amendments that could have given the judicial branch a considerably stronger ability to shape the American polity by applying the Bill of Rights to the states. Nevertheless, the justices placed a severe restriction on the “appropriate legislation” clauses of the Reconstruction Amendments. In particular, the Court limited legislation in pursuit of the goals of the Reconstruction Amendments to addressing only state action. This ruling thus placed some constraints on Congress. In the aftermath of Cruikshank, “appropriate legislation” to protect the rights created by the Reconstruction Amendments was limited to laws protecting citizens against state action. Individuals and private organizations were under no obligation to abide by the Radical Republicans’ vision of equality of all.

Reaction to the Decisions

As with its ruling in the Slaughter-House Cases, the Court enjoyed more praise than criticism for its rulings in Reese and Cruikshank. Newspapers and law reviews alike cheered the Court’s willingness to check a Congress that had exceeded its authority and threatened the American system of federalism. “The fatal defect in the legislation,” wrote the Independent, “consists in an assumption, which, if it were true, would revolutionize our whole system of government, and as remarked by the Supreme Court, clothe Congress at its discretion with jurisdiction in respect to the entire domain of civil rights heretofore belonging exclusively to the States.” The New York Times argued that the problem with the laws was “the tendency to confound the right which one citizen must respect in another with the rights whose enjoyment the State must guarantee to all its citizens. The United States have neither the power nor the obligation to do police duty in the States, a fact which both

118 Independent (6, 13 April 1876), quoted by Warren (1922, 605).
Judges and Legislators have committed serious mistakes in ignoring.”\textsuperscript{119} The \textit{Times} felt that the opinion indicated that Waite was acquitting himself ably, writing that “[s]o far as they may be regarded as reflecting [Waite’s] influence upon the Court, they afford abundant evidence that his appointment was a judicious one, adding strength and dignity to that great tribunal.”\textsuperscript{120} The \textit{Times} wrote that the decisions showed that the Court could be relied on to capably fulfill its important roles: “The decisions deal with constitutional questions of the highest order, and deal with them in a way to render still more firm the confidence of the people in the impartiality and wisdom of the Court, and to enhance the value of that department of the Government as a means of securing the rights of citizens. It is the highest function of the Supreme Court to interpret the National Constitution.”\textsuperscript{121} Criticism was reserved for the law the Court had struck. The \textit{New York Tribune} argued that after the war, “greedy and malignant partisanship began to demand, as necessary to the public welfare, measures which were only needful for the maintenance of unworthy or corrupt men in power. Of these measure, the Enforcement Act was one of the most odious. Under it, shameful abuses have been perpetrated.”\textsuperscript{122} Thanks to the Court, the Tribune continued, “[i]t will now lie dead upon the statute book, to remind future generations of Americans that no conceivable abuse of the Constitution by one party can justify disregard of the Constitution by the other.”\textsuperscript{123}

The \textit{Chicago Tribune} was more conflicted, stating that the decision was “fortunate, in so far as it restrains Congress from enacting penal legislation in elections beyond the power conferred upon it by the Constitution, the infraction of which would be seriously dangerous, no matter what party were in power. But it is unfor-

\textsuperscript{120} \textit{New York Times}, (8, 29 March 1876), quoted by Warren (1922, 608).
\textsuperscript{121} \textit{New York Times}, (8, 29 March 1876), quoted by Warren (1922, 608).
\textsuperscript{122} \textit{New York Tribune}, (29 March 1876), quoted by Warren (1922, 606).
\textsuperscript{123} \textit{New York Tribune}, (29 March 1876), quoted by Warren (1922, 606).
tunate, in so far as it may, for a time, open up the opportunity for serious abuses, and perhaps terrorism in the South.” 124 But heeding the justices’ assurances that more precisely worded statutes could remedy the constitutional flaw, the *Chicago Tribune* noted that all hope was not lost, provided Republican voters turned out. “The necessity for further and proper legislation, to carry into effect the provisions of the Fifteenth Amendment, will be another reason, however, for renewed effort on the part of the Republican Party to regain control of Congress.” 125 But not everyone was happy. *Harper’s Weekly* had argued before the decision came down that a decision like that ultimately rendered would make the statute “only a pretense, keeping a promise to the colored man’s ear and breaking it to his hope,” and “if the Amendments, intended to secure all citizens of the United States from legal discriminations on account of color, fail to express their intention, the blunder is unprecedented.” 126

In any event, the Court’s ruling did not inspire any political action to counteract its decision.

4.4.3 United States v. Harris

*United States v. Harris* 127 involved a federal case brought against residents of Tennessee who conspired to physically attack prisoners in the custody of a county sheriff, thereby depriving them of “due and equal protection of the law” under Section 5519 of the Revised Statutes of the United States. 128 In a deliberate and methodical opinion

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125 *Chicago Tribune* (22, 29 March 1876), quoted by Warren (1922, 606–607).


127 106 U.S. 629 (1883).

128 The text of the act in question is as follows: “SEC. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by
written by Justice Woods, the Supreme Court held Section 5519 unconstitutional.

The opinion began by noting the Court’s highly deferential standard of judicial review. “Proper respect for a coordinate branch of the government,” the Court noted, “requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.”¹²⁹ Nevertheless, the Court continued “every valid act of Congress must find in the Constitution some warrant for its passage.”¹³⁰ The Court quoted with approval the test set out by Justice Story in his Commentaries on the Constitution: “Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be express in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.”¹³¹ The opinion proceeds by considering, in turn, each of the “only four paragraphs in the Constitution which can in the remotest degree have any reference to the question in hand.”¹³²

The Fifteenth Amendment does not allow it, the Court concluded. The Fifteenth Amendment protected the equal right to vote of citizens based on race, color, or previous condition of servitude. The act in question, however, sought to protect citizens from the trampling of their equal privileges and immunities by other private actors. That the act in question dealt with neither race nor voting rights meant that

imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.” This section was originally part of Section 2 of the third Enforcement Act, signed into law on April 20, 1871.

¹²⁹ Harris, 106 U.S. at 635.
¹³⁰ Ibid., 636.
¹³¹ Ibid. (quoting Justice Story, Commentaries on the Constitution, Sec. 1243).
¹³² Harris, 106 U.S. at 636.
it could not find its authority in the Fifteenth Amendment.

Although it was “strenuously insisted” that the Fourteenth Amendment permitted the act, the Court rejected this claim. Citing its own recent precedents in the *Slaughter-House Cases* and *Cruikshank*, the Court stressed that the Fourteenth Amendment restrained the *states*, not private citizens. The Fourteenth Amendment had not created a radical reworking of the American political system. Each state retained its original “duty of protecting all its citizens in the enjoyment of an equality of rights;” the Fourteenth Amendment merely placed an obligation on the federal government to “see that the states do not deny the right.”\(^{133}\) Thus when the laws and official actions of the state respect the equality of all citizens before the law, the Fourteenth Amendment provides Congress no authority to interfere.\(^{134}\) By contrast, Section 5519, wrote the Court, “applies no matter how well the state may have performed its duty.”\(^{135}\) Indeed, “the gravamen of the charge against the accused is that they conspired to deprive certain citizens of the United States and Tennessee of the

\(^{133}\) Ibid., 639 (slightly misquoting *Cruikshank*, 92 U.S. 542 at 554–555 (and neglecting to note that the selected quotation comes from two different parts of the *Cruikshank* opinion. Compare *Cruikshank*, 92 U.S. at 554 ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.") and 555 ("Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.") with *Harris* at 638–639 ("When the case of *U. S. v. Cruikshank* came to this court the same view was taken here. The chief justice, delivering the opinion of the court in that case, said: ‘The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, and no more. The power of the national government is limited to this guaranty.’"))

\(^{134}\) See *Harris*, 106 U.S. at 639.

\(^{135}\) Ibid.
equal protection accorded them by the laws of Tennessee”—such a charge that “is not warranted by any clause in the Fourteenth Amendment to the Constitution.”

The Court also rejected finding authority for the bill in the Thirteenth Amendment and the Privileges and Immunities Clause of Article IV. The Thirteenth Amendment, the Court acknowledged, gave Congress the power to protect all individuals from being subjected to slavery or involuntary servitude. Thus perhaps the legislation would be permitted under the Thirteenth Amendment if it were limited to punishing attempts by individuals to interfere with the rights of others motivated by racial animus. But the act in question reached broader than the Thirteenth Amendment’s protections allowed. Under the act, two white citizens could be punished for conspiring to deprive another white person of equal protection of the laws; or two black citizens could be punished for conspiring to deprive another black citizen of equal protection. Statutes broader than their constitutional authority, the Court wrote, citing Reese, cannot be sustained. Allowing the punishment of such conspiracies under the Thirteenth Amendment would effectively “accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded”—a much greater scope of authority every conceived of for the federal government. Similarly, the Article IV Privileges and Immunities Clause was never intended to have “conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen conferred by the State of which they were both residents on all its citizens alike.”

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136 Ibid., 640.

137 In fact, this was just the situation at hand in Harris, though it’s not clear that Justice Woods or his brethren were aware of it. Brandwein (2011) made this important and interesting discovery, which had previously gone unnoticed (or at least unnoted).

138 Harris, 106 U.S. at 641.

139 Ibid., 643.

140 Ibid., 644.
states as the principal protectors of citizens and their rights. The act as written could be interpreted to enable federal prosecution of any crime by individuals—a situation not contemplated by the Reconstruction Amendments. The act under which the defendants had been charged was thus unconstitutional.

The *New York Times* agreed with the decision, declaring that “[t]he mere statement of the case makes it clear that it was covered by the statute but not by the constitutional amendment.”\(^{141}\) The paper reflected thoughtfully upon the Reconstruction period: “For some years after the close of the war there was a very strong tendency in Congress to frame legislation to meet the exigencies of the time without a very strict regard for the limitations of the Constitution. The courts have been gradually undoing its work so far as it was carried beyond the proper limits, but it can hardly be said, nevertheless, that the legislation did not serve its purpose, or that the purpose was not a useful one.”\(^{142}\) Thus this reliably Republican newspaper endorsed both the claim that the Radical Republicans had occasionally pursued legislation not permitted even by their Reconstruction Amendments and the notion any such constitutional overreaches had been in pursuit of noble purposes.

The Court’s decision in *Harris* satisfied an important constituency—those moderates who acknowledged the evil intentions and actions of Southern Democrats, but who believed that all that could be done had been done and that it was time for the nation to move forward and confront new challenges. The decision expressed sympathy with the plight of those who might be discriminated against improperly, but asserted that the Constitution already provided protection against such acts. It was, however, up to Congress to carefully craft legislation that defended these rights without remaking American federalism (and thereby exceeding the scope of even the Reconstruction Amendments).

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\(^{142}\) Ibid.
The Supreme Court’s decision in the Civil Rights Cases is typically described as the final nail in the coffin of post-Civil War efforts by the federal government to actively protect the rights of all citizens equally. The case arose from attempts to enforce the public accommodations provisions of the Civil Rights Act of 1876. The law entitled all persons “to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement” and declared that any owner of such a public accommodation who denied admittance to black citizens be subject to a five hundred dollar fine, to be paid to the victim of discrimination. In the cases before the Court, black citizens brought complaints against innkeepers and theater owners.

Justice Bradley wrote the majority opinion. He immediately cut to the chase: “It is obvious that the primary and important question in all the cases is the constitutionality of the law, for if the law is unconstitutional, none of the prosecutions can stand.” He continued by arguing that any possible authority for the law could come only from the Reconstruction Amendments. Bradley’s analysis focused, in turn, on the Fourteenth and Thirteenth Amendments.

The Fourteenth Amendment, wrote Bradley, was directed at state action. “Individual invasion of individual rights is not the subject matter of the amendment.” The “enforce by appropriate legislation” language of Section V of the amendment also refers to this prohibition on state action—Congress can “adopt appropriate leg-

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143 109 U.S. 3 (1883).
144 Ibid., 8–9.
145 See ibid., 10 (“Of course, no one will contend that the power to pass [the law in question] was contained in the Constitution before the adoption of the last three amendments.”).
146 Ibid., 11.
islation for correcting the effects of such prohibited State laws and State acts.” \(^\text{147}\) But the Fourteenth Amendment did not empower Congress to “create a code of municipal law for the regulation of private rights.” \(^\text{148}\) Bradley drew an analogy with the Contract Clause of the Constitution. The Contract Clause “did not give to Congress power to provide laws for the general enforcement of contracts” or give federal courts jurisdiction over contract disputes; instead it gave Congress “the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected” (power that the Congress exercised via the 25th section of the Judiciary Act of 1789 giving federal courts authority to review state laws or orders argued to be contrary to the Constitution). \(^\text{149}\) Congressional action in pursuance of the goals of the Fourteenth Amendment must similarly be focused on preventing wrongs caused by state action. “Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property,” argued the Court, which would “make Congress take the place of the State legislatures and to supersede them.” \(^\text{150}\) In contrast, the public accommodations provisions of the Civil Rights Act did not seek to correct prohibited state laws or actions. Rather, the act sought to regulate private behavior, and was thus not authorized by the Fourteenth Amendment. \(^\text{151}\) As such, it encroached on the “domain of local jurisprudence.” \(^\text{152}\)

The Court distinguished between impairments of civil rights by individuals supported by state authority and unsupported by state authority. In the case of wrongs by individuals supported by state authority, the Fourteenth Amendment permits Congress to provide federal remedies as the Court had recently held in \textit{Ex Parte}
Virginia. But interference with such rights by individuals unsupported by state authority are merely “private wrongs,” which may be “vindicated by resort to the laws of the State.” Similarly, the majority distinguished the Fourteenth Amendment’s focus on protecting citizens against state action from those matters over which the Constitution gives Congress plenary power in Article I, Section 8. “Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject is not now the question,” wrote Bradley for the Court. “What we have to decide is whether such plenary power has been conferred upon Congress by the Fourteenth Amendment, and, in our judgment, it has not.” The Court offered no real justification of this conclusion, which firmly established limits on Congress’s ability to legislate in pursuit of the protection of citizens’ rights of due process, equal protection, and privileges and immunities.

The Court thereby removed the establishment of the limits of the provisions of the Fourteenth Amendment from the realm of politics and identified it instead as a question of law. Granting Congress plenary authority over the issues implicated by the Fourteenth Amendment did not mean that the provisions of the unpopular public accommodations bill were required by the Constitution. It would have meant simply that it those provisions constituted part of the law of the land so long as the statute remained on the books. If Congress no longer wished to give effect to Charles Sumner’s pet project, it could simply nullify the law.

Bradley and the majority then turned to consideration of the Thirteenth Amendment. The argument presented to the Court was that the Thirteenth Amendment

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153 100 U.S. 339 (1879) (upholding Section 4 of the Civil Rights Act providing for punishment of individuals who interfere with the rights of all citizens to serve as jurors without regard to race, color, or previous condition of servitude).

154 Civil Rights Cases, 109 U.S. at 17.

155 Ibid., 18 (citing the power to regulate commerce, coin money, establish post offices, declare war, etc.).

156 Ibid., 19.
authorized Congress to enact “appropriate legislation” to “pass all laws necessary and proper for abolishing all badges and incidents of slavery.” The Court did not directly address this assertion, but instead focused on a secondary question: whether the public accommodations provision fell within this authority; that “the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre does subject that person to [a] form of servitude, or tend to fasten upon him [a] badge of slavery.” Bradley acknowledged that American slavery had an obvious and important racial component, but he nevertheless rejected that denying persons admittance to public accommodations because of their race necessarily implicated slavery. Thus the public accommodations provisions of the Civil Rights Act fell outside the Thirteenth Amendment because it was not legislation designed to prevent acts that would impose badges of slavery on citizens—it dealt instead with class discrimination that was covered by the Fourteenth Amendment. Yet the Act nevertheless fell outside the Fourteenth Amendment because it was not designed to be corrective of prohibited state action. The law was unconstitutional.

Bradley concluded the majority opinion with a declaration that strikes a discordant note with readers familiar with the subsequent history of violence, oppression, and discrimination against black citizens of the United States. He wrote that “[w]hen a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected.” This statement has been cited time and again as evidence of the justices’ hostility (or at

157 Ibid., 20.
158 Ibid., 21.
159 Ibid., 25.
least utter ignorance) of the reality confronting black Americans.

Justice Harlan wrote a vigorous dissent, in many ways foreshadowing his later and more famous dissent in *Plessy v. Ferguson.*

“I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism,” he declared.

He began his analysis by noting the Court’s longstanding deference to the legislative branch. He noted that this standard was applied by the Court in assessing the constitutionality of federal legislation passed in pursuit of the Fugitive Slave Clause in both *Prigg v. Pennsylvania,* when it upheld the Fugitive Slave Law of 1793, and in *Abelman v. Booth,* when it upheld the Fugitive Slave Act of 1850. These laws were upheld even though the power of Congress to pass them was merely implied, in contrast to the explicit authority granted Congress to enforce the Thirteenth and Fourteenth Amendments.

Justice Harlan reminded his colleagues that American slavery “rested wholly upon the inferiority, as a race, of those held in bondage.” Thus federal legislation meant to fully protect the equal rights of African American citizens clearly fell within the purposes of the amendments. Moreover, Justice Harlan pointed out that the use of public accommodations was an important element of living a life of liberty. Such businesses enjoyed specific protections at law that acknowledged their “quasi-public functions”—thus the Congress could pass legislation directing their actions under

160 163 U.S. 537 (1896).
161 *Civil Rights Cases,* 109 U.S. at 26 (J. Harlan dissenting).
162 See ibid., 27–28 (J. Harlan dissenting).
163 41 U.S. (16 Pet.) 539 (1842).
165 See *Civil Rights Cases,* 109 U.S. at 33–34 (J. Harlan dissenting).
166 Ibid., 36 (J. Harlan dissenting).
the authority granted it by the Thirteenth Amendment.\footnote{See ibid., 37–43 (J. Harlan dissenting).}

Turning to the Fourteenth Amendment considerations, Justice Harlan took issue with the majority’s interpretation of the amendment as providing Congress the power only to pass laws correcting state actions. Such an interpretation renders the “enforce by appropriate legislation” oddly meaningless. After all, he notes, “had the fifth section of the Fourteenth Amendment been entirely omitted, the judiciary could have stricken down all State laws and nullified all State proceedings in hostility to rights and privileges secured or recognized by that amendment.”\footnote{Ibid., 46 (J. Harlan dissenting).} The Fourteenth Amendment did something different by giving Congress the authority to protect all the rights of citizens as set out in all parts of the Fourteenth Amendment. “The citizenship thus acquired by [the African American] race in virtue of an affirmative grant from the nation may be protected not alone by the judicial branch of the government, but by congressional legislation of a primary direct character, this because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action.”\footnote{Ibid., 46 (J. Harlan dissenting).} Harlan insisted that black citizens’ right to be treated the same as white citizens was an obvious purpose of the Reconstruction Amendments.\footnote{Justice Harlan’s opinion also contains an interesting exploration of the idea that the Civil Rights Act may have been authorized under Congress’s Commerce Clause power—an interesting foreshadowing of the more successful Civil Rights Movement nearly a century later.}

Furthermore, Justice Harlan criticized the majority for deviating from the Court’s history of having “always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce the rights secured by that instrument.”\footnote{Civil Rights Cases, 109 U.S. at 50–51 (J. Harlan dissenting).} Justice Harlan also took issue with the majority’s assertion that black citizens enjoyed treatment as a “special favorite of the law.” He wrote, “[i]t is, I submit, scarcely just to say that the colored race has been the special favorite of the
laws.” Continuing, he wrote, “The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.”

The reaction to the Court’s decision in the Civil Rights Cases was generally quite positive. The general view seems to have been that with the public accommodations provision of the Civil Rights Bill of 1875 Congress tried to reach matters that were simply beyond the reach of the federal government. Thus, the Independent declared “It is important for both the State and the Federal Government to keep within the sphere assigned to it. In this way, and in no other way, can our duplicate system of government be harmoniously and successfully worked,” and further noting that although “several leading colored men have expressed great indignation and disappointment, the Court is clearly right. The question as to the class of rights involved belongs exclusively to the States. There is the proper place to look for a remedy against any abuse of these rights.” And Harper’s Weekly wrote that the decision helped correct a “dangerous centralizing tendency in the government,” and the decision was in agreement with “the true doctrine of National supremacy, with distinctly defined State authority—one of the great traditions of the Supreme Court”; and noted that the “long and terrible Civil War sprang from the dogma of State sovereignty, invoked to protect and perpetrate slavery, it was natural that, at its close, the tendency to magnify the National authority should have been very strong, and especially to defend the victims of slavery. . . . In a calmer time, the laws passed under that humane impulse are reviewed, and when found to be incompatible with strict constitutional authority, they are set aside. It is another illustration of

172 Ibid., 61 (J. Harlan dissenting).
the singular wisdom of our constitutional system.”174 The Nation wrote that “The decision settles the point forever, that the Fourteenth Amendment merely adds new limitations upon State action to those already existing in the Constitution, and does not change in any way the fundamental structure of the Government.”175

The New York Times had much praise for the Court, declaring that “[t]he Court has been serving a useful purpose in thus undoing the work of Congress” and “The fact is, that, so long as we have State governments, within their field of action we cannot by National authority prevent the consequences of misgovernment. The people of the State are dependent on their own civilized ideas and habits for the benefits of a civilized administration of laws.”176 The Court had strongly disliked the public accommodations provision of the Civil Rights Bill of 1875.177 The Times

175 Nation, (no date), quoted by Warren (1922, 613).
177 See, e.g., “While these various measures [that became the Civil Rights Bill] were under discussion, The [New York] Times took occasion frequently to point out that they were each and all impracticable, unwise, and, above all, without authority in the Constitution.” . . . “Finally, after eight years, in which the law has been practically a dead letter, the Supreme Court has decided, as it was evident that it must decide, that the act was unconstitutional. But while the law has, in one sense, been inoperative, in another it has been of great influence, and that mischievous. It has kept alive a prejudice against the negroes and against the Republican Party in the South, which without it would have gradually died out. It has furnished demagogues like Butler with the means of misleading the colored race, arousing hostility among the Southern whites, and rendering the Republican Party ridiculous. Unhappily, the decision which kills the law comes too late to remedy the ills which it produced. The principle which it involves is no longer an issue in national politics and can never again be made one. The judgment of the court is but a final chapter in a history full of wretched blunders, made possible by the sincerest and noblest sentiment of humanity, but in which the cunning and conscienceless schemers of the Butler school have played the larger part.” (“The Rights of Negroes.” New York Times, 18 October 1883: 4.); and “For several years after the ratification of this [Fourteenth] amendment Congress appears to have gone far beyond its limits in what was assumed to be appropriate legislation for the enforcement of its provisions, and judicial interpretation has been gradually undoing some of its work. It is probable that the rights of citizens to equal privileges on railroads and steam-boats and in hotels and theatres will henceforth be relegated to the keeping of the States where they belong, with the clear understanding, however, that the States are prohibited in the making and enforcement of their laws from denying equal protection to all. There will be more or less failure of the right principle until public sentiment is brought into accord with it, but the national Government cannot deal with offenses which are those of persons or corporations and not of States.” (“The Question of Equal Rights.” New York Times, 17 June 1883: 6).
acknowledged, but rejected Harlan’s forceful dissent: “The difference between Judge Harlan and the court [in the Civil Rights Cases] is one which has always existed and probably always must. The tendency during the war period was toward the construction which he favors. Since then a reaction has set in, which, so far, is beneficent. The recent decision has satisfied public judgment, and Justice Harlan’s will hardly unsettle it.”¹⁷⁸

Overall, popular sentiment seemed to be on the side of the Court. Indeed, Fairman (1987) surveyed “virtually every bound newspaper” in the Library of Congress for a period of two weeks following the decision for editorial comment. His results suggest that public opinion was resoundingly on the side of the Court.¹⁷⁹ But, it must be said, not everyone cheered the Court’s ruling. Speaking at the Civil Rights Mass Meeting, Frederick Douglass gave a speech decrying the Court’s decision. In it, he said: “It is said that this decision will make no difference in the treatment of colored people; that the Civil Rights Bill was a dead letter, and could not be enforced. There is some truth in all this, but it is not the whole truth. That bill, like all advance legislation, was a banner on the outer wall of American liberty, a noble moral standard, uplifted for the education of the American people. There are tongues in trees, books, in the running brooks,—sermons in stones. This law, though dead, did speak. It expressed the sentiment of justice and fair play, common to every honest heart. Its voice was against popular prejudice and meanness. It appealed to all the noble and patriotic instincts of the American people. It told the American people that they were all equal before the law; that they belonged to a common country and were equal citizens. The Supreme Court has hauled down this flag of liberty in open day, and before all the people, and has thereby given job to the heart of every man in the land who wishes to deny to others what he claims for himself.

It is a concession to race pride, selfishness and meanness, and will be received with joy by every upholder of caste in the land, and for this I deplore and denounce that decision.”

4.4.5 Other Important Cases

It is not enough to look at the five cases considered in depth here and conclude that the Waite Courts taken as a whole were hostile to some combination of minority rights, national power, and the Reconstruction Amendments themselves. Other decisions issued by the Court during this period produced outcomes favorable to each of these interests. Table 4.2 places some of these decisions in the historical context of the Supreme Court.

To be sure, the Court continued to take a dim view of arguments that the Privileges and Immunities Clause increased the rights of national citizenship. In *Bradwell v. Illinois*,\(^\text{181}\) announced the day after the Court’s decision in the *Slaughter-House Cases*, the Court denied the claims of Myra Bradwell that the Privileges and Immunities Clause required states to admit women to the bar if they met all other requirements (as she had, passing the bar exam with high honors\(^\text{182}\)). Chase was the lone dissenter, but, because he was deathly ill, did not write an opinion.\(^\text{183}\) Three of the other dissenting justices in the *Slaughter-House Cases* thus sided with the

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\(^{180}\) Speech of Frederick Douglass, 22 October 1883 (Civil Rights Mass Meeting, Washington, DC).

\(^{181}\) 83 U.S. (16 Wall.) 130 (1873).

\(^{182}\) Friedman (1993, 18).

\(^{183}\) See Aynes (1999) exploring Chases’s views on women, influenced as they were by his daughter Kate, and speculating as to what Chase might have written.
majority. Similarly, in *Minor v. Happersett*, a unanimous Court acknowledged that women were citizens, but denied that the Privileges and Immunities Clause guaranteed all citizens included a right to vote.

In a series of cases from 1880 and 1881, the Supreme Court upheld federal protection of civil rights against state action. In *Strauder v. West Virginia*, the Court ruled that a state law that denied African-American citizens the ability to sit as jurors violated the Equal Protection rights of a black criminal defendant and upheld federal legislation permitting removal of the case to federal court. Similarly, in *Ex parte Virginia*, the Court upheld federal legislation under which a state judge was charged for excluding African-American citizens from a jury. The last of these cases, *Neal v. Delaware*, involved the state criminal trial of a black defendant who had been sentenced to death for rape. Justice Harlan wrote for the Court. He gave a liberal ruling of the state constitution and laws, arguing that the ratification of the Fifteenth Amendment had established the eligibility of African-Americans for jury service despite no action on the part of the state to affirmatively declare it.

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184 Justice Bradley offered a statement defending his position that, like his infamous declaration in the *Civil Rights Cases*, reverberates discordantly with contemporary views. “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,” he wrote. “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” *Bradwell*, 83 U.S. at 141 (Bradley concurring).

185 88 U.S. (21 Wall.) 162 (1875).

186 See, especially, *Minor*, 88 U.S. at 170–171 asserting that the power to determine voter qualifications was held by the States and that the Fourteenth Amendment “did not add to the privileges and immunities of a citizen” (at 171).

187 100 U.S. 303 (1880) (with Justices Field and Clifford dissenting). But note that in *Virginia v. Rives*, 100 U.S. 313 (1880), the Court ruled that although black citizens may not be denied a position on a jury, black defendants were not entitled to a jury that included black jurors.

188 100 U.S. 339 (1880) (again, with Justices Field and Clifford dissenting).

189 103 U.S. 370 (1881).

190 Brandwein (2011) asserts that Neal had been charged with raping a white woman.

191 The argument was that because Delaware tied juror qualifications to voter qualifications, when the Fifteenth Amendment operated to broaden the franchise, it simultaneously extended juror qualifications.
Table 4.2: The Reconstruction Courts (1873–1883).

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* Chief Justice.

a. Important cases include *Slaughter-House Cases*, *Bradwell v. Illinois*.
c. Important cases include *Strauder v. West Virginia*, *Virginia v. Rives*, *Ex parte Virginia*.
d. Important cases include *U.S. v. Harris*, *Civil Rights Cases*. 


But no black juror had ever been summoned, which was sufficient for Harlan and the Court to conclude that the Equal Protection Clause had been violated.\textsuperscript{192} The Court thus recognized the constraining effects of the Reconstruction Amendments on state action.

But the Court also recognized the ability of the federal government to reach the actions of individuals under the Reconstruction Amendments. During the same period the Court was deciding \textit{Reese}, \textit{Cruikshank}, \textit{Harris}, and the \textit{Civil Rights Cases}, the Court (and its justices, sitting on circuit courts) handed down decisions that upheld prosecutions under the Reconstruction Amendments and related legislation. \textit{United States v. Butler},\textsuperscript{193} involved the federal prosecution of the leader of violence against African Americans in Aiken County, South Carolina. Chief Justice Waite sat on the court, which upheld the charges. The charges had, per \textit{Reese} and \textit{Cruikshank}, alleged a racial motive behind the denial of the victims’ Fifteenth Amendment voting rights and could thus be heard.\textsuperscript{194} In \textit{Ex parte Siebold}\textsuperscript{195} the Court denied a state election official’s petition for a writ of habeas corpus. The official had been charged with committing fraud in a national election, and the Court forcefully acknowledged the power of the national government to exercise its powers even within sovereign states.\textsuperscript{196} And in \textit{Ex parte Yarbrough},\textsuperscript{197} consider a federal criminal action brought under the Enforcement Act of 1870 against members of the Ku Klax

\textsuperscript{192} Chief Justice Waite and Justice Field dissented, arguing that the defendant had the burden of proof of showing that state agents had deliberately excluded African-Americans from jury service.

\textsuperscript{193} 25 F. Cas. 213 (C.C.D.S.C. 1877).

\textsuperscript{194} See Brandwein (2011, 145–147).

\textsuperscript{195} 100 U.S. 371 (1880).

\textsuperscript{196} See \textit{Siebold}, 100 U.S., at 395, “We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it.” Justice Bradley wrote the majority opinion; Justice Field wrote a long dissent, joined by Justice Clifford. See, also, Brandwein (2011, 147–148).

\textsuperscript{197} 110 U.S. 651 (1884).
Klan for beating an African-American voter. Justice Miller wrote for a unanimous Court. The Court noted the charges: “that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and, in the execution of that conspiracy, they beat, bruised, wounded, and otherwise maltreated him; and, in the second count, that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises.” The Court rejected the defendants’ claims that because the Constitution nowhere gave Congress express authority to punish such acts, the laws under which they were being charged were unconstitutional. “If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.”

The Court acknowledged that in Reese it had ruled that the Fifteenth Amendment did not affirmatively give any person the right to vote, but, it asserted, in such states that granted the right to vote to “white men,” the Fifteenth Amendment served to “substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.” Thus upholding the provisions of the Enforcement Act, the Court concluded, “If the government of the United States has within its constitutional domain no authority to provide against these evils—if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint—then indeed is the country in danger, and its best powers, its highest purposes, the hopes which it inspire, and the love which enshrines

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199 Yarbrough, 110 U.S. at 657.
200 Ibid., 657–658.
201 Ibid., 665.
it are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other.” These are hardly the words of nine men hostile to the goals of the Reconstruction Amendments and committed to their evisceration.

4.5 Reconstructing the Court’s Authority

The Supreme Court’s moderate decisions in the Reconstruction Amendment cases served to enhance its standing in the American political system. It asserted and established itself as the arbiter of the meaning of all aspects of the Constitution—even the Reconstruction Amendments. This did not have to be the case. There was a plausible argument (made by some Radical Republicans) that the Reconstruction Amendments effected a radical reworking of the American political system, and that the limits of the federal legislation that could be enacted in pursuit of these new rights was subject to the will of Congress and politics. Furthermore, the institutional weaknesses of the Court had been revealed by the Radical Republicans during and after the Civil War—the judiciary had been packed, had seen its rulings ignored, and had had its jurisdiction stripped. In many ways the Court was vulnerable. But by the end of Reconstruction, the Supreme Court had emerged as strong as ever, thanks in large part to its own rulings.

In the *Slaughter-House Cases*, *U.S. v. Reese*, *U.S. v. Cruikshank*, *U.S. v. Harris*, and the *Civil Rights Cases*, the Supreme Court rejected arguments that the

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202 Ibid., 667.

203 And shortly thereafter, a unanimous Court ruled that the unequal enforcement of a facially neutral statute against individuals of Chinese descent violated the Fourteenth Amendment’s Equal Protection Clause in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

204 Wiecek (1969, 359) similarly concludes that “The federal judiciary emerged from the turmoil of reconstructing the Union triumphant, vigorous, conscious of its power, and willing to exercise it exuberantly in the decades to come. This reconstruction of federal judicial power proved to be one of the most important and most lasting legacies of Reconstruction.” But he argues at 334 that “The responsibility for this accretion of power to the courts lies primarily with Congress” through the legislative enlargement of federal jurisdiction.
Reconstruction Amendments had created new rights of national citizenship and empowered Congress to protect them. Instead, the Court ruled that the states remained the source and definer of rights, and that the federal government’s role was simply to protect state denials of such rights on the basis of race. This had the immediate effect of limiting Congress’s ability to punish acts of violence, intimidation, or oppression by individuals, frustrating efforts to achieve racial equality in civil society. 205 But these decisions also asserted that the Court—and not Congress—should define the meaning and limits of the Reconstruction Amendments. Indeed, the Court argued (somewhat paradoxically) that leaving the interpretation of the limits of the Reconstruction Amendments to a political Congress would have required the Court itself to engage in “politics” rather than “law.” But the claim of judicial authority to define the Reconstruction Amendments was an expression of political power.

Whether the Court consciously and deliberately sought this enhanced authority or their rulings were sincere expressions of their objective legal interpretations, the effect of these decisions was to convince the people that the Court could be trusted to provide thoughtful interpretations of the Reconstruction Amendments. Thus questions about the proper interpretation of the amendments (and the extent to which they empowered the federal government) were seen as questions of law and not politics. And the Court made sure to assert that its power was limited to questions of law. Indeed, in several of the cases considered, the Court refused to give a more expansive reading of the amendments or statutes at hand because to do so would be to bring the Court improperly into the realm of politics. But by refraining from exercising such power, the Court somewhat paradoxically increased its power by building support for the notion that it could be trusted to make decisions grounded in legal

205 See Brandwein (2011) for an argument that the Court of this period remained committed to the protection of African-American citizens in the face of “state neglect” (as opposed to affirmative discriminatory state action) and locating the true “periodization” of the judicial abandonment of blacks at a later point in time (beginning with the Court’s decision in Plessy v. Ferguson, 163 U.S. 537 (1896)).
principles rather than motivated by the justices’ political inclinations.

The Reconstruction Amendment decisions were hard to overrule given broad support for their conclusions. Even Republicans believed that the Court was properly respecting the limits of national power in its interpretations of the amendments and legislation passed pursuant to Congress’s enforcement power. With no will to discipline the Court for such rulings, such institutional reactions did not occur and the Court’s interpretations of the meaning of the amendments stood. The effect of this was, in part, to establish the Court as the proper arbiter of the meaning of these provisions such that in later cases the Court was able to assert new (and sometimes different) interpretations and have those rulings accepted as legitimate judicial behavior.

The Court’s rulings in the Reconstruction Amendment cases were accepted and even praised. That may have been because they found the “correct” answer and placed limits on national power. It may have been because not enough political actors were interested in going beyond those limits to object.\textsuperscript{206} Regardless, the Court’s contemporaries were satisfied by the Court’s initial rulings. Later decisions by the Court that involved interpretations of the Reconstruction Amendments (especially the Fourteenth Amendment) were considerably more controversial.\textsuperscript{207} Nevertheless, the Court had established itself as the arbiter of the meaning of the new amendments. Thus although debates about the proper interpretation of the amendments continued, what was not debated was the Court’s legitimacy as the ultimate authority for settling such questions.

\textsuperscript{206} See Balkin (2010) for an argument that the limits defined by the Court are well within what is actually permitted under “text, history, and structure” of the Reconstruction Amendments and calling on the contemporary Court to reject the old rulings in favor of a more expansive view of Congressional authority to protect rights of national citizenship.

\textsuperscript{207} The Court’s late nineteenth- and early twentieth-century cases establishing its economic substantive due process and liberty of contract doctrine were and have continued to be the focus of much criticism. See, \textit{e.g.}, Bernstein (2003, 1–13) and accompanying notes.
By the 1930s, meaningful judicial review was well established in the American political system. If the Supreme Court ruled that a particular state or federal law was inconsistent with its interpretation of the Constitution, that law was void. And other political actors abided by the Court’s rulings, even when they had a strong preference for a different policy outcome. The Court restricted governments’ abilities to regulate economic activity via its interpretations of the Commerce Clause (with regard to the federal government) and the Fourteenth Amendment’s Due Process Clause (with regard to state governments). But the Court’s decisions were increasingly frustrating to political elites and the popular majorities who elected them. The pressure on the Supreme Court was at its maximum when President Franklin Roosevelt proposed changing the composition of the Court in pursuit of friendlier rulings. But this presented the public with a Hobson’s choice: accept the Court’s unpalatable interpretations nullifying popular policies or sacrifice judicial independence. In the end, the public did not have to make the choice. Both Roosevelt and the Court relented. Though this time is often cited as a period of institutional weakness for the judiciary, the Court was able to emerge from this period with a new
doctrine—based on John Marshall’s old-but-successful distinction between law and politics—justifying its participation in matters that were subject to intense political dispute.

The Court was seen as the legitimate arbiter of the meaning of the Constitution. But oftentimes constitutional interpretations had implications for political controversies. And, similarly, political controversies frequently could be given a constitutional dimension. In the period following the “switch in time,” the Court was able to make constitutional interpretations in new policy areas. As with previous incursions into territory that could easily be considered “politics,” the Court’s initial forays produced outcomes that resisted institutional checks on the Court’s authority. The Court made a further innovation: the development of a “political question doctrine” that itself masked the inherently political nature of a decision by the Court to assert its authority over a given class of questions and clothe such choices in the color of law.

5.1 The Switch in Time

The Constitution permits Congress to construct the federal judiciary as it sees fit. This includes the power to determine the size of the Supreme Court. Although this power is intended to allow Congress to address changing judiciary needs, it has been exercised for political reasons. The Federalists shrunk the Court to limit President Thomas Jefferson’s ability to make appointments (a measure that was subsequently repealed by Jefferson’s Democratic-Republican party). Radical Republicans, suspicious of the loyalties of President Andrew Johnson, reduced the Court’s size during his tenure, only to increase it back to nine following the election of President Ulysses Grant. The Court’s size has remained stable at nine since then, but President Franklin Roosevelt proposed increasing the size of the Court in 1937. In this section, I explore the background facts that motivated Roosevelt, the details of his
proposal, and the implications for the Court’s authority of its collision with Roosevelt.

5.1.1 The Lochner Era

The period of Supreme Court history covering the early twentieth century is often called the “Lochner era.” The Lochner-era Court is frequently described as hostile to government regulation of the economy. The Court, it is said, favored instead a laissez faire approach to economic matters, and imposed this preference on the nation. While it is certainly true that the Lochner-era Court was, relatively speaking, more suspicious of economic regulations than subsequent Supreme Courts, it is not the case that the Court during this period struck down every regulation brought before it for consideration. Nevertheless, newly articulated doctrines of the Court “made almost every governmental intervention in economic affairs the business of the judiciary, to approve or disapprove, as discretion might dictate.”1 As a result, politicians could never be sure whether their economic policies would survive judicial review. The Court’s wariness of economic regulation actually took two forms. One line of cases set limits on the ability of state governments to regulate economic activity, and an entirely different doctrine constrained the federal government.

With regard to state regulation, the Court had come to adopt an interpretation of the Fourteenth Amendment that it had all but rejected in the Slaughter-House Cases. The Court came to see the Due Process Clause of the Fourteenth Amendment as providing substantive—not merely procedural—protections of rights, particularly economic rights such as the liberty to contract. This doctrine of “substantive due process” had been applied by the Court in Lochner v. New York2 to invalidate a New York law that limited the number of hours bakers could work. The types of laws

1 McCloskey (2005, 89).
2 198 U.S. 45 (1905).
invalidated by the Supreme Court according to this standard included the maximum hours laws in *Lochner*,³ minimum wage laws,⁴ and consumer protection laws.⁵

The *Lochner*-era Court struck down federal legislation that did not satisfy its narrow interpretation of Congress’s enumerated powers, especially its power under the Commerce Clause. The Court also interpreted the Tenth Amendment as protecting the ability of states to regulate their own economies (provided such regulations were consistent with substantive due process requirements). Thus in *Hammer v. Dagenhart*,⁶ for example, the Court struck down federal legislation prohibiting interstate commerce involving merchandise manufactured using child labor. It was the Court’s restricted interpretation of the powers of the national government that led to its showdown with President Franklin Roosevelt. Indeed, in the years immediately preceding Roosevelt’s court-packing plan and the “switch in time that saved nine,” the Court struck down more laws more consistently than it had during earlier years of the *Lochner* era.⁷ The Court’s decisions in cases such as *Schechter Poultry v. United States*,⁸ *United States v. Butler*,⁹ and *Carter v. Carter Coal*,¹⁰ showed a Court that was committed to its laissez faire vision of the Constitution. This intransigence on

³ But compare *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a maximum hours law that applied to women only).

⁴ See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (striking—on Fifth Amendment Due Process grounds because it was a law for the District of Columbia—a minimum wage provision for women and children).


⁶ 247 U.S. 251 (1918).

⁷ This, of course, does not necessarily suggest that the Court was any differently or more aggressively. It may have simply been the case that Roosevelt’s New Deal policies pushed too far given the state of Commerce Clause doctrine.

⁸ 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act and thus regulations passed under its authority).

⁹ 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

the part of the judiciary prompted Roosevelt to explore more extreme measures for enacting his policies.

5.1.2 Roosevelt’s Plan

Franklin Delano Roosevelt was elected President in 1932 by a country hurting from the Great Depression. His proposed cure involved a large dose of government intervention in and oversight of the economy. Though wary of the Republican justices, Roosevelt was pleased by the Court’s decisions in *Home Building & Loan Association v. Blaisdell*\(^{11}\) and *Nebbia v. New York*,\(^{12}\) in which it appeared to recognize the legitimacy of extraordinary government action in response to the extraordinary crisis that was the Great Depression.\(^{13}\) He held out hope that the justices would similarly recognize the necessity for his own New Deal policies.

Roosevelt’s hopes went unrealized. In 1935 and 1936, the Court issued a series of decisions striking key policy planks in Roosevelt’s New Deal platform.\(^{14}\) In case after case, a majority of the justices—with the justices known as the “Four Horsemen”\(^{15}\) at the core of these majorities—remained wedded to *Lochner*-era ideas regarding the freedom to contract and held narrow views of the Commerce Clause. The Court’s obstruction enraged the Roosevelt administration and many voters. Emboldened by his historic victory in the 1936 election, Roosevelt began exploring his options for minimizing the Court’s ability to hinder him.

After considering and rejecting the possibility of pursuing a constitutional amendment, the Roosevelt administration began to focus on the idea of increasing the size

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\(^{11}\) 290 U.S. 398 (1934) (upholding a Minnesota law extending the time debtors had to redeem their mortgages).


\(^{13}\) Leuchtenburg (1995, 83–84).

\(^{14}\) See, e.g., ibid., 85–108.

\(^{15}\) The “Four Horsemen” were Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter.
of the Supreme Court.\textsuperscript{16} Attorney General Homer Cummings presented the plan to Roosevelt on 26 December 1936.\textsuperscript{17} The idea was to expand the size of the Supreme Court as a part of a broader plan of judicial reform that would also add lower-court judges. This, they hoped, would temper any complaints that the plan was mere court-packing motivated by politics.\textsuperscript{18} Roosevelt apparently agreed to the plan, so Cummings put the finishing touches on the plan.

On 5 February 1937, President Roosevelt delivered a message announcing his plan to reorganize the federal judiciary. In his message, he stressed the need for judges who were mentally and physically vigorous and questioned the ability of anyone to recognizing their failing strength. Accordingly Roosevelt proposed a system whereby the president could add a new federal judge to the bench each time a judge who had served at least ten years waited more than six months to retire.\textsuperscript{19} If enacted, this policy would have meant that (assuming none of the current justices retired) Roosevelt could have appointed six new justices to the Supreme Court.\textsuperscript{20}

5.1.3 A Judicial Retreat?

On 29 March 1937, the Supreme Court announced its decision in \textit{West Coast Hotel Co. v. Parrish}.\textsuperscript{21} The decision upheld a Washington minimum wage law and overturned its previous ruling in \textit{Adkins v. Children’s Hospital}.\textsuperscript{22} Justice Owen Roberts, who had joined the Four Horsemen in striking down a New York minimum wage

\textsuperscript{17} See ibid., 122.
\textsuperscript{18} See ibid., 124.
\textsuperscript{19} See ibid., 133–134.
\textsuperscript{20} See ibid., 134.
\textsuperscript{21} 300 U.S. 379 (1937).
\textsuperscript{22} 261 U.S. 525 (1923) (holding a minimum wage law for women to violate due process rights of freedom to contract).
provision in the 1936 case *Morehead v. New York ex rel. Tipaldo*,\(^{23}\) was the deciding vote in favor of upholding the law. Shortly afterward, the Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,\(^{24}\) upheld the National Labor Relations Act as a valid exercise of Congress’s power under the Commerce Clause and implicitly overruled *Carter v. Carter Coal Co.*\(^{25}\) among other cases articulating a restrictive interpretation of the Commerce Clause. With the retirement of Justice Willis Van Devanter (one of the Four Horsemen) at the end of the spring 1937 term, the *Lochner* Court’s reign was over. The Court subsequently announced a series of decisions upholding New Deal legislation that had previously been called into question. Thus Roosevelt’s court-packing plan, even though not enacted, seemed to have had its intended effect of bringing the Supreme Court in line with the nation. Justice Robert’s switch regarding the constitutionality of minimum wage laws had come just in time to preserve the Court’s size at nine members.

But there is considerable evidence to suggest that the Supreme Court was not caving in to President Roosevelt’s threats. For one reason, it had little reason to fear the court-packing plan, which was wildly unpopular. The public retained a high level of support for the Court as an institution. A 1935 Gallup poll had reported that just 31 percent of the population supported limits on judicial review.\(^{26}\) And in response to Roosevelt’s message calling for the reorganization of the Court, the public expressed outrage. Senators received an average of 10,000 letters each in the first two weeks of the controversy, with 90 percent opposed to the plan.\(^{27}\)

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\(^{23}\) 298 U.S. 587 (1936).

\(^{24}\) 301 U.S. 1 (1937).

\(^{25}\) 298 U.S. 238 (1936) (striking the federal Bituminous Coal Conservation Act as outside the scope of the Commerce Clause).

\(^{26}\) Cushman (1998, 12).

\(^{27}\) See ibid., 13.
officials were also disinclined to get behind Roosevelt’s plan.\footnote{28} Chief Justice Charles Evans Hughes—a swing voter on the Court—penned a letter that was read to the Senate Judiciary Committee in March. In it, he rejected Roosevelt’s claims that the Court needed more personnel to handle its business.\footnote{29} The reading of this letter signaled the likely death of the court-packing bill. Vice President Garner called Roosevelt, who was on vacation to declare “We’re licked.”\footnote{30} All this occurred before the Court announced its decision in \textit{West Coast Hotel}. Indeed, the justices had voted on the case in conference in December 1936 before Roosevelt had even announced the plan.\footnote{31}

Regardless, the Court’s decisions in \textit{West Coast Hotel} and \textit{Jones \& Laughlin} did mark a change in direction from the Court’s previous rulings.\footnote{32} Ariens (1994, 631–634) explains that most contemporary accounts and early histories of the events “concluded that politics, in the form of FDR’s reelection and his Court reorganization plan” inspired Roberts’s reversal.\footnote{33} That is, even if the specific threat posed by the court-packing plan was not understood at the time of the Court’s decision in \textit{West Coast Hotel}, the justices knew that the public strongly preferred Roosevelt’s views to their own.

It’s hard to say that any party clearly won or lost the events surrounding the “switch in time.” On the one hand, Justice Roberts’s change of opinion can be seen as a concession to Roosevelt and the popular majorities supporting him. The era of

\footnote{28} It is, of course, difficult to know whether the politicians’ reluctance to back Roosevelt was motivated by sincere qualms about the proposal or by their observation of the public’s dissatisfaction.

\footnote{29} See Cushman (1998, 17).

\footnote{30} Ibid., 18.

\footnote{31} Ibid.

\footnote{32} See, \textit{e.g.}, Ho and Quinn (2010), whose quantitative analysis of voting blocs on the Court led them to conclude that Roberts’s move to the left was sharp, sudden, and statistically significant.

\footnote{33} Ariens (1994) further credits Felix Frankfurter with launching the revisionist version of the story, motivated by his own interest in maintaining the appearance of the Court as always above politics.
the *Lochner* Court was over, and the Democrats’ New Deal policies met no further resistance from the judiciary. On the other hand, Roosevelt’s court-packing plan was not executed. In fact, the public reaction to this proposal by an otherwise popular president was strikingly negative. Although the public disliked the Court’s constitutional interpretations striking New Deal legislation—and perhaps even disagreed with them, they were firmly committed to the idea of an independent judiciary exercising the power of judicial review. Roosevelt would have had to pay a steep price had he pushed through his court-packing plan. Even if the Court ultimately relented on policy grounds, deviating from its sincere interpretations, the episode illustrated that the Court could deviate significantly and obviously from public opinion yet retain public support.

Over the next ten to fifteen years, the Supreme Court exercised judicial review less frequently to strike down laws. This may have been the result of institutional meekness in the face of the court-packing controversy. Or it may have simply been the case that the justices appointed by Franklin Roosevelt interpreted the Constitution in a manner consistent with that of the administrations in power. Whatever the case, the Court’s apparent retreat was temporary. Later Courts would become famous for their apparent activism in protecting the civil rights and liberties of individuals (other than the discredited economic substantive due process rights such as the liberty to contract). I will next consider the Court’s treatment of cases involving

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34 See Cushman (1998) for an extended argument against the idea of a “switch,” suggesting that there was a coherence and consistency in the Court’s opinions that reflected a gradual and sincere evolution of jurisprudential views.

35 The Court had signaled this shift in emphasis to other fundamental rights and the rights of minorities in 1938 in Footnote Four to its opinion in *United States v. Carolene Products Company*, 304 U.S. 144 (1938): “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar
the apportionment of legislatures to examine the Court’s ability to assert its powers of constitutional interpretation to resolve political controversies.

5.2 The Reapportionment Cases

I have maintained that the Supreme Court expands its authority by subjecting its powers of judicial review and constitutional interpretation to new questions—questions that have traditionally been resolved through political rather than legal processes. The best way to understand this process is to see it in action. And we have an example of just that in the Court’s mid-twentieth century cases involving redistricting. Here was a matter about which the Court had remained aloof. Its expressed rationale for declining to consider such questions was that redistricting fell on the politics side of the law–politics divide. Yet beginning with its opinion in *Baker v. Carr*, the Court reversed course. Questions of apportionment and line drawing, it now said, were properly considered questions of law. As with other successful conquests, the Court’s reapportionment decisions resisted reversal, in part because they provided settlement of difficult disputes that the political process just could not generate. And once the Court’s authority over such questions was firmly established, the re-drawn line between law and politics clearly showed redistricting to be among those matters subject to judicial authority. In the process, the Court also set out a clearer explanation of the conditions under which it would conclude that a given question was legal or political. Thus the Court was able to make a claim that questions of line drawing between law and politics were themselves questions of law! Prudently and strategically applied, the Court’s “political question doctrine” considerations enter into the review of statutes directed at particular religious, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” (citations omitted).

provides it with a considerable amount of political power.

5.2.1 A Question for Politics

An oft-repeated satire of the Golden Rule declares that “they who have the gold makes the rules.” But politicians and political scientists would be quick to argue for yet another claim: “they who make the rules get the gold.” This is particularly the case with regard to voting rules. Given knowledge of a particular electorate, a conniving vote engineer can typically construct a series of voting schemes that can generate any desired outcome. Add in the authority to draw district lines and the ability to set voting rules is the power to say what the “will of the people” is in a democracy. The incentives are thus strong for political actors with the ability to influence voting rules to do so in ways that benefits their interests. The history of American politics is full of examples of parties and interest groups attempting to manipulate the levers of the voting system to gain an advantage. And from time to time, the losers of such competitions have sought redemption in the courts hoping that they will impose requirements that voting procedures conform to some minimal notions of democracy and fairness. But for much of its history, the Supreme Court declined to hear such cases. Only in the most obvious cases of vote denial would the Court intervene—and not always then.

In such cases, the Court typically denied that it had any authority to make rulings about the propriety of voting system. The American political system had vested such power in Congress and the state legislatures. Questions about how to design voting systems were to be decided by political processes. The Court thus developed a practice of highly deferential review in such cases. If there was some plausible and legitimate rationale for a given electoral system, the Court would accept it.

See Malkevitch (1990, 91–93) for an example in which the use of five different voting systems to produce a winner among five choices for a given set of preferences yields five different results. That is, each option wins under one system.
The Court’s reluctance to review cases involving voting rights was articulated most clearly by Justice Felix Frankfurter’s opinion in *Colegrove v. Green*. In *Colegrove*, Illinois’s redistricting plan was challenged on the basis that the districts it created lacked compactness and approximate equality of population. Frankfurter declared that the matter was not a question for the Court—indeed, it was a type of controversy the Court had refused to involve itself in. The Court, Frankfurter wrote, had “refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination.” The opinion continued to expound on this theme, declaring “It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.” The “one stark fact” revealed by consulting the history of apportionment disputes was its “embroilment in politics,” by which the Court meant “party contests and party interests.” Any judicial attempt to resolve the current controversy or those like it would involve a trespass on Congress. “Courts ought not to enter this political thicket,” cautioned Frankfurter. Like it or not, he concluded, “[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action, and, ultimately, on the vigilance of the people in exercising their political rights.”

The Court, following *Colegrove*, refused to describe just how electoral systems

38 328 U.S. 549 (1946).
39 Ibid., 552.
40 Ibid., 553–554.
41 Ibid., 554.
42 Ibid., 556.
43 Ibid., 556.
should be formed. *MacDougall v. Green* 44 involved a complaint against an Illinois law requiring candidates from new political parties to obtain at least 200 signatures from at least fifty counties—a difficult task given the size of the state and how sparsely populated many counties were. In a per curiam decision, the Court rejected the argument that the Illinois scheme violated (among other things) the Fourteenth Amendment’s Due Process and Equal Protection Clauses. “It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States.” 45 The Court thus declined to rule on such “purely local questions” that had “no federal constitutional aspect.” 46 And in *South v. Peters*, 47 the Court affirmed the lower court’s dismissal of a claim charging that Georgia’s practice of allocating unit votes for counties to determine primary elections unduly diluted the votes of citizens in more populous counties. In a per curiam opinion, the Court noted that “[f]ederal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state’s geographical distribution of electoral strength among its political subdivisions.” 48

The force of this argument was such that Alabama legislators felt emboldened to use its political power to draw city limits for the city of Tuskegee that excluded

44 335 U.S. 281 (1948).
46 Ibid., 284.
48 Ibid., 277.
virtually all black citizens. The Court in *Gomillion v. Lightfoot*,\(^49\) reversed a district court’s dismissal of claims brought by black citizens and rejected this argument (with Frankfurter writing the opinion). If the only rationale for the borders as drawn was the exclusion of African-American voters, then the lines violated the Fifteenth Amendment. But the strength of the Court’s views in *Colegrove* that apportionment questions were matters of politics left a great deal of discretion for state legislatures.\(^{50}\)

But the Court was evolving (along with the country). The justices were growing less tolerant of the peculiar institutions designed by Southern politicians to limit the full and equal participation of African-American citizens in civil society. The various voting schemes that offered disproportionate electoral influence to rural voters were a part of the schemes intended to perpetuate white dominance of political and economic institutions. The injustice was apparent and the allure of exercising judicial power to remedy the situation proved impossible to resist.

5.2.2 *A Question of Law*

The strong words of Frankfurter’s opinion in *Colegrove* made it all the more surprising when the majority opinion for *Baker v. Carr* reversed the Court’s practice of refusing to hear voting-rights cases. *Baker* involved a challenge to the way Tennessee apportioned its state legislature. The state had not updated its districts since 1901

\(^{49}\) 364 U.S. 339 (1960).

\(^{50}\) Prior to *Colegrove*, Texas elections officials had cited earlier versions of its arguments in defense of a state law that explicitly banned African-American voters from participating in the Democratic primary in *Nixon v. Herndon*, 273 U.S. 536 (1927). The lower court in the case had dismissed the plaintiff’s claims on the grounds that “the subject-matter of the suit was political and not within the jurisdiction of the Court.” (Ibid., 540). The Supreme Court, in an opinion delivered by Justice Oliver Wendell Holmes reversed and struck down the law, noting that “it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.” (Ibid., 541). Absent such clear and direct violations of equal protection, however, the Court was less sympathetic to voting claims. Texas, in fact, was able to get around the *Nixon* decision by permitting the Democratic Party state convention to determine the eligibility criteria for its primaries. In *Grovey v. Townsend*, 295 U.S. 45 (1935), the Court upheld this practice because the Party was a private organization. This decision was overturned by *Smith v. Allwright*, 321 U.S. 649 (1944).
despite considerable demographic shifts. The plaintiffs argued that the arrangement violated the Equal Protection Clause of the Fourteenth Amendment. The district court had agreed with the defendants that the matter—because it implicated a political question—was not justiciable by the federal courts, and cited Colegrove as support. Justice Brennan, writing for the majority in Baker, rejected this argument. The mere fact that the case involved political rights did not mean that it required settling political questions. Brennan sought to clear up confusion about the meaning of the Court’s political question doctrine by providing an extensive description of what it did and did not entail. Brennan analyzed the instant case in light of this doctrine and found that it did not present any of the problems giving rise to the political question doctrine. Furthermore, Brennan argued that his reasoning was consistent with Colegrove. Thus, Brennan concluded for the Court, “the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.”

Justice Frankfurter submitted a blistering dissenting opinion. The majority had cast aside “a uniform course of decision established by a dozen cases.” Despite the wrongheadedness of the decision from a legal perspective, Frankfurter was concerned about the implications for the judiciary itself. “Disregard of inherent limits in the effective exercise of the Court’s ‘judicial Power’ not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been, and now is, determined. It

52 Ibid., 194–195.
53 Ibid., 209.
54 See ibid., 210–217.
55 Ibid., 237.
56 Ibid., 266 (J. Frankfurter dissenting).
may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”

Deciding how states should draw their legislative districts was beyond the scope of the judiciary’s legitimate power, and Frankfurter was worried that in so exceeding the limits on its authority, the Court was threatening its effectiveness in areas it had rightful claim to.

Nevertheless, the Supreme Court soon exercised this newly found power to review legislative districts. In the 1963 case *Gray v. Sanders*, the Court struck down elections for statewide offices organized by counties, which meant that votes were weighed differently depending on where they were case. Writing for the majority, Justice Douglas wrote “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” In *Wesberry v. Sanders* and *Reynolds v. Sims*, both 1964 decisions, the Court set out “one person, one vote” requirement for congressional and state legislative

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57 Ibid., 267 (J. Frankfurter dissenting).

58 In addition, Frankfurter was likely concerned about whether state authorities would comply with the Court’s attempts to oversee redistricting. He may have felt his brethren were insensitive to such considerations that he believed were very important to the Court’s legitimacy. (Charles, 2002, 1129–1131).

59 372 U.S. 368

60 *Gray*, 372 U.S. at 381.


districts, respectively. In his opinion for *Wesberry*, Justice Black examined the intent of the framers of Article I, Section 2 and declared that it was their wish that “no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.”\(^{63}\) In *Reynolds*, the Court held that unequal state legislative districts violated the Equal Protection clause of the Fourteenth Amendment.\(^{64}\)

Congress reacted harshly to these decisions. In addition to complaining vocally about the rulings, there were calls for a constitutional amendment, the House passed a jurisdiction-stripping bill, and Congress as a whole reduced the pay raise coming to the Supreme Court justices.\(^{65}\) But despite the bluster, Congress was not able to muster support for an institutional override of the Court’s rulings. Indeed, the *Wesberry–Reynolds* requirements were implemented with a speed that surprised academic observers.\(^{66}\) This can be explained in large part by the popularity of the decisions. The media had provided significant coverage of the worst examples of malapportionment, and the public welcomed the Court’s solution to this problem.\(^{67}\) After all, how could they trust the politicians who successfully navigated the electoral politics of these districts to redraw the lines? Klarman (1991) suggests that the rapid adoption of the one-person, one-vote rule, as well as its application to situations in which legislators’ self interest was not implicated\(^ {68}\) can be attributed not only to the fact that the standard was politically popular, but that it was also simple, and thus spared

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\(^{63}\) *Wesberry*, 376 U.S. at 9.

\(^{64}\) “Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status.” *Reynolds*, 377 U.S. at 566 (citations omitted).

\(^{65}\) See Friedman (2009, 268–269).

\(^{66}\) See ibid., 269.

\(^{67}\) See ibid., 269–270.

\(^{68}\) E.g., *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964) (striking down a malapportionment arrangement that had been approved by referendum by Colorado voters).
the Court the kind of agonizingly complicated oversight that troubled Frankfurter.\textsuperscript{69} This “administrative simplicity” could only have reinforced public perceptions that the Court was engaged in “law” and not “politics.” Indeed the phrase “one person, one vote” has a certain aphoristic sense that imbues it with the authority of law. In any event, the public backlash against any efforts to undo the voting rights decisions would have been strong, thus the Supreme Court carried the day and established a new and important ability to influence American government.

5.3 The Political Question Doctrine

In addition the specific holding that the federal judiciary could consider cases involving reapportionment, Brennan’s opinion in \textit{Baker} clarified the Court’s “political question doctrine.” The Court had long maintained that it would refrain from settling “political” questions. Marshall gave an early statement of the argument in \textit{Marbury} when he noted that “[q]uestions in their nature political, or which are, by the constitution and the laws, submitted to the executive, can never be made in this court.”\textsuperscript{70} The practice itself went back to the Court’s 1849 decision in \textit{Luther v. Borden}\textsuperscript{71} declining to interpret the Guarantee Clause of the Constitution.\textsuperscript{72} In \textit{Baker}, Brennan explained that political questions implicated “the relationship between the judiciary and the coordinate branches of the Federal Government,” and thus “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.”\textsuperscript{73} Brennan surveyed the Court’s precedents to identify common themes of

\begin{itemize}
\item \textsuperscript{69}Klarman (1991, 258–262).
\item \textsuperscript{70}Marbury, 5 U.S. at 170.
\item \textsuperscript{71}48 U.S. (7 How.) 1 (1849).
\item \textsuperscript{72}“The United States shall guarantee to every State in this Union a Republican Form of Government.” Article IV, Section 4. See also \textit{Pacific States Telephone and Telegraph Co. v. Oregon}, 223 U.S. 118 (1912) (refusing to consider the constitutionality of an Oregon referendum process as a potential violation of the Guarantee Clause).
\item \textsuperscript{73}Baker, 369 U.S. at 210. Thus questions of federalism did not implicate the political question doctrine.
\end{itemize}
separation-of-powers cases that made them political questions. From this analysis, he articulated the following elements: “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

The Court’s longstanding practice of finding political questions nonjusticiable now had a doctrinal standard to go along with it.

5.3.1 Good Fences Make Good Neighbors

What Brennan hoped to accomplish in *Baker* was a definitive statement of the political question doctrine. John Marshall’s distinction between law and politics had proven so useful to the Court’s legitimacy that members of the legal profession struggled to understand it. At its core, the idea was that the Court had to defer to political processes in some cases. But how to draw the line? When should the Court abstain and when should the Court intervene? One element of the doctrine had been the notion that the Constitution assigned authority over certain questions to other branches. This has been described as the “classical” political question doctrine.

A subsequent development in thinking about political questions stressed prudential...
considerations.\textsuperscript{76} This approach, most associated with Alexander Bickel’s work,\textsuperscript{77} cautioned that judicial avoidance and deference are important strategies for protecting the legitimacy of courts. Of course, other scholars have denied that there ever was such a thing as a political question doctrine. Henkin (1976), for instance, declared that the cases purported to have established such a doctrine did not require judicial abstention, just the “ordinary respect by the courts for the political domain.”\textsuperscript{78}

Brennan’s expression of the doctrine in \textit{Baker}, however, has served as the Supreme Court’s official statement on the matter. The doctrine has been applied to find political questions in just two instances. In the first case, \textit{Gilligan v. Morgan},\textsuperscript{79} students of Kent University sought judicial oversight of Ohio’s use of the National Guard in response to the shootings of students by Guardsmen in May 1970. The Court declined, citing the political question doctrine: “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”\textsuperscript{80} The second case, \textit{Nixon v. United States},\textsuperscript{81} involved the challenge by an impeached federal judge of a Senate rule regarding the impeachment proceedings. The Court deferred to the Senate’s interpretation of the Impeachment Clause, finding that “there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the

\textsuperscript{76} See ibid., 253–263.

\textsuperscript{77} See, \textit{e.g.}, Bickel (1961) and Bickel (1962).

\textsuperscript{78} Furthermore, to the extent courts did employ the phrase “political question,” Henkin argued it was in the following context: “We have reviewed your claims and we find that the action complained of involves a political question, and is within the powers granted by the Constitution to the political branches. The act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it.” (Henkin, 1976, 601).

\textsuperscript{79} 413 U.S. 1 (1973).

\textsuperscript{80} \textit{Gilligan}, 413 U.S. at 10.

\textsuperscript{81} 506 U.S. 224 (1993).
meaning of the word ‘try’ in the Impeachment Trial Clause.”

Both cases were extreme cases. The Court itself in Gilligan stated that “[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process,” continuing by further noting that “it is difficult to conceive of an area of governmental activity in which the courts have less competence.” And in Nixon the Court emphasized that the text of the Impeachment Clause gives the Senate “sole” power to try impeachments.

Perhaps the most striking aspect of the political question doctrine is how infrequently it has been applied. The considerations outlined by Brennan in Baker could apply to many more cases than it has been. In the time since Baker the Court has decided questions that some have felt better answered by political process. Thus the Court has asserted its influence over matters of federalism, separation of powers, civil rights and civil liberties, criminal law and procedure, electoral processes

82 Nixon, 506 U.S. at 237.
83 Gilligan, 413 U.S. at 10.
84 Nixon, 506 U.S. at 229.
86 See, e.g., Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (Congress cannot give itself a legislative veto over powers delegated to the executive branch); and Clinton v. City of New York, 524 U.S. 417 (1998) (the line-item veto is unconstitutional for failure to abide by constitutional requirements of bicameralism).
88 See, e.g., Dickerson v. United States, 530 U.S. 428 (2000) (upholding judicially created arrest procedures in the face of legislative attempts to override them).
(and outcomes\textsuperscript{90}), the eligibility of legislators,\textsuperscript{91} and executive appointments.\textsuperscript{92} I am making no normative claims about whether the Court should or should not be adjudicating such matters. But I am noting that there is no class of constitutional issues that—as a class—presents only political questions. What occurs instead is that the Court evaluates particular questions on a case-by-case basis to determine whether it presents a political question or not. That is, the Court has assumed the constitutional authority to ascertain whether it has the constitutional authority to decide a matter.

5.3.2 Maintaining the Law–Politics Divide

*Baker* thus reasserted the old and popular notion that the Court legitimately operates only within the realm of law, not politics. But the political question doctrine set out in *Baker* accomplished something else: it set up the Court as the legitimate authority on the law–politics distinction. The Court would respect the divide between law and politics, but the Court enjoyed primacy in defining a given matter as a question of law or of politics. “In the brief space of three words,” writes Nagel (1989, 643), “the phrase ‘political question doctrine’ funnels the noisy sounds of conflict into a staid category of law.” But by claiming the authority to apply such a doctrine, the Court is, in fact, asserting an important form of political power.

Law professors, accustomed to analyzing legal principles, have struggled to justify the Court’s ruling in *Baker* and its use of that precedent to submit other questions to judicial authority. Thus Charles (2002) notes that “one of the *[Baker]* opinion’s glaring weaknesses is the Court’s failure to defend its decision to supervise the


\textsuperscript{91} See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969) (ruling that although Congress may “expel” a member by a two-thirds vote, Congress may not “exclude” someone who has met all the membership requirements).

\textsuperscript{92} See, *e.g.*, *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014) (placing limits on the President’s ability to make appointments during legislative recesses).
political process.”

Tushnet (2002) argues that the standards set out by Brennan effectively legalized (or doctrinalized) what had previously been a prudential judgment and effectively removed this “technique for coordinating the Court with the nation’s other political institutions.” The effect of this was to advance the cause of judicial supremacy. The existence of a political question doctrine suggests that when the Court agrees to decide a matter, it is because it has made the considered legal judgment that the question is justiciable. Thus the Court need not even cite the doctrine to reap its benefits. The Court has thus been able to exert influence over a variety of political questions without even raising the possibility that they could be settled otherwise by political processes. It is precisely this aspect of the political question doctrine that leads Seidman (2004, 442–443) to call it “the most dangerous concept in all of constitutional law.” Indeed, even before Baker was decided Roche (1955) provided a very musical analogy to express the inherent difficulty in establishing a political question doctrine: “the definition of a political question can be expanded or contracted in accordion-like [sic] fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins.”

In addition to noting the political power grab, legal scholars have come to recognize that the political question doctrine as articulated in Baker “has rarely served as a meaningful restraint on the Supreme Court’s authority.” Thus the Court has been able to use its expanding authority to influence political outcomes in important

95 Roche (1955, 768).
96 Choper (2005, 1459). See, also, Pushaw Jr (2002, 1182) declaring that the political question doctrine “imposes no meaningful limits on judicial discretion in any area.”
ways. Without clear limits on particular subject matters, the standard for the political question authority became whether the Court could articulate standards for a given issue area. In the words of Nagel (1989) “[e]xpanding the scope of judicial supervision required the assumption that the availability of relevant legal standards was a matter of volition and experimentation rather than of the intrinsic nature of the subject matter.” Moreover, he argued, “the Court’s behavior appeared to validate that assumption, for an ever widening array of unmistakably political issues became the customary stuff of constitutional adjudication.”

In response to the Baker doctrine’s apparent inability to constrain the Court, some scholars, like Choper (2005), have proposed new sets of criteria for identifying political questions. Others, like Tyler (2006, 379), for instance, have argued that “a one-size-fits-all approach to defining political questions presents potentially insurmountable challenges.” In order to distinguish between legal and political questions, then, “it is necessary to explore the purpose and history behind a constitutional provision as well as its position within our broader constitutional scheme.” Regardless of the approach, there are repeated calls for a stricter political question doctrine, due principally to concerns about the role of the judiciary.

The worry is that the Supreme Court, untethered from any meaningful political question doctrine, can acquire too much power. For example, Barkow (2002, 318) argues that there is an “intellectual tension” between the political question doc-

97 See Barkow (2002, 273–300 and 303–314) arguing that the Court’s intervention in the 2000 election as well as its decisions interpreting Section 5 of the Fourteenth Amendment and the Commerce Clause exemplify a judicial intrusion on traditionally political matters.

98 Nagel (1989, 661).

99 Ibid.

100 Tyler (2006, 379).

101 But see Fallon Jr (2006) noting that though the political question doctrine requires legal questions to be subject to “judicially manageable” standards, the political question doctrine itself may not be judicially manageable. Furthermore, Fallon argues, very few constitutional provisions are judicially manageable outside court-created doctrine. Thus the problems of the political question doctrine plague many aspects of constitutional law.

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trine and judicial supremacy. In response, she argues, “the Court has ushered out the doctrine—allowing its supremacy theory to flower and its confidence in its own constitutional abilities to grow.” And through this process of judicial aggrandizement, some claim, the Court has displaced popular democratic processes. Such contemporary concerns are merely the latest iteration of Bickel’s countermajoritarian difficulty.

But the articulation of the political question doctrine in Baker has served the institutional interests of the judiciary well. Under it, the Court has been able to successfully expand its authority. And despite the normative concerns of legal thinkers, in recent memory the Supreme Court has not had its authority meaningfully challenged by Congress, the President, or the states. It may be impossible to deduce the test set out in Baker from any first principles. But in practice, the Court used this power to determine which questions belong to law and which to politics to give itself permission to decide a long list of questions touching on politics and the Constitution. The public does not always cheer the Court’s decisions, and the Court’s popularity may have waned in recent years, but there has been no sustained popular movement questioning the legitimacy of the Supreme Court to resolve some of the most contentious political disputes of the day. It is hard to imagine that the Court would alter its approach to the political question doctrine absent some strong incentive to do so.

By articulating a political question doctrine in Baker, the Court was able to create the perception that it can and does apply legal analysis to questions about interpretive authority. Even if the Court applies a “secret” political question doctrine

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103 See generally Kramer (2001).
104 See Tushnet (2002) arguing that today’s Court acts boldly because it believes the law requires it to do, which is made possible “[p]recisely because [the Court] is not under imminent threat of retaliation.” (Ibid., 1234).
to many more cases than it acknowledges, the very existence of a clearly stated standard (i.e., the Baker standard) suggests that when the Court declines to apply it, it is because the justices have made the legal determination that the political question doctrine does not apply.

5.4 The Province and Duty of the Court

The Court’s reversal from Colegrove to Baker suggests that the justices do not believe that the law–politics divide is based on subject matter. Any political question can be framed as a legal question. Baker reveals a Court that is willing to contradict clear and recent precedents in agreeing to hear questions that have been previously recognized as political questions. The Court can pursue such a strategy in any matter involving disputes about constitutional interpretation. The real question is whether the Court’s assertiveness will go unchallenged.

In the case of Baker, despite some protestations from judges, scholars, and politicians, the Court’s decision to assume authority for deciding reapportionment and redistricting cases was accepted by the American public. These early, popular cases set a precedent for judicial supervision of elections that has permitted the Court to develop a large body of election law. Such questions are now seen by the public as legitimately legal questions such that attempts to punish the Court’s decision in such a case—even an unpopular decision—would be met with backlash.

But the capture of a subject matter was not the principal achievement of Baker. The more impressive accomplishment was the establishment of the Court as the ultimate definer of boundaries between law and politics. The Court had had much success using its authority over constitutional interpretation to intervene in disputes with constitutional implications and bring its influence to bear on the policy outcomes. In Baker, the Court used this maneuver to claim that the determination and

105 See generally Seidman (2004).
definition of the law–politics distinction was itself a question of law.

This is not to suggest that the Court, with its decision in *Baker*, acquired (or even sought) unlimited judicial authority. The Court is still subject to the institutional checks of the separation-of-powers system, which is, in turn, overseen by the American voters. A political actor may be willing to risk public backlash to punish or evade the Court in response to a particular ruling. Or the Court’s ruling may be so novel or distant from the public’s preferences that the expected backlash for institutional reactions against the Court is small.

What the Court’s articulation of the political question doctrine did accomplish was to complete the project begun by Chief Justice John Marshall. He declared that it was the “province and duty” of the Court to say what the law is.\textsuperscript{106} Within this duty to say what the law is, he had staked the Court’s claim to the authority to interpret the Constitution. Subsequent Courts had followed his plan by asserting authority to determine the meaning of new amendments to the Constitution—amendments that had the potential to radically alter the American systems of federalism and the separation of powers. Now, with the decision in *Baker*, the Court was removing from the political process the final obstacle to judicial authority. Those who might argue that the Court was improperly entering a matter better left to politics were free to make such a claim. But from now on they would be expected to make that claim before the justices of the United States Supreme Court.

\textsuperscript{106} *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803).
Judicial review has been a feature of American politics since well before *Marbury v. Madison*. But the institution has changed over time. The Supreme Court’s authority to have its constitutional interpretations set the course of politics has strengthened. Thus the Court declared in *Cooper v. Aaron*\(^1\) that the principle “that the federal judiciary is supreme in the exposition of the law of the Constitution” has, since *Marbury*, “been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system,”\(^2\) and rebuked congressional efforts to alter constitutional standards in *City of Boerne v. Flores*\(^3\) and *Dickerson v. United States*.\(^4\) The contemporary Court is able to issue rulings pushing such hot buttons as abortion, affirmative action, gay marriage, health care, and voting rights. Indeed, it is difficult to identify any major political debate of the day that

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\(^1\) 358 U.S. 1 (1958).

\(^2\) *Cooper*, 358 U.S. at 18.


the Court’s rulings have not shaped in some way. How has the Court achieved this? After all, the Court is, in many ways, the weakest branch of the government.

In this study, I have argued that the United States Supreme Court has used its institutional weakness to its advantage. It is susceptible to institutional attacks on its authority from other political actors. But such challenges themselves depend on political support, and in the American system of government, all power has its ultimate source in the voting public. The Court has increased its authority to determine the meaning of the Constitution—and thus shape American public policy—by winning public support for such a power. It has achieved this by convincing the public that the questions it answers are matters of law rather than politics and thus particularly well suited to judicial determination. The public has been willing to accept this claim because the Court has also been careful to issue rulings the results of which the public will tolerate. This public support for the Court has increased the costs to other political actors of attempting to override the Court. That is, the Court’s cultivation of its own institutional legitimacy has increased the public backlash costs associated with institutional challenges to the Court.

This understanding of the development of judicial review describes a process of endogenous institutional change. This account speaks to two theories of increasing judicial authority as described in Staton (2010), those of Ginsburg (2003) and Carrubba (2009). Ginsberg’s treatment posits that a norm of compliance with the Court is established in cases that “impose negligible short-run costs on political principals” that gradually extends to new policy areas. In contrast, according to Carrubba the public supports judicial supremacy because “the systematic application of the rule of law provides a greater expected value over the long run than allowing the state to violate the rule of law on occasion.” My story of institutional change depends on

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5 Staton (2010, 191).
6 Ibid., 193.
the evolution of norms, with the Court itself playing an important role in changing those norms. The public has accepted the fact that the Supreme Court has the ultimate say on questions of law—all that remains for the Court to increase its power is to expand the publicly accepted definition of law. In this way, it more closely resembles the description offered by Ginsburg. But, Staton notes, the chief question for Ginsburg’s model is “why is the norm of compliance over nonsalient policies transferable to salient policies?” My account of the U.S. Supreme Court answers this puzzle in the following way: the Court uses the simple-to-say-but-hard-to-define law-vs.-politics distinction to gain entrance to a policy area and then crafts popularly acceptable decisions to cement its position as an authority in the field. This raises the public backlash costs of punishing the Court.

The Court can most aggressively expand its influence in cases in which it can craft results that are more politically popular than anything the elected branches could create, as in the reapportionment cases. The inverse situation provides further support for this notion. As described by Justice Jackson in his pre-SCOTUS opus, “[i]f the judiciary attempts to enforce a judicial conservation after legislative and political conservatism has decided to yield and compromise, it will jeopardize its power to serve the Republic in high and undisputed functions which only it can perform. By impairing its own prestige through risking it in the field of policy, it may impair its ability to defend our liberties.” Thus some of the biggest failures of judicial authority, such as Dred Scott v. Sandford and the Four Horsemen’s nullification of the New Deal, are examples of attempts to do “law” that ultimately produced disfavored outcomes. The Court can apply legal methods to nearly any question. As long as the public accepts the outcome of such decisions, it can trespass

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7 Ibid., 191.
8 Jackson (1941, 323–324).
9 60 U.S. (19 How.) 393 (1856).
on the turf of the other branches while escaping any institutional reaction. And the sophisticated use of just this sort of judicial strategy turns the elected branches’ threats of punishment into a liability for their own political popularity instead of a real danger to judicial authority.

The merit of this strategy became clear during Chief Justice John Marshall’s tenure on the Court. The Marshall Court sought to simultaneously assure political actors—especially the public—that it would stay out of politics while asserting that constitutional interpretation was best considered a legal matter. As a consequence, by the time Marshall died, attempts to counter the Court’s rulings came with a steep price. The public saw such actions as a deviation from constitutional norms. The Marshall Court had been able to use its power of judicial review, in particular, to manage the relationship between the federal and state governments.

The three Reconstruction Amendments could have threatened the Court’s authority to distinguish between national and local powers. The Amendments established rights of national citizenship and gave Congress the power to enforce these guarantees through “appropriate legislation.” The Court was nevertheless able to claim the authority to define the meaning of these amendments. It achieved this by overruling laws seen as the remnants of a radical previous regime. Striking such laws could have been left to the political process—just because a law is imprudent does not mean it is necessarily unconstitutional. But the Court’s rulings proved a quite popular statement of current public opinion. No significant actor had any incentive to check the Court’s claim to power. And thus the precedent was established that the meaning and limits of the Reconstruction Amendments would be settled by the Supreme Court.

During the twentieth century, the justices continued to act to expand their Court’s judicial authority. President Roosevelt’s failed court-packing plan demonstrated just how costly it was for political actors to retaliate against the Court—even when
it was done in pursuit of very popular policy outcomes. The Court’s insistence that it operated only in the realm of politics resonated with the public. But the distinction between law and politics is difficult to draw in terms of policy areas. Any political question can be subjected to legal processes and thereby transformed into a legal question. The Court illustrated that the subject-matter definition of the law–politics divide was of little value when in *Baker* declared electoral apportionment cases subject to judicial review, reversing many of its earlier decisions. Moreover, in its *Baker* opinion, the Court set out legalistic standards for its political question doctrine. Thus the Court was assuming the power to say where the line between law and politics fell, and it should be no surprise that it has more often than not found this standard to permit, even require, judicial review.

### 6.1 Implications for the Study of Judicial Review

My account of increasing judicial authority explains the overall increase in the Supreme Court’s influence over American politics as a product of the expansion of meaningful judicial review to a growing number of topics. What I mean by meaningful judicial review is when the Court’s interpretation of the Constitution is both different from that of another actor (or there are at least plausible arguments for alternative interpretations) and that the Court’s endorsement of a particular interpretation compels another political actor to act contrary to its preferences. Meaningful review requires that the checks against the judiciary possessed by other political actors go unexercised. I explain these actors’ decisions not to check the Court as the result of a rational cost-benefit analysis. The expected public backlash associated with institutional retaliation against the judiciary makes such actions too costly to pursue. The Court’s own actions over its history have altered the separation-of-powers context of judicial review—it has successfully attached the “law” label to a variety of subjects that have previously been viewed as political matters. What are
the implications of this theory of judicial authority for our understanding of judicial review? I will, in turn, consider the implications for both the study of positive aspects of judicial politics and normative discussions of the proper role of the judiciary in the American system of government.

6.1.1 Implications for Positive Inquiries

I agree with the description of meaningful judicial review—the source of judicial authority—as “politically constructed.”\(^\text{10}\) Graber (1998b, 265) provides a statement articulating his conception of politically constructed judicial review: “the general tenor of judicial rulings have to be sufficiently congruent with the sentiments of most leading political actors to maintain the general consensus in favor of judicial review that has existed throughout American history.” I do not disagree with Graber, but I would stress two points. First, political support for judicial review can vary from issue area to issue area. I argue that the authority of the Supreme Court has increased as this politically supported judicial review has spread to more and more topics. This observation may help to explain some apparent contradictions in the judicial politics literature. The contemporary Court may enjoy considerable leeway overall because it has captured a high proportion of the issue areas regularly before it. But in other areas—areas the Court is entering for the first time (or areas that have been “politicized” by the Court or other actors)—the institutional checks on the Court may serve as tighter constraints.

Second, Graber’s “leading political actors” must include, perhaps most importantly, voters. When the Court enjoys public support of itself and its power of judicial review over a particular subject matter, other political entities will find it very costly to strike against the Court’s exercise of judicial review in a given case.\(^\text{11}\)

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\(^{10}\) See, \textit{e.g.} Graber (2006).

\(^{11}\) Of course, given the electoral connection between many political entities and the public, we should not be observed to find that there is frequently agreement (declared if not real) between
Other political actors’ invitation to judicial review or acquiescence to it is a necessary first step. But such short-term decisions have long-term consequences—they foster a public perception that the questions at issue are “legal” issues that, in a sense, belong to the courts. Congress and the President may be important participants in the construction of judicial review as a political power, but they find it difficult to undo their work. It is not “transformative” Presidents who are able to encourage the Court to change course,\(^\text{12}\) it is the underlying popular movement they are associated with.

And the Court’s relationship with the public may be a bit more complicated than suggested by Friedman (2009). The Court does not need to give the people what they want in order to maintain or even enhance its institutional legitimacy. Rather, the Court merely needs to assure the public that it sticks to legal topics—an assurance that depends not so much on some inherent attributes of political subjects but on the Court’s ability to apply legal processes to resolve disputes. And the Court’s overall legitimacy should be seen as a summation or collection of the Court’s judicial authority over all issues before it and not as a single feature of a given Court. The Supreme Court at any point in time may enjoy high levels of prestige and nonetheless lack authority over a given policy outcome because the public does not (yet) see it as a question of law. The reverse may be true as well—unpopular Courts may wield considerable influence over important policies firmly established as legal matters.

One interesting area for future study may be a closer examination of the justices’ motivations. Although I tend to believe that the members of the Supreme Court seek to enhance their institution’s ability to affect public policy, I need not attribute such intentions to them for my description of increasing judicial authority to be true. Justices of the Supreme Court may be motivated by a variety of factors on matters of policy and governance, including the legitimacy of judicial review.

\(^{12}\) See Whittington (2007).
tors beyond preferences over policy outcomes. Many justices—all justices on the current Court—have been socialized into a legal profession that stresses the value of legal processes for the public interest. Thus the Supreme Court may not agree to hear new cases as a part of a surreptitious, strategic attempt to aggrandize its power—rather, the justices may believe that the legal process can provide a better resolution of a particularly tricky dispute than other available methods.

6.1.2 Implications for Normative Inquiries

My findings may also have interesting implication for the normative study of judicial review. My analysis comports with that of scholars who argue that the Court has assumed a more prominent role in determining important policy outcomes—outcomes that were decided by political processes earlier in American history. Many such scholars worry about the democratic implications of having the unelected justices of the Supreme Court oversee so much. Some have called on the Court to change its approach to constitutional review and to create more space for democratic dialogue to resolve disputes about the fundamental principles of American government. If a sufficient proportion of the justices can be convinced of the wisdom, righteousness, or value of that alternative, such appeals to doctrinal adjustment may work. But if the justices are committed to a vision of Court-directed constitutionalism, then these requests will go unrequited. Based on my findings, I would argue that a better way to alter the nation’s practice regarding constitutional interpretation would be to try to convince the people themselves to take on a more active role in the maintenance and evolution of constitutional law—an approach advanced more clearly by Kramer (2006). Greater engagement on the part of citizens could, in theory, usher in a permanent period of popular constitutionalism that has characterized important episodes

13 See Epstein and Knight (2013) for a summary of recent work suggesting as much.
of constitutional change in American history.\textsuperscript{15} The countermajoritarian difficulty would be eliminated by a return to majoritarian democratic constitutionalism.

Other critics of the Court’s exercise of judicial authority are interested in preserving judicial supremacy. That is, they worry that aggressive acts by the Court will inhibit its ability to effect change in American politics. To the extent that concerns about the countermajoritarian difficulty are motivated by a worry that aggressive acts by the Court will undermine its legitimacy with the public, however, I will note that my findings suggest that of the passive virtues cited by the legal process movement application of neutral legal principles (or at least establishing the perception of such) may be more important to judicial authority than judicial minimalism.\textsuperscript{16} Judicial minimalism may be a reasonable approach to novel questions of law—questions that have not yet been developed and accepted by the people as legal questions. Judicial avoidance or minimalism can help the Court avoid conflicts with the other branches. But once the Court has entered a particular area, the way in which the Court decides matters more. In order to maintain the appearance (and perhaps reality) that the Court is staying on the law side of the law–politics divide, the Court must carefully follow legal processes.

These two approaches to judicial authority are in tension in an important way. The first group of scholars and observers wants popular, democratic processes to decide important matters. The second group would like to subject fundamental inquiries to legal analysis. That is, the groups differ on whether the Constitution should properly fall on the law or politics side of the law–politics distinction. The first group thus might seek to convince the public that the law–politics distinction promoted by the Court promotes is a fiction. That is, there are not questions that are inherently political or legal, and by describing a given dispute as legal, the Court

\textsuperscript{15} For a description of such periods of constitutional revolution, see Ackerman (1991).

\textsuperscript{16} See Molot (2004) for more on this theme.
is merely seeking to exercise a form of political power. In response, the second group
might acknowledge that the difference between law and politics is indeed a difference
based on process rather than subject matter. But, they may continue, the people—
the ultimate authority in America’s democracy—have made the considered political
choice to settle constitutional disputes via legal processes rather than the potentially
volatile and unsettling modes of democratic discourse.

6.2 The Future of Judicial Authority

Might we see further increases in judicial authority? As I have declared throughout,
I see very few truly “political” questions that would resist subjection to legal pro-
cesses. Perhaps some constitutional provisions themselves resist interpretation. For
instance, it is hard to see the Court interpreting the age minimum for the presidency
to mean anything but thirty-five years of age. Some issue areas that seem especially
exposed to judicial intrusion include executive and administrative authority, parti-
san gerrymandering, and even military intervention. The use of executive orders
and prerogatives has become a matter of political controversy. The judiciary has
typically taken a hands-off approach to such disputes, permitting the competition
between branches to play out in the political realm (although the Court has perhaps
been more willing to police attempted collusion between the branches\(^\text{17}\)). The Court
asserted the power to review redistricting cases in \textit{Baker}, of course. And in \textit{Davis v. Bandemer},\(^\text{18}\) the Court declared that questions of partisan gerrymandering were jus-
ticiable under the Equal Protection Clause—a question that still divided the Court
in \textit{Vieth v. Jubelirer}.\(^\text{19}\) Given the increased ability of partisan state legislatures to
draw legislative districts that minimize overall electoral uncertainty (while maximiz-

\(^{\text{17}}\) See, \textit{e.g.}, \textit{Clinton v. New York} (1998).


\(^{\text{19}}\) 541 U.S. 267 (2004) (with the four justices joining the plurality opinion finding them nonjusti-
ciable while the remaining five justices finding them justiciable).
ing their parties interests) and the increasing public outcry against such practices, it would not be surprising to see the Court attempt to articulate some minimal standards for redistricting along party lines. Finally, the ability of Presidents to commit military personnel to actions in foreign lands without much congressional oversight has similar potential to attract judicial review.

But just because the general trend for the Court has been an increase in judicial authority, it is not necessarily the case that the Court’s power will continue to expand. The mechanisms I have outlined may have operated to increase judicial authority over the course of American history, but that process has not been steady or consistent. The overall effects might suggest that the Court has sought more judicial authority, but it is not as clear that the justices knowingly adopted such a strategy. And even if the justices of the Court on average deliberately seek to enhance the Court’s power through this process, they may make miscalculations that undermine those efforts. Or there may be outside factors that frustrate the process of endogenous change.

Thus there are both endogenous and exogenous factors that might continue to influence the play of the judicial review game. If the Court behaves immodestly in entering new areas or fails to apply neutral principles in its analysis, it may undermine the public’s perception that the Court—despite its claims—is doing “law” rather than politics. Similarly, if the members of the Court come to be seen as readily identifiable and reliably supportive of particular partisan groups, they may have less credibility in asserting their branch’s ability to resolve disputes in a neutral, objective matter. Along these lines, Jacobi (2013) argues that Chief Justice John Roberts’s opinion in *NFIB v. Sebelius* reveals him as “not a humble law applier, but a keen politico-legal strategist.”

She argues that Roberts’s decision to ultimately uphold the ACA was motivated by concerns that the Court’s legitimacy could be undermined by a

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20 Jacobi (2013, 841).
vote down partisan lines.\textsuperscript{21} If the balance on the Court between pragmatists like (allegedly) Roberts and those committed to their principles like (perhaps) Justices Scalia and Thomas tips too heavily toward the ideologues, then judicial authority—or at least the growth of judicial authority—may be threatened.\textsuperscript{22} In addition, the tone of disagreements between the justices may affect the Court’s standing in the public. If a justice aggressively questions the legitimacy of a competing opinion or suggests that other justices’ decisions are motivated by something other than legal judgment, those critiques may resonate with the public.

Other players in the judicial review game could also potentially change their behavior to alter the quasi-parameters affecting judicial authority. If the President or Congress decide, in particular, that they would like to reduce judicial authority for some reason, they may find it worthwhile to pay the public backlash costs associated with retaliation against the Court in order to reduce the justices’ sense of freedom. Or such political actors may try to make a case directly to the public that a particular subject matter inherently implicates politics rather than law and should thus be taken away from the Courts.

Exogenous factors may also alter the equilibrium outcome of the institution of judicial review. For instance, if the nation’s politics enter a period of constitutional revolution such as those described by Ackerman (1991). In such a period, the Court’s authority may be threatened as “we the people” re-engage in constitutional politics and take on the power to reinterpret the meaning of the Constitution. In such a period, the elected branches are much more likely to be in line with the public than

\textsuperscript{21} See ibid., 829–835. She goes on to note that Roberts's vote to uphold the ACA was accompanied by a quite conservative justification that will, going forward, permit the Roberts Court to expand its influence at the expense of Congress. (Ibid., 841–844).

\textsuperscript{22} See, \textit{e.g.} Justice Scalia’s comment in his concurring opinion in \textit{McCullen v. Coakley}, 573 U.S. \underline{\underline{\textendash}}} (2014), explaining that he agreed with the majority opinion (by Rehnquist) on several points, he felt compelled to write a separate opinion because he preferred “not to take part in the assembling of an apparent but specious unanimity.” (Ibid., (14) (Scalia, J. concurring)).
the Court, and the public may watch the Court more closely on important issues or reduce (or even eliminate) the backlash costs associated with institutional checks on the Supreme Court.

Perhaps the most important specific exogenous threat to judicial authority is rising political polarization. Political scientists have noted that elected officials in the United States have been polarizing dramatically over the last several decades. There is some evidence that this trend extends to voters as well.\textsuperscript{23} At a minimum, voters seem to be doing a better job of sorting themselves into ideologically coherent groups.\textsuperscript{24} What effect might this phenomenon have on judicial authority? On the one hand, polarization act to “break” American politics such that policies needed and wanted by popular majorities fail to be passed.\textsuperscript{25} This political gridlock may provide opportunities for the judiciary to find and provide solutions to policy challenges. On the other hand, especially if polarization extends to the public, the Court may be unable to act without implicating partisan conflict in some way. In particular, if polarization is a product of increased ideological consistency, then the Court may have a difficult time applying neutral principles. The principles may themselves be implicated in partisan disputes such that attempts by the Court to apply them consistently predictably antagonizes groups backing a competing interpretation. Or we may observe the influences of both effects, with the overall effect a stalemate. In any event, the rising importance of partisanship in American politics portends new and difficult challenges for the Court given its insistence on the existence of the law–politics distinction and the fact that partisanship is the one factor that has always seemed to fall on the politics side of the line.\textsuperscript{26}

\textsuperscript{23} See, \textit{e.g.}, Abramowitz and Saunders (2008).

\textsuperscript{24} See Fiorina and Abrams (2008).

\textsuperscript{25} See generally Mann and Ornstein (2013).

\textsuperscript{26} See generally Garrett (2002) for the difficulties confronting the Court when it attempts to intervene in partisan matters.
6.3 Parting Thoughts

The Supreme Court has become a powerful force in the American separation-of-powers system. The Court has achieved this by acquiring the authority to impose its interpretation of the Constitution onto political outcomes. The Constitution sets out the supreme, fundamental law of American political society. The ability to define the obligations of and limits on governmental actors established by the Constitution is the ability to set the limits of ordinary politics. The Court has ruled that the political process has violated the Constitution’s mandates with regard to an increasing number of subjects and thus left its influence on the ultimate policies enacted to address these topics.

But the Constitution is, at its heart, a fundamentally political document—the most important political document for American government. And at the outset it establishes that it represents the will of “we the people.” The Court does not get to say what the Constitution means because of fundamental principles of constitutionalism or because of some textual provision in the Constitution itself. Rather, the Court derives its authority from the people. “We the people” have effectively delegated to the Supreme Court the authority to determine the meaning of the Constitution. For better or worse, the people sometimes seem to forget that this delegation has occurred. Part of what makes the Court an effective arbiter of constitutional disputes is this amnesia. The nation’s politics work more effectively and efficiently absent constitutional crises that highlight fundamental divisions between groups with regard to their vision of what American democracy is. Thus the Court may be excused for promoting blind allegiance to the idea of judicial supremacy.\(^{27}\)

\(^{27}\) It may also explain the Court’s complicated relationship with constitutional amendments. On the one hand, additions to the constitutional text give Court more to interpret—a potential expansion of judicial authority. On the other hand, Article V revisions of the Constitution effect constitutional change outside the Court’s supervision. Thus the Supreme Court may be tempted to effect constitutional amendments via new or altered interpretations, to ensure that alternative,
Popular constitutional discourse in the United States may be surprisingly stunted and underdeveloped for a people so committed to the idea of government of the people, by the people, for the people, but strong commitments to and frequent debates about fundamental principles among an extended republic of millions of citizens may not be the best way for them to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of liberty to themselves and their posterity.

This study began with the observation of a Frenchman about the nature of American judicial review. It is only fitting to give him the last word, as he recognized the source of the Supreme Court’s power, which I have identified as a critical part of the mechanism by which it has increased its judicial authority. Speaking of the Supreme Court, Alexis de Tocqueville declared: “Their power is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it. Now, the power of opinion is that which is most difficult to make use of, because it is impossible to say exactly what its limits are. It is often as dangerous to fall short of them as to exceed them.”

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28 Tocqueville (2000, 142).
Bibliography


Biography

Aaron Mitchell Houck was born on January 14, 1980 in Beckley, West Virginia, the son of William Mack and Deborah Anne Houck. He studied economics and political science at Davidson College in Davidson, North Carolina as a John Montgomery Belk Scholar and was graduated *cum laude* with a B.A. in 2002. He earned a J.D. from Harvard Law School in Cambridge, Massachusetts in 2005. He was employed as an attorney at the Charlotte, North Carolina law firm of Robinson, Bradshaw & Hinson, P.A. and as the Associate Director for the Renaissance Computing Institute Engagement Center at the University of North Carolina at Charlotte. He has studied political science at Duke University as a James B. Duke Fellow and a University Scholar, earning a M.A. in 2012 and a Ph.D. in 2014. He is the husband of Pearlynn Gilleece Houck and the father of Watson Mack Houck and Ginette Marie Houck.