JUDICIAL REVIEW AND NON-ENFORCEMENT AT THE FOUNDING

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This Article examines the relationship between judicial review and presidential non-enforcement of statutory law. Defenders of non-enforcement regularly argue that the justification for judicial review that prevailed at the time of the founding also justifies the president in declining to enforce unconstitutional laws. The argument is unsound. This Article shows that there is essentially no historical evidence, from ratification through the first decade under the Constitution, in support of a non-enforcement power. It also shows that the framers repeatedly made statements inconsistent with the supposition that the president could refuse to enforce laws he deemed unconstitutional. In contrast, during this same period the historical record contains hundreds of discussions of judicial review. The Article then advances an explanation of why there was considerable support for judicial review but none for non-enforcement. Judicial review followed from what that generation called "expounding" the law, which meant explaining it. A court was supposed to explain the law in the course of deciding a case. Explaining the law involved examining all potentially relevant legal rules and showing how they fit together to deductively justify the judgment reached. In that context, if a statute could not be reconciled with the constitution, it would not be given effect. Since the president neither decided cases nor expounded the law, he did not enjoy a power of non-enforcement parallel to the power of judicial review.

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INTRODUCTION

Can the president refuse to enforce a law he deems unconstitutional? Take the Affordable Care Act. The Supreme Court upheld the provision in the Act mandating that individuals purchase health insurance, but leading Republicans continue to press the view that the law is unconstitutional.[1] Suppose one such Republican captures the presidency in 2016. His first act in office is to recommend legislation repealing the Affordable Care Act,[2] but a Democratically controlled Senate tables the proposal. Can the president instead dispose of the law by refusing to enforce its provisions? Can he abandon enforcement of the individual mandate?[3] Can he decline to enforce federal regulations of state health-care exchanges?[4] Can he decline

[1] *See* Nat'l Fed. Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Tom Howell, Jr., *Ted Cruz sees legal landmines ahead for Obamacare*, WASHINGTON TIMES, Dec. 9, 2013.

[2] *See* U.S. CONST., art. II, § 3 ("He shall . . . recommend to their Consideration such Measures as he shall judge necessary and expedient.").

[3] The president could direct the Secretary of the Treasury not to demand payment for an individual's failure to obtain minimum essential coverage. *See* 42 U.S.C. § 18091 (individual mandate); 26 U.S.C. § 5000A(g)(1) ("The penalty provided by this section shall be paid upon notice and demand by the Secretary . . . .").

[4] *See* 42 U.S.C. § 18031(d), (e) (specifying requirements for state exchanges). Candidate Mitt Romney suggested during the presidential election contest of 2012 that he

to pursue insurers who deny coverage or employ underwriting practices in violation of the Act?[5] Can he decline to pursue covered employers who refuse to provide health insurance for their employees?[6]

Many commentators would say yes, assuming that the president acts on the basis of a constitutional objection to the provision in question.[7] Their principal ground for taking this position is an analogy between executive and judicial power. They argue that the justification for judicial review that prevailed at the time of the founding also justifies the president in refusing to enforce laws he deems unconstitutional.[8] According to Sai Prakash and John Yoo, for example, "the same constitutional reasoning that supports judicial review also militates in favor of a form of executive branch review in the course of executing the laws."[9] Prakash and Yoo are joined in this view by a remarkable group, including Akhil Amar,[10] Larry Kramer,[11] John Harrison,[12] Gary Lawson,[13] Christopher Eisgruber,[14] Michael Stokes

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would issue "waivers" to states exempting them from various requirements under the Affordable Care Act, including those related to state exchanges. *See, e.g.*, Philip Klein, *Romney and Obamacare Waivers*, WASHINGTON EXAMINER (Dec. 7, 2011). The position verged on non-enforcement, since the waiver provision in the Affordable Care Act extends only to states that develop coverage mechanisms at least as comprehensive as those mandated by federal law, a requirement Romney aides suggested would be not strictly enforced. *See id.*; 42 U.S.C. § 18052(b), (c).

[5] *See, e.g.*, 42 U.S.C. § 300gg-1(a) (guaranteed issue); § 300gg-2(b) (guaranteed renewability); § 300gg-3 (preexisting conditions).

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

[7] *See infra* notes 9-16. I set aside the question of whether the agency charged with enforcing the Affordable Care Act enjoys the discretion not to enforce the law under the Administrative Procedure Act. *See* Michael Sant' Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 394-95 (2014) (discussing Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

[8] *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 17-18 (2000) (identifying this argument).

[9] Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 924-25 (2003); *see also* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 800-01 (2013); Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 533 (2012); Saikrishna B. Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1645-46 (2008).

[10] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005).

[11] *See* Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 87 (2001).

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

[13] *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional*

Paulsen,[15] and Judge Frank Easterbrook,[16] among others.[17]

The view is wrong. The analogy these scholars draw between executive and judicial power rests on a serious misreading of founding-era history. By the time of the founding, and for the first decade under the Constitution, most regarded the courts and the executive as very different institutions, with very different obligations. My purpose in this article is to explain where these scholars have gone wrong and to argue for a different interpretation of the founding-era understanding of executive and judicial power. To be clear, I do not argue that the president under no circumstances may be understood to possess a power to decline to enforce laws he thinks unconstitutional. He may have such a power. I argue merely that the analogy between non-enforcement and judicial review is mistaken, and that if there is such a presidential power, its source must lie elsewhere.

The effort to tie presidential non-enforcement to a broadly accepted practice like judicial review has had significant practical consequences. It has played a key role in justifying the expansion of presidential authority. As the nation's chief prosecutor, early presidents did "direct non-prosecution[s]," and thus block the enforcement of criminal law.[18] Today,

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Interpretation, 81 IOWA L. REV. 1267, 1287 (1996).

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

[15] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267 (1994).

[16] *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-20 (1989-90).

[17] For example, Judge Nina Pillard endorsed the analogy between judicial and executive power, although she did not expressly conclude on that basis that the president may decline to enforce a law he deems unconstitutional. *See* Cornellia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005). Notably, the last twenty years has seen only one extended effort to rebut the claim that non-enforcement can be defended on originalist grounds. *See generally* CHRISTOPHER MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE (1998). For leading textualist arguments against non-enforcement, see Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381 (1985). There have been significant book-length defenses of departmentalism without any emphasis on non-enforcement, but these mostly date from an earlier period and have had little impact on the contemporary debate within legal scholarship. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231-70 (1988); JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 77-95, 139-67 (1984).

[18] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 49, 60-61 (2008) (Washington and Adams). *But see* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286-90 (1989) (showing that early prosecution was highly decentralized); Susan Low Bloch, *The*

however, presidents do not confine their claims of interpretative authority to the discretion traditionally afforded a prosecutor.[19] During the presidency of George H. W. Bush, the Office of Legal Counsel in the Department of Justice ("OLC") advised the White House that "the Constitution provides the President with the authority to refuse to enforce unconstitutional [statutory] provisions," including those administrative or civil in nature, like the provisions of the Affordable Care Act cited above.[20] In defense of this position, OLC drew an analogy between presidential non-enforcement and judicial review, invoking a founding-era justification for judicial review and citing Marbury v. Madison.[21] Later, OLC sought to temper its advice; in a subsequent memo, issued in 1994, the agency suggested that that non-enforcement authority was significantly limited, and should be employed only in cases where the president had reason to believe the Supreme Court would concur in his judgment.[22] Yet the limits proffered by OLC did not

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Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 DUKE L.J. 561, 585-90, 637 (same).

[19] Notably, the examples cited by Calabresi and Yoo in which Washington or Adams ordered an end to a prosecution did not turn on the president's view of constitutional meaning. *See id.* The first president to stop a prosecution on constitutional grounds was apparently Jefferson. *See infra* n.42; PAULSEN, CALABRESI ET AL., THE CONSTITUTION OF THE UNITED STATES 318 (2d ed. 2013).

[20] Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31 (1992) (advising the president that he could refuse to enforce an administrative provision prohibiting him from issuing multiple diplomatic passports); *see also* The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. No. 11, *4-5 & n.8 (1993), *in* THE CONSTITUTION AND THE ATTORNEYS GENERAL 565-66 (H. Jefferson Powell ed., 1999) (advising White House counsel that the president may decline to enforce a "clearly unconstitutional law," and that this proposition is "consistent with the views of the framers," citing a statement by James Wilson at the Pennsylvania ratifying convention).

[21] *See* 16 Op. O.L.C. at 31-33 ("Where an act of Congress conflicts with the Constitution, the President is faced with the duty to execute conflicting 'laws' – a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed and execute the Constitution, the supreme law of our Nation. Thus, the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all . . . ."); *cf.* The Att'y Gen.'s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275, 4A Op. O.L.C. 55, 55-56, 58 (1980) (defending a more moderate position, and conceding that "the available evidence concerning the intentions of the Framers lends no specific support" to non-enforcement, and that there is "relatively little direct evidence of what the framers thought" about a presidential power to decline to enforce "transparently" unconstitutional laws).

[22] *See* Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199, 201 (1994) (stating that the president has "enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency," and that the president may refuse to enforce such a law "unless he is

reflect, in any transparent way, the logic of the executive analogy to judicial review, on which the non-enforcement power had been rested.[23] Consequently, the 1994 limits have proven illusory. President George W. Bush asserted the authority in signing statements "to disobey more than 750 laws," a pattern difficult to square with the 1994 opinion.[24] Tellingly, executive branch attorneys defended Bush's action by again invoking founding-era arguments for judicial review.[25] And just last term, in United States v. Windsor, Justice Scalia's defense of non-enforcement suggested no clear limitations on the power.[26] According to Scalia, a president who concluded that section 3 of the Defense of Marriage Act violated the Equal

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convinced the [Supreme] Court would disagree with his assessment); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 61-63 (2000) (describing the evolution in views at OLC). According to Judge Pillard, the requirement that the president enforce the law unless he believes the Supreme Court will concur in his judgment effectively embraces judicial supremacy. *See* Pillard, *supra* note 17, at 735. Another view is that the requirement of judicial concurrence serves to measure the obviousness of the constitutional defect, functioning like a Thayerian doubtful case rule. *See* James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893).

[23] The executive-judicial analogy is not explicit in the 1993 or 1994 O.L.C. opinions, but it is very much present. For example, the 1994 opinion bottoms the president's non-enforcement authority on a reading of the Take Care Clause popularized by defenders of the executive-judicial analogy. *Compare* 8 Op. O.L.C. at 200, *with* 16 Op. O.L.C. at 32, *supra* note 21. On another note, it is suggestive that restrictions on *judicial* review like those proposed for non-enforcement in the 1994 opinion—such as limiting judicial review to 'defensive' uses or a doubtful case rule—have also proved impossible to sustain. For a discussion of 'defensive' judicial review, see Robert Lowry Clinton, *Marbury v. Madison, Judicial Review, and Constitutional Supremacy in the Nineteenth Century*, *in* MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 88-91 (Mark Graber & Michael Perhac eds., 2002); Michael Klarman, *How Great were the 'Great' Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1121 (2001). For a discussion of the doubtful case rule, see Thayer, *supra* note 22, at 140.

[24] *See* TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N REPORT 2, 14-18 (2006) (listing laws), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf; Curtis A. Bradley & Eric Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 323 (2006) (identifying 844 "sections challenged" by signing statement); Dawn Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 410 (2008) ("Although the Bush administration has not publicly replaced the 1994 nonenforcement guidelines, its actions have demonstrated unambiguously that it does not believe the President's nonenforcement authority is so limited.").

[25] *See* Johnsen, *supra* note 24, at 410-11.

[26] *See* United States v. Windsor, No. 12-307, slip. op. at 9-10 (S. Ct. June 26, 2013) (Scalia, J., dissenting) ("He could have equally chosen . . . neither to enforce nor to defend the statute he believed to be unconstitutional . . . ."); *accord* Devins & Prakash, *supra* note 9, at 509.

Protection Clause should have simply refused to enforce it. Yet section 3 was a *definitional* provision; its effects spanned federal law.[27] A non-enforcement power applied across the reach of section 3 would be broad, deep, and largely insensitive to considerations of institutional competence and political context.[28]

As I show below, none of this comports with founding-era history. Somehow the argument for non-enforcement has garnered a reputation for resting on original meaning and practices.[29] Too little effort has been made to limn the boundaries of period concepts. Thus, what *is* supported by historical evidence is the abstract proposition that each of the branches of the federal government, or "departments," enjoys a coordinate authority to interpret the Constitution.[30] "Coordinate" means equal.[31] The departments are equals. As Madison put it in Federalist 49, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[32] In other words, being an equal implies being *autonomous*—each department gets to make its own determination of the nature and scope of its authority under the Constitution.

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[27] *See id.* at 2. In an earlier case, Freytag v. Commissioner of Internal Revenue, Justice Scalia asserted that the president had a defensive non-enforcement authority. *See* Freytag v. Comm'r, 501 U.S. 868, 870 (1991). Citing Easterbook's article, Justice Scalia suggested that the president had a power to "resist legislative encroachment" by "disregard[ing] [laws] when they are unconstitutional." Easterbrook's article, however, defends non-enforcement by analogy to judicial review, and consequently does not limit non-enforcement to defensive uses. *See* Easterbrook, *supra* note 16, at 919-20.

[28] In contrast, the 1994 OLC opinion emphasized the non-enforcement was a context-sensitive determination. *See* 18 Op. O.L.C. at 199-202. For examples of non-enforcement in the Obama Administration, see Delahunty & Yoo, *supra* note 9, at 781-84. Consider, as well, efforts by *state* executive officers to justify non-defense or non-enforcement of state law on the basis of an analogy to judicial review. *See, e.g.*, Transcript, *Virginia's New Attorney General Will Not Defend Gay-Marriage Ban*, NPR MORNING EDITION, Jan. 23, 2014.

[29] Aziz Huq, *Enforcing (but not Defending) 'Unconstitutional Laws'*, 98 VA. L. REV. 1001, 1008-09 (2012). Huq's 'strong' departmentalism includes a non-enforcement power. I do not mean to suggest that Huq himself takes the view that non-enforcement can be defended on originalist grounds, or that he has misread any of the relevant sources. For a defense of a duty of non-enforcement on originalist grounds, see Prakash, *supra* note 9, at 1649-59.

[30] *See, e.g.*, Paulsen, *supra* note 15, at 228-40; Clinton, *supra* note 23, at 92; Gordon Wood, *Judicial Review in the Era of the Founding*, *in* IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 161-62 (Robert A. Licht ed., 1993).

[31] Matthew Steilen, *Collaborative Departmentalism*, 61 BUFF. L. REV. 345, 355-60 (2013).

[32] THE FEDERALIST 273 (J.R. Pole ed., 2005).

This abstract proposition is called "departmentalism."[33] Departmentalism was conceived in response to a difficulty that arose as the framers wrestled with the consequences of judicial review in a system with separated powers and judicial independence.[34] Their concern was that the power of courts to interpret and enforce fundamental law would make an independent judiciary superior to (and not coordinate with) the other departments, by giving courts 'final say' in determining the departments' powers. Put simply, departmentalism is the idea that *courts do not have the final say*. The executive and the legislature have an authority to decide for themselves what the Constitution means.[35] They need not acquiesce in a judicial interpretation—any more than the judiciary is obligated to adopt their view when deciding a case. As Jefferson put it sometime later, "each of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question."[36] It should be easy to see, however, that departmentalism does not entail non-enforcement. The two are very different.[37] Departmentalism is an abstract statement of the relative interpretative authority of the departments; non-enforcement is a specific presidential power. President Jefferson professed to give effect to his "free & independent judgment" of the Constitution's meaning—but through "the functions confided to [him]."[38] What functions actually were confided to

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[33] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES 105-08 (2004).

[34] *See id.*

[35] This is the basic point defended by Edwin Meese in his famous (or infamous) Tulane speech. *See* Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983-86 (1986-87). Herbert Wechsler made more or less the same point in "The Courts and the Constitution." *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared.").

[36] Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 12 THE WORKS OF THOMAS JEFFERSON 107 (Paul Leicester Ford ed., 1905); *see also* Letter from Thomas Jefferson to Edward Livingston (May 26, 1801), *in* 9 THE WORKS OF THOMAS JEFFERSON 259 (Paul Leicester Ford ed., 1905) ("I affirm that act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, *wherever it comes in the way of my functions*." (emphasis added)).

[37] *See* Stephen M. Griffin, *Executive Power in the U.S. Constitution: An Overview* 17 (2014), *available at*: http http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422927

[38] *The Paragraph Omitted from the Final Draft of Jefferson's Message to Congress* (Dec. 8, 1801), *in* 3 ALBERT JEREMIAH BEVERIDGE, THE LIFE OF JOHN MARSHALL 605-06 (1919); *see also* James Madison, Helvidius No. II (Aug. 28, 1793), *in* 6 THE WRITINGS OF JAMES MADISON 153 (Galliard Hunt ed., 1906) (arguing that the power to interpret a treaty or determine obligations to go to war "belongs to the department to which those functions belong").

him was another matter entirely.[39] One could not determine *that* by inference from coordinacy alone.[40]

Jefferson did decide to "remit . . . execution" of the Sedition Act, and this is sometimes adduced as an example of non-enforcement in the modern sense.[41] Even if it is—a proposition I doubt, but will assume here for purposes of argument[42]—those who seek to analogize non-enforcement to judicial review face a significant problem of *timing.* The problem is obvious, but remarkably unappreciated. While there was a relatively widespread discussion of judicial review in the decade *prior* to Jefferson's election,[43] there was no discussion of presidential non-enforcement.[44] *None*. If the same argument supports both practices, this makes little sense. Why was there no discussion of presidential non-enforcement during the

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[39] *See* Barron, *supra* note 22, at 91 ("[Jefferson] may be understood to be arguing only that the President has the constitutional authority to exercise the pardon power to remit sentences, and that in the exercise of that constitutionally vested power, he is free to make a judgment as to a law's unconstitutionality.").

[40] See the argument infra in Part II.C.1.

[41] *See, e.g.*, SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 3-4 (1992).

[42] Jefferson defended his conduct by citing his powers of pardon and control over federal prosecutions. *See* Letter to Roane, *supra* note 36, at 107 ("A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion . . . ."); Letter to Livingston, *supra* note 36, at 260 ("The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into legal train."); Letter from Thomas Jefferson to Abigail Smith Adams (July 22, 1804), *in* 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 23 (Thomas Jefferson Randolph ed., 1829) ("I discharged every person under punishment or prosecution under the sedition law . . . ."); *cf.* ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 33-35 (1971) (observing that Jefferson never publicly proclaimed an authority to refuse to enforce laws he thought unconstitutional).

[43] This discussion took place in multiple forums, including the press and litigated cases. William Treanor and Philip Hamburger have recently shown that judicial review was exercised, and often discussed, in many more cases than was traditionally appreciated. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 358-503 (2008); William Michael Treanor, *Judicial Review Before "Marbury"*, 58 STAN. L. REV. 455, 457-58 (2005).

[44] On the lack of evidence, see *infra* Part II.A. Although I am aware of no defenses of *gubernatorial* non-enforcement during this period, I have not attempted an exhaustive search, which would be a formidable undertaking. In his study of judicial duty, Philip Hamburger does not describe instances of state executive expounding or non-enforcement. *See* HAMBURGER, supra note 43, at 544 ("Among those who accepted the force of judgments were the executive officers of the states."); *id.* at 546 ("As might therefore be expected, Virginia's executive is not known to have claimed any distinctive authority to expound the constitution or any other law . . . .").

Federalist period? What accounts for the discrepancy in timing?

To answer this question, I begin from a premise advanced by a number of leading historical studies of judicial authority and judicial review.[45] According to Gordon Wood, Sylvia Snowiss, and Larry Kramer, the founding generation distinguished the *fundamental* law set out in written constitutions from *ordinary* law, and believed fundamental law would ultimately be enforced by the people themselves acting 'out of doors,' through petitions, voting and protest.[46] If this is correct, as I shall assume it is, then we should think of the movement to establish judicial review in the 1780s as being centrally concerned with showing why violations of fundamental law should be determined and remedied *in court*, as well as outside it, as was the traditional practice. The evidence examined here suggests that the answer lies in the distinctive procedures utilized by courts of law.

Much more than we, the framers had a special regard for courtroom proceedings, or what some in that period called "forensic litigation." Forensic litigation, they thought, could shape to a dispute in a way that made it possible for a judge or jury to resolve the matter in a non-partisan fashion, according to the law of the community.[47] This was a valuable institutional asset in the decades after the Revolution. It was during that period that popular assemblies completed their transformation into active

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[45] *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 291-305 (2d ed. 1998) [hereinafter WOOD, CREATION]; SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); KRAMER, *supra* note 33. Sylvia Snowiss's account of the origins of judicial review has, in particular, been influential. *See* Treanor, *supra* note 43, at 461-62 (describing Snowiss's account as "dominant"). To be sure, it is now somewhat dated, and it has certainly come in for its fair share of criticism, in part for insisting on a rather rigid and unnatural reading of key sources. *See* Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 867-73 (2006); Dean Alfange, Jr., *Marbury v Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 333-49 (1993). Nevertheless, Snowiss's claims about fundamental law are quite similar to those made by Wood and Kramer. Moreover, the Snowiss study remains particularly important for my purposes, given its influence on those who have advocated the analogy between judicial and executive power. *See, e.g.*, Kramer, *supra* note 11, at 33 n.114 (acknowledging Snowiss's influence); Easterbrook, *supra* note 16, at 922 n.50 (citing Snowiss); Paulsen, *supra* note 15, at 241 n.78 (same).

[46] SNOWISS, *supra* note 45, at 1-2, 90-91; KRAMER, *supra* note 33, at 29-30; WOOD, *supra* note 45, at 291-92. For an important older study that casts doubt on the separation of fundamental law and ordinary law, see Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

[47] *See infra* Part III.A.

law-*making* bodies—i.e., true legislatures—occupied largely by settling contests between constituent groups over the goods generated by public policy.[48] Courts were an anodyne to this development. By curbing fits of legislative excess, courts could promote the rule of the public's *reason*—what that generation called "public opinion"—rather than the "passion" or raw interests that animated the assembly.[49]

Yet courts could play this institutional role only if they conducted themselves in the right way. *Procedure* thus became the core of a multistate reform movement aimed at reshaping state and local courts at the turn of the nineteenth century.[50] At the center of that movement, I argue, were two key ideas, which reformers used both to describe practice ideals and to justify proposed changes. First was the idea of a *case*, which was the sort of dispute suited for resolution in a court of law. Second was the idea of *expounding* the law, which was the form legal explanation took in deciding a case. Philip Hamburger's magisterial study of judicial duty devotes attention to both ideas,[51] but, as others have noted, leaves the notion of expounding largely undeveloped.[52] I try to fill in this idea, as it was used in the United States in the 1780s and 1790s. In this context, expounding the law often meant more than simply making sense of it; it involved something like deducing an outcome from a systematic formulation of the community's basic legal principles.[53] While all departments had to make sense of the law to exercise their functions, only courts expounded it, because expounding enabled the court to resolve disputes non-politically.[54] Sources from this period often describe judicial review as a kind of a kind

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[48] *See, e.g.*, WILLIAM NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 30-34 (2000) [hereinafter NELSON, MARBURY].

[49] *See, e.g.*, James Kent, Introductory Lecture to a Course of Law Lectures (1794), *in* 2 AMERICAN POLITICAL WRITING IN THE FOUNDING ERA 1760-1805, at 941-42 (Charles S. Hyneman & Donald S. Lutz eds., 1983) ("[I]n this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary Legislature, and this precaution is considered in general as essential to perfect security, and to guard against the occasional violence and momentary triumphs of party. . . . The Courts of Justice which are organized with peculiar advantages to exempt them from the [12] baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution."); *see also infra* Part I.A.

[50] *See infra* Part III.A, B.

[51] *See* HAMBURGER, *supra* note 43, at 536-48.

[52] *See* Mary Sarah Bilder, *Response: Expounding the Law*, 78 GEO. WASH. L.R. 1129, 1140-42 (2010) (reviewing HAMBURGER, *supra* note 43).

[53] *See infra* Part III.C.

[54] This was the majority view, not a universal one. *See infra* Parts III.C. and III.D.

of by-product of expounding, which occurred when a systematic account of potentially relevant community law included the constitution. Reform thus brought an end to the pre-revolutionary American paradigm, in which judicial "magistrates" exercised multiple governmental functions and led the process of law-enforcement and even policy-making at the local level.[55] By the time of ratification, most would draw a distinction, in principle, between judges and executives, since executives neither decided cases nor expounded the law. And since executives did not expound, they had no power of review.[56] The justification for enforcing the constitution *in court* did not extend to the executive—at least with respect to its office of enforcing the law.

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

I. THE NON-ENFORCEMENT ARGUMENT

The analogy between executive non-enforcement and judicial review grows out of a leading historical account of the early republic.[57] In this account, judicial review emerges in response to the politics of debt and paper money that gripped state assemblies after the Revolutionary War. Proponents of judicial review during this period sought to employ legal challenges to slow down the legislative process, and to inhibit measures unfairly targeting creditors and loyalists. Below, I sketch this political

[55] Reform took decades in some jurisdictions, stretching into the nineteenth century. *See, e.g.*, JOHN PHILIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 3-17 (2009) [hereinafter REID, LEGISLATING].

[56] *See* HAMBURGER, *supra* note 43, at 545.

[57] The account is associated largely with Gordon Wood. *See infra* Part I.A.

context and then examine a leading defense of judicial review from the period, James Iredell's essay "To the Public," in which Iredell defends the enforcement of constitutional limits in court. My discussion of Iredell's essay and its relationship to the politics of the time will be familiar to many readers. However, to make the comparison between judicial review and non-enforcement as precise and stable as possible, I lay out Iredell's argument 'formally.'[58] I call the formal version of the argument the *Standard Justification*. This formal argument is a creature of my own making and new to the literature, but the analysis is meant to track conventional wisdom, so that we can figure out later where that wisdom goes wrong. Formalizing Iredell's argument also enables me to show exactly how the Standard Justification can be adapted to support a presidential non-enforcement power, as commentators have claimed. To help us keep our various arguments straight, I call this adaptation the *Non-Enforcement Argument*. Thus, the Standard Justification justifies judicial review; the Non-Enforcement Argument justifies presidential non-enforcement. As we will see, the Non-Enforcement Argument springs from the same political logic as judicial review, but recruits the executive (rather than just the judiciary) to resist the popular assembly.

A. State politics and judicial review

The American Revolution was followed by a period of deep-felt anxiety.[59] Concern centered on the economy. At the national level, the Confederation emerged from the war with a massive debt and few fiscal tools to discharge it.[60] At the state level, there was a widespread perception that commercial trade was depressed. Markets had disappeared; Britain closed the lucrative ports of the West Indies to American ships, forcing exporting states to locate new overseas markets.[61] Inland markets dried up as customers struggled to repay wartime debt.[62] At the same time, states

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

[59] *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 611-12 (2d ed. 2005).

[60] *See* Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 130-33 (Richard Beeman, Stephen Botein, & Edward C. Carter eds., 1987). For the Confederation's fiscal difficulties, see MIDDLEKAUFF, *supra* note 59, at 616-19.

[61] *See* MIDDLEKAUFF, *supra* note 59, at 613.

[62] *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 248-49 (1991) [hereinafter WOOD, RADICALISM].

sought to discharge their own public debt through taxation.[63] Governments wanted to collect "specie," or hard money, but it was scare, and a number of states resorted to printing paper currency so taxes could be paid.[64] Inflation followed.

It was perhaps natural that Americans would blame the Confederation Congress and the state assemblies for this state of affairs. They did. What is remarkable, however, is the constitutional register in which their discontent was voiced.[65] Americans drew ready inferences about their own character as a people. They lacked "virtue" and had succumbed to a "licentious" addiction to "luxury."[66] "Having won independence at great cost," writes Jack Rakove, "Americans seemed unprepared or unable to manage their affairs wisely or peacefully."[67] The people now held power in the state assemblies, but majority factions in the assembly used this power to pursue economic and social policies that advanced their private interests at the expense of others.[68] Thus, assemblies dominated by merchant interests sought to require full repayment of private debt in inflation-resistant specie, at the expense of farmers unable to repay notes at face value.[69] In some states, and at other times, the opposite policy prevailed.[70] Assemblies also made quick work distributing the landholdings of loyalists, confiscating their property and creating 'efficient' mechanisms for quieting title that dispensed with protective procedures traditionally available at common law.[71] But most importantly, and most disquietingly, this style of

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[63] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 29-30 (1996).

[64] Printing notes to be removed from circulation through taxation was known as "currency theory." *See* Riesman, *supra* note 60, at 130; *see also* MIDDLEKAUFF, *supra* note 59, at 617.

[65] *See* WOOD, CREATION, *supra* note 45, at 393-96.

[66] *See id.* at 403-04, 419-21.

[67] RAKOVE *supra* note 63, at 29.

[68] *See* WOOD, RADICALIZATION, *supra* note 62, at 229.

[69] NELSON, MARBURY, *supra* note 48, at 31.

[70] WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 92 (1975) [hereinafter NELSON, AMERICANIZATION].

[71] The seizure and distribution of real property is only one example of state laws targeting loyalists. Other examples include the seizure of personal property, the elimination of debt liability, and laws stripping loyalists of basic civil and political rights. *See* Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 835-38 (2006); *see generally* Alison Reppy, *The Spectre of Attainder in New York (Part I)*, 23 ST. JOHN'S L. REV. 1 (1948); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution (Part I)*, 3 ILL. L. REV. 81 (1908); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution (Part II)*, 3 ILL. L. REV. 147 (1908).

politics—the politics of self-interest—was inherently contentious.[72] In place of the pre-war "consensus style of government" there was an openly hostile battle for state favor and public resources.[73]

The experience of state politics in the 1780s drove the development of judicial review.[74] According to the dominant account, the pivot point was a revision in the understanding of separation of powers.[75] As alienation from state assemblies grew, the American people began to conceptualize themselves not as *part of* the government, present in a popular law-making body, but as standing *outside* government entirely. The state assembly, such as it was, and such as it had conducted itself, was no longer the people's presence within government. It became simply another form of governmental magistracy, answerable to the sovereign people through elections. This shift in understanding was evidenced in a period of constitutional reform at the state level, where the people's delegates sought to design the institutions of government in ways that would inhibit a politics of self-interest and the concomitant risk to individual rights.[76] Adjustments were made throughout the system—to apportionment in the assembly, to its form and powers, to qualifications for membership in the upper house, and to the term and powers of the governor.[77] Some proposed expanding government with a system of public schools, to promote virtue among the people themselves.[78] But courts of law underwent perhaps the most striking

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[72] RAKOVE, *supra* note 63, at 30; WOOD, CREATION, *supra* note 45, at 399-403.

[73] The expression comes from NELSON, MARBURY, *supra* note 48, at 27; *see also* WOOD, RADICALIZATION, *supra* note 62, at 245-47. Nelson argues that this development followed a transformation in the understanding of the authority of law; after the Revolution, law was an instrument that could be used to advance one's interests. *See* NELSON, MARBURY, *supra* note 48, at 32-33; *see also* NELSON, AMERICANIZATION, *supra* note 70, at 3-5.

[74] KRAMER, *supra* note 33, at 54; Prakash & Yoo, *supra* note 9, at 930; Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 CONST. COMMENT 231, 233 (2003); Matthew Harrington, *Judicial Review before John Marshall*, 72 GEO. WASH. L. REV. 51, 65-67 (2003); Wood, *supra* note 30, at 156-57.

[75] The claims in this paragraph derive from Gordon Wood's seminal study in *The Creation of the American Republic*. WOOD, CREATION, *supra* note 45, at 446-53; *see also* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 450-52 (2009) [hereinafter WOOD, EMPIRE]; Wood, *supra* note 30, at 159. For a criticism of the separation of powers explanation, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 509 (2006).

[76] The same concern guided constitutional design at the national level. *See* RAKOVE, supra note 63, at 48-55.

[77] *See* WOOD, CREATION, *supra* note 45, at 433-46. Notably, no state gave its governor an express power of non-enforcement.

[78] *See* DAVID TYACK, THOMAS JAMES ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 14-15 (1987); SHANNON STIMSON, THE AMERICAN

change. They emerged as a separate and independent branch of government: the judiciary.[79]

As agents of the people, equal in status to the other great departments, the judiciary could play a role in safeguarding individual rights and preserving constitutional limits.[80] Its role, to be sure, would not be unique.[81] The judiciary would not be the "appointed arbiters" of the legislature's constitutional boundaries.[82] The primary mechanisms for determining and enforcing constitutional limits would be the structural features established to check the legislative power.[83] Yet courts would be duty-bound to contribute to this effort. Now, just like members of the state assembly, judicial officers were agents of the people, and as such were themselves bound by the limits of the constitution.[84] A judiciary co-equal (or "co-ordinate," as that generation put it) with the legislature, whose principal was the people, should refuse to give effect to a legislative act that violated constitutional limits. So conceived, judicial review was an "extraordinary political act" of resistance to a usurping popular assembly, not an exercise of "conventional legal responsibility."[85]

It is with these aims, according to our narrative, that judicial review took its first, halting steps in state courts in the 1780s.[86] The leading state

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REVOLUTION IN THE LAW 88-89 (1990). Outside government, the "public sphere" of voluntary societies and print media would filter and shape public opinion. *See* John L. Brooke, *Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic*, *in* LAUNCHING THE EXTENDED REPUBLIC: THE FEDERALIST ERA 277-84, 296-309 (Ronald Hoffman & Peter J. Albert eds., 1996).

[79] WOOD, EMPIRE, *supra* note 75, at 407; REID, LEGISLATING, *supra* note 55, at 114. *See, e.g.*, MASS. CONST. of 1780, ch. III; N.H. CONST. of 1784, art. XXXV; S.C. CONST. of 1790, art. III; PA. CONST. of 1790, art. V.

[80] *See* KRAMER, *supra* note 33, at 60; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 174 (1998 ed.); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 125 (1965).

[81] *See* SNOWISS, *supra* note 45, at 55; Prakash & Yoo, *supra* note 9, at 917.

[82] Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 173 (Griffith McRee ed., 1858).

[83] SNOWISS, *supra* note 45, at 92-94.

[84] Wood, *supra* note 30, at 159-60.

[85] SNOWISS, *supra* note 45, at 2; *see also* KRAMER, *supra* note 33, at 63. For a different approach, see HAMBURGER, *supra* note 43, at 17-18, 407; 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 50-142 (1971).

[86] *See* KRAMER, *supra* note 33, at 63-64.

cases in this period are familiar: Commonwealth v. Caton,[87] Rutgers v. Waddington,[88] Trevett v. Weeden,[89] and Bayard v. Singleton[90] are perhaps the best known.[91] Though students of judicial review have long known of the cases, there remains disagreement about the public's reception of them.[92] Popular constitutionalists would describe the reaction as an "outcry," as courts took it upon themselves, for the first time, to exercise powers long thought to be held by the people themselves.[93] The account may be overdrawn.[94] Still, it is undisputed that several of the early cases of judicial review met with severe criticism.[95] Nor can the reaction be understood wholly as 'sour grapes', since, as we will see, opponents triggered a dialogue about the power of judicial review itself.[96]

B. The "standard justification" for judicial review

One of the best-known examples of this dialogue arose out of the litigation in Bayard v. Singleton.[97] *Bayard* was a suit for ejectment brought by Elizabeth Bayard and her husband against Spyers Singleton. The Bayards' claim on the property in question derived from a deed of transfer executed by Elizabeth's father, Samuel Cornell. Cornell was a loyalist and

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[87] *See* 4 Call 5, 8 Va. 5 (1782); 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 416-27 (David John Mays ed., 1967); William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 529-38 (1994).

[88] *See* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393-419 (Julius Goebel, Jr. ed., 1964).

[89] *See* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417-29 (Bernard Schwarz ed., 1971).

[90] 1 N.C. 5 (Super. L. & Eq. 1787).

[91] These are probably the most commonly discussed cases, but there are other important early state authorities, including Holmes v. Walton and the Ten Pound Act Cases. *See* HAMBURGER, *supra* note 43, at 407-35. The list of precedents for judicial review has, naturally, been the subject of intense historical debate. For recent lists of state authorities, up through the early 1790s, see *id.* at 655-58; Treanor, *supra* note 43, at 473-517; Scott Douglas Gerber, *The Myth of Marbury v. Madison and the Origins of Judicial Review*, *in* MARBURY VERSUS MADISON, *supra* note 23, at 7-11. An older example is CHARLES GROVES HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 88-159 (2d ed. 1932).

[92] *Compare* KRAMER, *supra* note 33, at 65-69, *with* HAMBURGER, *supra* note 43, at 463-75.

[93] KRAMER, *supra* note 33, at 63-65; *see also* 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 950, 964, 966-68, 971-72 (1953) (*Holmes*, *Rutgers*, *Trevett*, *Bayard*).

[94] *See* HAMBURGER, *supra* note 43, at 407; Prakash & Yoo, *supra* note 9, at 936-39.

[95] The outstanding example is Trevett v. Weeden. *See supra* note 93.

[96] *See, e.g.*, Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), *in* 2 IREDELL CORRESPONDENCE, *supra* note 82, at 169.

[97] *See* HAMBURGER, *supra* note 43, at 463.

had fled for Great Britain at the start of the war. Shortly after he deeded his estate to Elizabeth, the state confiscated it and then sold the property to Singleton.[98] The constitutional issue posed in *Bayard* concerned the summary process for quieting title adopted by the state assembly during the pendency of the litigation. After Elizabeth Bayard and her husband first brought suit in late 1784, Singleton secured passage of an act requiring courts to dismiss all "suits brought by persons, whose property had been confiscated, against purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property."[99] When Singleton moved for dismissal on the grounds of the act, William Davie, arguing for the Bayards, argued "warmly" that the act was "unconstitutional and therefore no law."[100] The court made some brief remarks and took the matter under advisement.[101] A year passed with no decision. Finally, at May term 1787, the court reconvened and held the summary process statute unconstitutional.[102]

Nine months before that decision, in the summer of 1786, an anonymous letter entitled "To the Public" appeared in the *North Carolina Gazette*.[103] The author was James Iredell, and it seems likely that Iredell wrote the letter in an effort to persuade the North Carolina Superior Court to resume the Bayard matter and find for the plaintiffs on constitutional grounds.[104] As others have recognized, the letter contains one of the most cogent defenses of judicial review in the period.[105] Iredell began by recalling the recent experience in North Carolina of drafting a constitution. That process, he said, left "no doubt, but that the power of the Assembly is

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[98] *See id.* at 450.

[99] Bayard v. Singleton, 1. N.C. 5 (Super. L. & Eq. 1787); *see also* HAMBURGER, *supra* note 43, at 451-52.

[100] HAMBURGER, *supra* note 43, at 453 & n.153.

[101] *See* 1 N.C. 5.

[102] *See id.* Nevertheless, at trial the court determined that because Cornell was an alien he could not hold lands in the state, and on this plea the jury returned a verdict for defendant Singleton.

[103] HAMBURGER, *supra* note 43, at 463; *see* An Elector, *To the Public, in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 145-49 (Griffith McRee ed., 1858).

[104] *See id.* Hamburger shows that Iredell did not represent the Bayards, as is often suggested, *see, e.g.*, 2 CROSSKEY, *supra* note 93, at 972, but was conflicted out because of involvement in a related matter. The conflict, which had been artfully arranged by Singleton, angered Iredell and his friends Archibald Maclain and William Hooper, who were interested in protecting loyalists from having their property confiscated. *See id.*; *see also* Hulsebosch, *supra* note 71, at 829, 851 (attorneys in Bayard and other early judicial review cases were targeting antiloyalist legislation).

[105] *See, e.g.*, Leonard, *supra* note 45, at 868.

limited and defined by the constitution."[106] The assembly as clearly subject to constitutional limits; the question was what remedies there were when the assembly exceeded those limits. Were the people confined to petitioning their government or to popular resistance?

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

> These two remedies being rejected [i.e., petition and resistance], it remains to be inquired whether the judicial power hath any authority to interfere in such a case [i.e., a case where the assembly violates the constitution]. The duty of that power, I conceive, in all cases, is to decide according to the *laws of the State*. It will not be denied, I suppose, that the constitution is a *law of the State*, as well as an act of Assembly, with this difference only, that it is the *fundamental* law, and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people*, not *mere servants of the Assembly*.[107]

Iredell is impressively clear in this passage, but for my purposes, it is important to lay out the argument formally. Iredell begins with what we can call Premise 1, namely, the proposition that "the duty of [the judicial] power . . . in all cases, is to decide according to the *laws of the State*." Premise 2 is the next sentence, "the constitution is a *law of the State*." If we substitute Premise 2 into Premise 1, as the italicized language suggests, it gives us (what we might call) Conclusion 1—namely, that the duty of the judicial power in all cases is to decide according to the constitution. But

[106] *To the Public*, *supra* note 103, at 146.
[107] *Id.* at 148.

this is not yet judicial review. The problem, of course, is that an act of assembly is *also* a law of the state, as Iredell acknowledges. If we substitute *this* proposition into Premise 1, it gives us Conclusion 2—namely, that it is the duty of the judicial power in all cases to decide according to an act of assembly. Conclusion 1 and Conclusion 2 describe two different duties. Those duties may coincide, but they may not. Where an act of assembly and the constitution are "inconsistent," it will be impossible to satisfy both Conclusion 1 and Conclusion 2; the court will be unable to discharge both duties. What is required, it would seem, is a judicial rule for privileging either the constitution or the unconstitutional act. Iredell proposes such a rule by drawing a simple comparison to legislative repeal. An assembly can repeal any previous act it has passed. When it does, he says, copying Blackstone, the "latter act" (in time) becomes the law of the state for purposes of deciding a case.[108] Yet the assembly cannot repeal the constitution, since the constitution is "*fundamental* law," and thus the source of the assembly's power. An act inconsistent with the constitution must be void—i.e., not a law at all.[109] Call this Premise 3. It follows, says Iredell, that for the court to decide a case according to an unconstitutional law would be to violate the judicial duty to decide in all cases according to the laws of the state.[110] This proposition, which we can call Conclusion 3 (abbreviated "C"), is judicial review.

Paraphrasing where appropriate, this gives us the following argument.

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[108] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND I, 89-90 (1765-1769) (seventh rule of construction) [hereinafter BLACKSTONE, COMMENTARIES]; *see* 1 COLLECTED WORKS OF JAMES WILSON 539-40 (Kermit L. Hall & Mark David Hall eds., 2007).

[109] For this usage, see, for example, Prakash, *supra* note 9, at 1665.

[110] *See* CHARLES HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 63 (1996).

The Standard Justification[111]

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

To understand this argument, one has to keep in mind that Premise 3 is not equivalent to judicial review. Premise 3 says that an unconstitutional act of assembly is void. But "void" does not mean "of no effect in a court of law." As Snowiss and others have shown, one cannot assume in this period that a constitution can be enforced in legal proceedings within a court of law.[112] The constitution was fundamental law; it regulated the government, not the people.[113] Courts promulgated and applied ordinary law, which regulated the people. Thus Premise 3 is not sufficient for judicial review. Its role in the Standard Justification is, rather, to show why courts should privilege the constitution over an inconsistent act of assembly. Other premises have to get us into court in the first place. With this point in mind, we can think of the propositions of the Standard Justification as playing four basic roles, here in order: (1) describe the judicial office; (2) show that the constitution naturally figures into that office; (3) provide a reason to privilege the constitution; and (4) conclude that a court is duty-bound to give the constitution effect.

The most significant premise in Iredell's argument is, therefore, the first one: that there is a judicial duty to decide cases according to the laws of the state. The burden of the argument really rests here, and, indeed, Premises 2 and 3 were relatively well accepted at the time "To the Public" was written.[114] Yet Premise 1 is far from obvious, and, after pausing to examine

[111] This term comes from Charles Hobson. *See id.*

[112] *See, e.g.*, SNOWISS, *supra* note 45, at 42-43; Wood, *supra* note 30, at 161-65.

[113] *See, e.g.*, KRAMER, *supra* note 33, at 29; SNOWISS, *supra* note 45, at 90-91.

[114] For Premise 2, see HAMBURGER, *supra* note 43, at 293. In assessing Premise 2, it is important to understand that it does not entail, *eo ipso*, that a constitution is cognizable in a court of law. *See* SNOWISS, *supra* note 45, at 49. In other words, to deny judicial review, one need not maintain that a constitution is *purely* a social compact, and not a law; one can argue that it is a fundamental law, and that fundamental laws are not cognizable in court. For Premise 3, see Prakash, *supra* note 9, at 1658; SNOWISS, *supra* note 45, at 48.

it, we may wonder whether Iredell has simply begged the question. Why is it the duty of the judiciary, after all, to decide cases according to *all* the laws of the state? Why consider the constitution, even if it is a law? The constitution is obviously different in kind from ordinary law; and it is easy to describe a system in which courts ignore fundamental law. A court might be obligated merely to decide cases in conformance with those laws *duly enacted* by the state legislature, regardless of whether the laws violate substantive constitutional limitations.[115] Or the constitution might function hortatively, as it does in a number of constitutional regimes.[116]

Premise 1, it would seem, is in need of its own justification. A number of different justifications are possible, but I want to focus on two suggested by the text of "To the Public," and present in other leading period defenses of judicial review. The first justification is based on the idea of *constitutional agency*. Roughly, constitutional agency is the idea that judges are the agents of the people. Iredell closes his argument in the passage above by gently admonishing North Carolina judges that they hold their office "*for the benefit of the whole people*." They are not, he reminds them, "mere servants of the Assembly."[117] Because judges are agents of the people, and not the assembly, they "must take care at their peril" to enforce only laws that comply with their principal's constitution. To do otherwise would be, in effect, to *disobey* the principal. As Iredell put the matter in a subsequent letter to Richard Dobbs Spaight, then a delegate at the federal convention in Philadelphia, "[E]ither . . . the fundamental unrepealable law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people . . . ."[118] Since one disobeys what one does not obey, Iredell's implication is clear: judges who gave effect to unconstitutional laws "themselves would be lawbreakers, acting without lawful authority."[119] To remain within the bounds of their authority, judges must decide cases in conformance with the constitution.

This concept of constitutional agency lay at the center of a cluster of interrelated ideas, whose distinctions were not always made explicit. Thus,

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[115] *See* Eakin v. Raub, 12 Serg. & Rawle (Pa. 1825) (Gibson, J., dissenting).

[116] *See* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 18 DUKE L.J. 1, 18-20 (1969); *see also* HAINES, *supra* note 91, at 201.

[117] The point evidences the development in separation of powers doctrine described *supra* in Part I.A. Were the people understood as *part* of the government through the state assembly, it would follow from popular sovereignty that the courts of law *were* servants of the assembly.

[118] Letter to Spaight, *supra* note 82, at 173.

[119] KRAMER, *supra* note 33, at 63.

it was said that agency implied a *duty*: a duty not to act without constitutional authority,[120] or a duty to resist unlawful power,[121] or perhaps a duty not to 'aid and abet' another in violating the constitution.[122] There were a number of suggestions. To be sure, none was entirely without difficulty. Where law imposes any kind of duty, failure to satisfy that duty is a violation; and the conclusion that a judge "violates" the constitution by giving effect to an unconstitutional law has seemed to some too strong.[123] Another common suggestion was that the legislature's violation justified others in resisting the unconstitutional act.[124] A judge *could* resist, even if he did not *have* to. This, too, might be connected to judicial review. In his *Lectures in Law*, delivered in the early 1790s, James Wilson argued that "whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge."[125] The judiciary would thus be justified in resisting the legislature by refusing to enforce the law.[126] This idea, too, was

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[120] Several theories are possible here. An unconstitutional law might rob a court of jurisdiction. *See* 3 ELLIOT'S DEBATES: THE DEBATE IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (Jonathan Elliot ed., 2d ed. 1836) (statement of John Marshall) ("If they were to make a law not warranted by any of the powers enumerated, . . . [the judges] would not consider such a law as coming under their jurisdiction. They would declare it void."). Alternatively, enforcing an unconstitutional law might violate a judge's oath of office. *See* 1 BILL OF RIGHTS, *supra* note 89, at 423 (Varnum's account of Trevett v. Weeden).

[121] *See, e.g.*, WILLOUGHBY BERTLE ABINGDON, THOUGHTS ON THE LETTER OF EDMUND BURKE TO THE SHERIFFS OF BRISTOL, ON THE AFFAIRS OF AMERICA 13 (1777) ("Obedience is due to the laws, when founded on the constitution; but when they are subversive of the constitution, then disobedience instead of obedience is due."), *quoted in* 1 GOEBEL, *supra* note 85, at 127 (noting the popularity of the Abingdon pamphlet in the states); KRAMER, *supra* note 33, at 98 ("[Courts] justified their refusal to enforce laws as a 'political-legal' act on behalf of the people, a responsibility required by their position as the people's faithful agents.").

[122] Kamper v. Hawkins, 3 Va. 20 (Gen. Ct. 1793) (Opinion of Tyler, J.) ("[C]an one branch of the government call upon another to aid in the violation of this sacred letter? The answer to these questions must be in the negative.").

[123] *See* Eakin, 12 Serg. & Rawle 330 (Gibson, J., dissenting); Louise Weinberg, *Our "Marbury"*, 89 VA. L. REV. 1235, 1398 (2003).

[124] *See, e.g.*, 2 ELLIOT'S DEBATES: THE DEBATE IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (Jonathan Elliot ed., 2d ed. 1836) (statement of Theophilius Parsons) ("An act of usurpation is not obligatory; it is not law; and any man may be *justified in his resistance*." (emphasis added)).

[125] 1 WORKS OF WILSON, *supra* note 108, at 421.

[126] KRAMER, *supra* note 33, at 54 ("In refusing to enforce unconstitutional laws, judges were exercising the people's authority to resist, providing a supplemental remedy for ultra vires legislative acts . . . ."); Treanor, *supra* note 87, at 534 (similar); *cf.* HAMBURGER, *supra* note 43, at 276-77 (judicial refusal to use stamped paper during the 1765 Stamp Act

somewhat of an imperfect fit. To invoke Wilson's reasoning, one must conceive of the judiciary as being "obliged to obey" *all* legislative acts—not just those that expressly command courts or judicial officers to do something.[127] Yet coherence aside, the notion was a common one.

A second justification for Premise 1 focuses on the duty to *apply the law*.[128] The particular duty of the judicial power, says Iredell, is to decide "cases" according to the laws of the state.[129] This duty entails a set of further tasks. The tasks are familiar—they are the workaday norms of decision-making in courts of law. Thus, to decide a case according to the laws of the state, a judge must first determine what the laws of the state are; and to determine what the laws of the state are, the judge must make sense of how different laws that are potentially relevant fit together. The constitution is one such law. It is, Iredell tells us, "*fundamental* law." It follows that the judge must determine how ordinary acts of the assembly fit together with the constitution. If they are inconsistent, the judge must give effect to the constitution, since it is "superior law." In this way, reasons Iredell, judicial review "is not a usurped or discretionary power, but one *inevitably resulting from the constitution of their office*."[130] The judge's office requires him to consider the constitution, in addition to ordinary law.[131]

In effect, we are left with two versions of the Standard Justification: one based on constitutional agency, and another on the duty to apply the law. Both ideas were common in defenses of judicial review during this period.[132] Yet they have very different implications for the allocation of interpretative authority. It is easy to see that if the justification for judicial review rests *solely* on the fact that judicial officers are agents of the people, then any other such agent will enjoy a power of review.[133] If, however, the

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controversy), 559-74 (Cases of the Judges).

[127] Alternatively, one could infer that judicial review is limited to acts that do expressly require the judiciary to do something. *See* Clinton, *supra* note 23, at 88-89.

[128] *See* SNOWISS, *supra* note 45, at 49; Hobson, *supra* note 110, at 64.

[129] *See* HAMBURGER, *supra* note 43, at 464. Hamburger's treatment of "To the Public" focuses on this aspect of Iredell's argument.

[130] *To the Public*, *supra* note 103, at 148 (emphasis added).

[131] *See* Treanor, *supra* note 87, at 523 (describing Tucker's argument in Commonwealth v. Caton). Even Sylvia Snowiss, who has contended that American judges of the late eighteenth century lacked the authority to expound fundamental law, agrees that these judges could "consider" the constitution in the course of expounding ordinary law. *See* Snowiss, *supra* note 74, at 236; SNOWISS, *supra* note 45, at 48-55.

[132] *See* HAMBURGER, *supra* note 43, at 395-461 (judicial duty); KRAMER, *supra* note 33, at 57-72 (agency).

[133] *Cf.* Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two*

justification for judicial review rests on the particular office or duty of the agent—say, the duty to apply the law—then only a subset of the people's agents enjoy a power of review.[134]

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

I have now suggested several times that the Standard Justification for judicial review also supports a presidential power of non-enforcement. Before I try to evaluate that assertion, it will help to make it more precise.

Nothing in the Standard Justification for judicial review appears to turn on the unique features of the judicial office. As we have seen, the argument has several different versions, based on the ideas of the constitutional agency and a duty to apply the law. While the distinction is relevant to the scope of non-enforcement power, it would not seem to affect the president's claim to that power. Thus, a theory of the judge as constitutional agent of the people would require him to resist, or to refuse to 'aid and abet', legislative violations of the constitution; a variation on that theory would authorize him to resist, much like anyone is morally and legally justified in disobeying an unconstitutional law.[135] Yet the judge is not distinguished from the executive insofar as he is a constitutional agent of the people. The president is also the people's agent; so if agency itself implies a duty, or an authority, to resist another agent's unconstitutional action, then it implies such a duty in both the judiciary and the executive.[136]

We can make a similar argument using the version of the Standard Justification based on the duty to apply the law. Adjudicating a case by the law of the land requires the judge to determine what that law is, and that process requires ironing out conflicts of law. This includes the constitution, since the constitution is law. But it is easy to see that this does not distinguish the judiciary from the executive. The executive also applies the law, in the sense that he enforces it or executes it. Since he applies the law, he must interpret the law. Since the constitution is law, he must interpret the constitution; and since the constitution is supreme law, he must privilege the constitution in his interpretation.[137] It is worth noting that the

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Questions for Michael Stokes Paulsen and One for His Critics, 83 GEO. L.J. 373, 373-74 (1994).

[134] Of course, the duty to apply the law is not unique to judges; any officer charged with executing the law must apply it. Kramer, *supra* note 11, at 83; *see* Prakash & Yoo, *supra* note 9, at 924-25.

[135] *See supra* notes 120-127 and accompanying text.

[136] *See* Paulsen, *supra* note 15, at 244-45, 252-55.

[137] Easterbrook, *supra* note 16, at 919.

Constitution's text provides an additional footing for this argument. For example, the Take Care Clause commands the president to "take Care that the laws be faithfully executed."[138] The Constitution is law, so the president must take care it is executed; and it is supreme law, so he must take care to privilege it above inconsistent ordinary law.[139] This is the power of non-enforcement.

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

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

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

The Non-Enforcement Argument

> P1′. The duty of the executive power is to execute the laws of the state.
> P2. The constitution is a law of the state.
> P3. An unconstitutional act of the assembly is void, and thus not a law of the state.
> C′. If the executive power executes an unconstitutional act of the assembly, it does not execute the laws of the state, and thus it violates its duty.

If the Standard Justification is valid, then modified Standard Justification is

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[138] U.S. CONST. art. II, § 3.

[139] *See* Delahunty & Yoo, *supra* note 9, at 798-801; Prakash, *supra* note 9, at 1631-33; Easterbrook, *supra* note 16, at 919. *But see* Miller, *supra* note 17, at 397. Similar arguments can be developed from the Article II Oath Clause and the Article II Vesting Clause. *See* Lawson & Moore, *supra* note 13, at 1281-82; Paulsen, *supra* note 15, at 257-62.

also valid, since its formal validity does not turn on the substantive difference between the judiciary and the executive. Thus, if the modified premise is true, then the president has a power of non-enforcement. I will assume that the modified premise is true.

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

II. THREE PROBLEMS WITH THE NON-ENFORCEMENT ARGUMENT

There are three principal problems with the Non-Enforcement Argument. First, no one drew the conclusion. Prior to ratification, there is only one known instance of an explicit defense of a presidential power of non-enforcement. Yet the premises of the argument were widely accepted;[140] and the parallel inference—from the Standard Justification to a putative power of judicial review—was widespread, if not common.[141] In the first decade after ratification, as the Standard Justification achieved greater acceptance,[142] defenses of non-enforcement remain absent from the historical record. This needs explaining. Whatever else they were, the framers were ready practitioners of the constitutional syllogism. They had reasons to defend non-enforcement. So if the Non-Enforcement Argument is simply a corollary of the Standard Justification, we should expect the framers, or at least some of them, to have drawn its conclusion.[143]

Yet, second, a number of leading framers actually advanced positions *inconsistent* with the conclusion of the Non-Enforcement Argument. Both

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[140] *See supra* Parts I.B, I.C.

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

[142] Treanor, *supra* note 43, at 519; KRAMER, *supra* note 33, at 98 ("What achieved acceptance in the 1790s was the theory of review formulated by men like James Iredell in the 1780s.").

[143] I am not assuming that the framers drew all conclusions logically implied by other views they held. The point is that they had *reason* to conclude that executives had a non-enforcement power—the same reasons they had to conclude that judges had a power of judicial review.

before ratification and in the decade following, where the course of argument would have made it natural to cite a presidential power to decline to enforce the law on constitutional grounds, discussants remained silent, or made concessions at odds with such a power. I will argue that the idea of a non-enforcement power was, in fact, inconsistent with important strands of Republican thinking about executive authority. These points suggest that something is amiss with the Non-Enforcement Argument, and, by extension, with our parallel formulation of Iredell's Standard Justification for judicial review. Third, when we take a closer look at the Standard Justification with these points in mind, it becomes apparent that the argument is question begging. Something more is necessary—something that shows why it is appropriate to hear and determine questions of constitutional meaning in the institutional setting of a court of law. In short, the Standard Justification is in need of additional support, and when it is supplied, the argument can no longer readily be adapted to support a power of presidential non-enforcement. What is this missing support? It is the proposition that it is uniquely the judicial function to *expound* the law.[144] Judicial exposition implies, in turn, judicial review.

A. A lack of evidence

There is little support for the view that anyone, prior to 1789, thought the Constitution conferred a presidential power of non-enforcement.[145] Only one explicit endorsement is known. It came from James Wilson in the second week of the Pennsylvania ratifying convention. The convention had gotten off to a rocky start. Following a heated dispute over rules of procedure, delegates turned to an examination of Article I, in hope, said Thomas McKean, that the "a spirit of conciliation and coolness may prevail."[146] As Pauline Maier has shown, what actually did prevail was "pandemonium," punctuated by lengthy orations that did little to persuade opponents.[147] The chief concerns about Article I voiced by those in

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[144] *See* Bilder, *supra* note 52, at 1140-42; RAOUL BERGER, CONGRESS V. THE SUPREME COURT 55 (1969); Edward S. Corwin, *Marbury v Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 561 (1914). *Cf.* HAMBURGER, *supra* note 43, at 505, 543 (discussing expounding the law). As will become clear, I develop the idea of expounding somewhat differently than does Hamburger.

[145] The most extensive discussion of this point can be found in MAY, *supra* note 17, at 9-41. My claim is not meant to include a *gubernatorial* power of non-enforcement, for which I know of no evidence but have not attempted an exhaustive search. *See supra* n.44.

[146] 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 380 (Merrill Jensen, John P. Kaminski, Gaspare J. Saladino eds., 2001) [hereinafter 2 DHRC].

[147] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 106-11 (2010).

opposition to ratification were real. On November 28, John Smilie pointed to the absence of any bill of rights; McKean and Wilson responded that no bill of rights was necessary, because Congress was limited to enumerated powers.[148] After a dispute over whether Virginia's constitution contained a bill of rights (Wilson erroneously claimed it did not), Robert Whitehill made an important point in rejoinder: "If indeed the Constitution itself so well defined the powers of the government that no mistake could arise . . . then we might be satisfied without an explicit reservation of those rights."[149] But, he said, the powers were not well defined; they were "unlimited" and "undefined."[150] In fact, observed John Smilie, the language of Article I, section 8, was so broad that it would support a "complete system of government" and thereby effect a *consolidation of the states*.[151]

Consolidation became the leading issue over the next few days. Delegates returned to it repeatedly. On December 1, after several failed attempts to quiet the concern, Wilson again took up the issue.[152] His strategy that day proved well conceived. He began by denying the premise of the argument. The states did not possess sovereign power, he argued, and thus could not be deprived of it by consolidation. The *people* were sovereign, and the people could choose to distribute authority among different governments as they thought most conducive.[153] Under the proposed Constitution, the people would distribute only a portion of the legislative power to the national government. The national legislature, in turn, would be kept to these limits by a variety of devices, including "a division of power in the legislative body itself," "the PEOPLE themselves," and—most important for our purposes—by "the interference of those officers, who will be introduced into the executive and judicial departments."[154] Wilson then elaborated:

> [I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it . . . but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. And [independent] judges . . . will behave

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[148] 2 DHRC, *supra* note 146, at 384-88.
[149] *Id.* at 393.
[150] *Id.* at 428.
[151] *Id.* at 408; *see* MAIER, *supra* note 147, at 110.
[152] 2 DHRC, *supra* note 146, at 445-46.
[153] *Id.* at 448; *see* MAIER, *supra* note 147, at 109.
[154] 2 DHRC, *supra* note 146, at 450.

> with intrepidity and refuse to the act the sanction of judicial authority. In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.[155]

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

It is clear that Wilson is endorsing the non-enforcement power. He is not referring to the qualified veto, since he describes the president as refusing to carry into effect "an act," rather than a bill, and he addresses the veto power expressly a short time later.[156] Nor is he referring to the pardon or to the president's 'prosecutorial discretion,' since he says nothing of remitting or dispensing with the prosecution of a crime.[157] Wilson's language does leave the scope of non-enforcement somewhat unclear. He describes the president as using the power to "shield himself," which could mean that non-enforcement was limited to preventing other departments from usurping executive authority.[158] In contrast, some have suggested that Wilson's language reflects the idea, common at the time, that an officer who gave effect to an unconstitutional law would himself violate the Constitution.[159] Of course, as we have seen, there were other versions of the Standard Justification, also in circulation, that carried no such implication.[160] Wilson himself advanced such a version several years later in his *Lectures on Law*.[161] Moreover, Wilson's language at the convention suggests a contrast between the judicial *duty* to pronounce the law void and the president's *authority* to do so ("the President . . . *could* shield

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[155] *Id.* at 451.

[156] *Id.* at 452-53.

[157] See Wilson's discussion of the pardon in *Lectures on Law*. 2 COLLECTED WORKS OF JAMES WILSON 95-98 (Kermit L. Hall & Mark David Hall eds., 2007).

[158] As has been often noted, a number of delegates at the Philadelphia Convention described judicial review as a defensive power. Wilson was among them. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

[159] *See, e.g.*, Paulsen, *supra* note 15, at 253.

[160] *See supra* Part I.B. Notably, John Smilie advanced a contrary view at the convention. He argued that federal judges would refuse to hold a law invalid out of a fear that Congress would impeach them for "disobeying a law." In the case of non-enforcement, Smilie's view implies that the president would *expose* himself to liability, not "shield himself," by refusing to enforce an unconstitutional law. *See* 2 DHRC, *supra* note 146, at 466.

[161] 1 WORKS OF WILSON, *supra* note 108, at 421 ("[W]hoever would be obliged to obey a constitutional law, is *justified in refusing* to obey an unconstitutional act of the legislature." (emphasis added)).

himself")—implying that the president would not violate his constitutional duty by executing an unconstitutional law. Still, there would be little point, in the context of a discussion about consolidation, to adduce a non-enforcement power limited to interbranch defense, for such a power would be of little use in preventing the national legislature from encroaching on the states. The scope of a non-enforcement/'anti-consolidation power' would have to be broader than presidential self-defense, whether or not the president violated the Constitution by giving effect to an unconstitutional law.

Wilson's endorsement is clear, but it was also isolated, and in the end this factor is dispositive in assessing its significance.[162] It was a brief remark in the midst of what was supposed to be a discussion of the merits of Article I. Apparently, the remark fell on deaf ears. As far as we know, it drew no response from the vocal opposition led by Simile, Whitehill, and William Findley. Wilson's principal ally, McKean, did not pick up on the point. There was no response in the gallery, or in the press. Perhaps his audience missed the comment entirely. They could be forgiven; Wilson was prone to long lectures at the convention, and it is unclear how many delegates paid attention to the details.[163] Wilson himself did not return to the point, although the issues that led him to broach it on December 1 did reappear.[164] He brought up judicial review again on December 7, and his comments were reported in the press.[165] No mention was made of presidential non-enforcement. He thus gave the matter a grand total of one sentence. Nor did Wilson offer a defense of non-enforcement in his ambitious and systematic *Lectures on Law*.[166] There he adopted the Standard Justification for judicial review,[167] but focused his discussion of presidential authority almost entirely on the pardon power.[168] Courts, said

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[162] In the memorable malaprop of the ABA Task Force on Presidential Signing Statements, it was a "vagrant remark." ABA REPORT, *supra* note 24, at 18, *cited in* Prakash, *supra* note 9, at 1659 n.182.

[163] MAIER, *supra* note 147, at 114 (describing a speech delivered by Wilson and remarking, "Its printed version remains powerful, but how closely did his fellow delegates listen to it?").

[164] *See id.* at 111-20 (describing the remainder of the convention). Christopher May points out that Wilson had defended an absolute veto at the Philadelphia Convention, and may have thought of non-enforcement as a second-best option. He concludes that Wilson had ample incentive to defend such a power, which makes its brief appearance at the ratifying convention significant. *See* MAY, *supra* note 17, at 27.

[165] 2 DHRC, *supra* note 146, at 517, 524.

[166] *See* KRAMER, supra note 33, at 99 ("Wilson wanted nothing less than to produce a complete philosophy of American law.").

[167] SNOWISS, *supra* note 45, at 76.

[168] *See* 2 WORKS OF WILSON, *supra* note 157, at 95-98. Wilson suggests that the

Wilson, were the "noble guard against legislative despotism," before the "great and last resort" of the people.[169]

While Wilson's is the only known explicit endorsement of non-enforcement prior to ratification, there were a number of near misses. In the Massachusetts convention, the eminent Theophilius Parsons argued that if Congress were to enact a law that infringed individual rights, "the act would be a nullity, and could not be enforced."[170] Parsons's comment is obviously equivocal as between judicial review and presidential non-enforcement.[171] Before the convention, delegate William Symmes had expressed anxiety that the president's obligation under the Take Care Clause might be insufficient to prevent him from ignoring congressional directives as to how federal law should be enforced.[172] Symmes, an anti-federalist, did not think the executive should have such a power. Apparently his concern was answered, or forgotten, because he did not raise it at the convention.[173]

Also suggestive are Madison's comments in October 1788, shortly after the Constitution had taken effect. In "Observations on the Draught of a Constitution for Virginia," Madison observed that courts, "by refusing or not refusing to execute a law," had been able "to stamp it with its final character," a result that made the judicial department "paramount in fact to the Legislature, which was never intended, and can never be proper."[174] The language clearly suggests doubts about judicial review in a constitutional system that made courts independent of the legislature. Yet the point does not support non-enforcement. Were the president to have a power of non-enforcement, it would, by Madison's reasoning, fall to *the president* to "stamp [the law] with its final character," making *him* superior to the legislature—a result also inconsistent with departmental coordinacy and republicanism.[175] A more republican solution to Madison's concern was described by the anti-federalist Brutus. Six months before

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"executive" can "prevent[]" legislative excess, and that he has a "right to judge" whether a act of the legislature is constitutional. The point is that Wilson does not expressly argue that this "right to judge" implies a presidential power of non-enforcement. *See* 1 WORKS OF WILSON, *supra* note 108, at 421.

[169] 1 WORKS OF WILSON, *supra* note 108, at 170, 541.

[170] 2 ELLIOT'S DEBATES, *supra* note 124, at 162.

[171] Unfortunately, nothing about the context—a discussion of whether the Constitution should have a bill of rights—shows whether Parsons had presidential non-enforcement in mind. Some have read Parsons to support jury review. *See* BERGER, *supra* note 144, at 177.

[172] *See* MAY, *supra* note 17, at 27.

[173] *See id.*

[174] 5 THE WRITINGS OF JAMES MADISON 284, 293 (Galliard Hunt ed., 1904).

[175] *See infra* notes 221-235 and accompanying text.

"Observations," in the spring of 1788, Brutus had observed precisely the same problem, arguing that it arose because the national legislature could not hear appeals from the Supreme Court.[176] Publius, of course, rejected the idea.[177] Later, in the midst of the controversy over the Virginia Resolution, Madison conceded that "the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort . . . in relation to the authorities of the other departments."[178]

In any case, there is no need to insist on a delicate reading of Madison's language in "Observations." The point does not depend on "Observations," or any other statement in the rather tangled body of commentary Madison left us on this topic.[179] We can assume that a number of endorsements of non-enforcement escaped the historical record; and that there are others

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[176] *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 316, 325-26 (Ralph Ketcham ed., 2003) (Essay XII and Essay XV).

[177] *See* THE FEDERALIST, *supra* note 32, at 414-18 (Federalist 78).

[178] James Madison, The Report of 1800, *in* LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE 245 (Lance Banning ed., 2004). Madison argued that the Virginia Resolution had not usurped judicial power because it had merely "express[ed an] opinion, unaccompanied with any other effect than what [it] may produce, by exciting reflection." In contrast, he said, "[t]he expositions of the judiciary . . . are carried into immediate effect [and] enforce[] the general will." *Id.* at 259. This reflects the distinction between merely interpreting the Constitution and refusing to enforce an unconstitutional law. *Cf.* H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 983-84 (1993) (observing that Madison "firmly believed in an active interpretive role for both the executive and legislative branches," but distinguished departmental expressions of opinion about constitutional meaning from "the enforceable 'expositions of the judiciary'" (quoting The Report of 1800, *supra*, at 259)); *see also infra* notes 399-406 and accompanying text.

[179] On the difficulty of reconciling Madison's various claims about constitutional enforcement, *see* KRAMER, *supra* note 33, at 146; *see also* BERGER, *supra* note 144, at 70-71. There are other snippets from Madison's writings that can be adduced to support non-enforcement, but the result is largely the same. Madison argued in "Observations" that where a constitution provides for the submission of bills to the executive and the judiciary prior to enactment, and a law so submitted is enacted over their objection, "It sd. not be allowed the Judges or the Ex[ecutive] to pronounce a law thus enacted, unconstitul. & invalid." 5 MADISON PAPERS, *supra* note 174, at 292-93. This remark suggests that Madison at least contemplated the idea of presidential non-enforcement. Yet since our system *has* executive consultation, created by the Presentment Clause, the remark also implies that Madison saw no place for the power under the actual Constitution. Indeed, in a letter written four years later, Madison said, "You know that the President has exerted his power of checking the unconstitutional power of Congress. The Judges have also called the attention of the public to Legislative fallibility, by pronouncing a law providing for invalid pensioners unconstitutional and void." Letter from James Madison to Gen. Henry Lee (Apr. 15, 1792), *in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 554 (1865). "[H]is power of checking" must refer to the president's veto, since no acts of non-enforcement had then taken place.

preserved somewhere, but presently unknown. The existence of these endorsements does not change the analysis. In one study, Sai Prakash and John Yoo found a total of 109 discussions of judicial review of federal law during the ratification process, either in convention or in pamphlets or essays published during the pendency of a convention.[180] It is impossible that a comparable number of discussions of presidential non-enforcement have escaped notice.[181] There was simply no sustained, public discussion of such a power, and *a fortiori* no such defense of it.

The pattern of evidence after ratification confirms this view. In the first decade of government under the constitution, there is no known explicit defense of a presidential power to refuse to enforce the law on constitutional grounds. Neither Washington nor Adams refused to enforce a duly enacted law on grounds that he believed it unconstitutional, and neither made a claim to enjoy such a power.[182] Sai Prakash has observed that Washington occasionally referred to the obligation created by "constitutional laws," which Prakash reads as impliedly endorsing non-enforcement.[183] Washington, however, never identified the phrase as carrying such freight, and he never connected the idea to the presidential office—this during a period that saw repeated discussion of a *judicial* duty to apply only "constitutional laws." The point suffers from a more general

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[180] Prakash & Yoo, *supra* note 9, at 975; Prakash, *supra* note 9, at 1659.

[181] I assume here that there is not some specific reason to think that the historical record is skewed, that is, that evidence of non-enforcement was not uniquely suppressed or unavailable. In other words, I am treating the extant, published record as representative of the entire range of commentary, including unpreserved statements. If that is correct, then we should assume that a number of discussions of judicial review were *also* lost or remain unknown, and we would need to compare missing discussions of non-enforcement with the extant *and* missing discussions of judicial review. This would make the Prakash & Yoo figure too low.

[182] Prakash, *supra* note 9, at 1662 ("Washington never actually refused to enforce a statute on the grounds that it was unconstitutional. . . . [T]here is no instance of President John Adams refusing to enforce a statute on the grounds that it was unconstitutional."). Prakash nevertheless defends non-enforcement on originalist grounds. Christopher May, who opposes non-enforcement, dates its first assertion to 1860. *See* MAY, *supra* note 17, at 127. It is likely that President Washington and President Adams impounded funds appropriated by Congress, but their doing so is not best described as non-enforcement, since it was "largely attributable to the fact that, unlike today, appropriations bills 'were quite general in their terms and, by obvious . . . intent, left to the President . . . the [power] for determining . . . in what particular manner the funds would be spent.'" Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 5 (1974) (quoting *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Power of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 233 (1971) (testimony of Assistant Attorney General William Rehnquist)).

[183] *See* Prakash, *supra* note 9, at 1660-61.

defect that, unfortunately, affects much of Prakash's analysis, which is premised on the proposition that the founding generation widely agreed that an unconstitutional law was void and thus "no law at all."[184] As an historical matter, one cannot reason from the premise that an unconstitutional law is void to the conclusion that the president had a power to refuse to enforce it; the basic lesson of Wood, Snowiss, and Kramer's work is that officers had to *justify* the practice of determining and enforcing constitutional violations within their office, since fundamental law was designed to regulate *them* and was traditionally enforced through popular mechanisms.[185] Prakash also suggests that Washington never endorsed a presidential power to refuse to enforce unconstitutional law because, as the first president, he had an opportunity to *veto* all the bills he thought unconstitutional.[186] Since Congress never overrode Washington's veto, the president never had need of a non-enforcement power. Yet this hardly means that non-enforcement was never relevant to the president's decision calculus. Washington had reason to broach the topic when Jefferson, then his Secretary of State, advised him that the president could express his constitutional objection to the Bank Bill through a veto.[187] Indeed, *any* constitutional objection to a bill directing action in the executive department should have raised the issue. In sorting through their options, Washington's advisors had reason to consider the possibility of a veto override and to plan accordingly.[188] Non-enforcement would have been an alternative. Indeed,

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[184] *Id.* at 1616-17, 1658-59. Prakash has reiterated this analysis in his recent work with Neil Devins attacking presidential duties to enforce and defend unconstitutional laws. *See* Devins & Prakash, *supra* note 9, at 522, 533.

[185] *See, e.g.*, Hulsebosch, *supra* note 71, at 825 (Kramer and Snowiss); Wood, *supra* note 30, at 160-63.

[186] Prakash, *supra* note 9, at 1662. Prakash also points to President Washington's refusal to honor a request from the House of Representatives for communications regarding the negotiation of the Jay Treaty, *id.* at 1661-62, but on this question, a one-house "resolution" is not analogous to a bill, due to the lack of a veto. The existence of the limited veto for unconstitutional bills is the best structural argument against non-enforcement. Again, the point is not that the president would not act on the basis of his understanding of the Constitution; it is that the president specifically would not refuse to enforce laws he deemed unconstitutional.

[187] *See* Secretary of State Jefferson, *Opinion on the Constitutionality of the Bank* (Feb. 15, 1791), *in* PAULSEN, CALABRESI ET AL, *supra* note 19, at 62 ("The negative of the President [the veto] is the shield provided by the Constitution to protect against the invasions of the legislature." (insertion by editors)); MAY, *supra* note 17, at 37. The bank bill directed the United States to receive notes issued by the bank "in all payments to the United States." *An Act to incorporate the subscribers to the Bank of the United States*, 3 Stat. 191, 196 (1791). The president could have directed the secretary of the treasury to refuse to accept the notes as payment.

[188] *See* Harry C. Thompson, *The First Presidential Vetoes*, 8 PRES. STUDS. Q. 27, 30-31 (1978) (discussing veto of reapportionment act and attempted override).

they had greater reason than most to examine all the options, given President Washington's well-known prudence, even anxiety, about exercising the veto.[189] For these reasons, it is difficult to take seriously the speculation that Washington, and Adams after him, "likely would have refused to enforce" a law enacted over a constitutional veto.[190] The fact of the matter is that neither president did so or expressed the view that he had such a power.

In 1801, President Jefferson ended prosecutions under the Sedition Act and pardoned those convicted. If we date non-enforcement to these acts, it is at least fifteen years younger than judicial review. If we date the defense of non-enforcement to Jefferson's defense of his acts in contemporaneous writings and subsequent letters,[191] it postdates the defense of judicial review by at least fifteen years. This demands an explanation.

B. Negative evidence

Not only is there a lack of evidence that framers drew the conclusion of the Non-Enforcement Argument, there is evidence that they *rejected* its conclusion. Christopher May advanced this argument in his study of the suspension power and non-enforcement. Suspension was a royal prerogative to temporarily abrogate a statute.[192] May analogized suspension to non-enforcement, and then argued that the widespread American rejection of suspension implied a rejection of non-enforcement.[193] Obviously, the force of May's argument depends on the force of the analogy between suspension and non-enforcement—and that analogy has been challenged.[194] In the course of developing his argument, May observed that on several occasions framers spoke as if judicial review were the only institutional protection against laws violating individual rights.[195]

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[189] *See, e.g.*, *id.* at 28.

[190] Prakash, *supra* note 9, at 1662.

[191] *See supra* note 42.

[192] MAY, *supra* note 17, at 4.

[193] *Id.* at 37. Interestingly, May adopted the same 'deductive' or 'Euclidean' strategy as Michael Paulsen, see Paulsen, *supra* note 15, at 226, but defended a logically contrary view. Paulsen argued that 'If judicial review was justified, then non-enforcement was as well; and judicial review was justified.' May argued that 'If the suspension prerogative was rejected, then non-enforcement was rejected as well; and suspension was rejected.' The strategy is indicative of the lack of direct evidence we have on the issue of non-enforcement. No one was talking about it.

[194] *See, e.g.*, J. Randy Beck, *Book Review: Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 423-24 (1999) (reviewing MAY, *supra* note 17).

[195] MAY, *supra* note 17, at 14, 25.

This point has force whether or not non-enforcement functionally duplicates, or even approximates, the prerogative of suspension. Thus, May pointed to Hamilton's language in Federalist 78 that a constitution's "specified exceptions" to the legislative power "can be preserved *in no other way* than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[196] Apparently, Hamilton assumed that the president did not have a non-enforcement power, since such a power could also be used to keep Congress within its constitutional limits.

Hamilton may have seen a greater need for judicial enforcement of the constitution than did most of his peers.[197] But the point about 'negative evidence' does not depend on Hamilton's idiosyncrasy. The argument that courts of law were the only institution that could, or would, protect the people from certain legislative abuses was in fact widespread. Examples are easy to adduce. They lie at the surface of the historical record, both before and after ratification. These comments assume, admittedly with different degrees of clarity, that the president lacks a non-enforcement power; and none imply that judicial review is the only means of enforcing the Constitution, or that judges are supreme in determining its meaning.

At the federal convention, for example, the conclusion that courts alone could protect the people from legislative excess drove the delegates to reject the Council of Revision. Like the New York body on which it was based, the council proposed in Philadelphia as part of the Virginia Plan comprised the president and several federal judges, who would together exercise a qualified negative on federal and state legislation.[198] Almost at once delegates objected to the proposal on the grounds that it might undercut judicial review, by biasing judges in favor of laws they had previously approved.[199] The emphasis on judicial review eventually drew objections from John Mercer and John Dickinson. After listening to Mercer argue that judges should not enjoy an authority to declare unconstitutional law void, Dickinson said he was "strongly impressed," and "thought no such power ought to exist. He was at the same time at a loss what expedient to

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[196] THE FEDERALIST, *supra* note 32, at 414 (emphasis added).

[197] *See* KRAMER, *supra* note 33, at 81; *see also* STIMSON, *supra* note 78, at 119.

[198] 1 FARRAND'S RECORDS, *supra* note 198, at 21 (Resolution 8). On the relationship to New York, see Jeff Roedel, *Stoking the Doctrinal Furnace: Judicial Review and the New York Council of Revision*, 69 N.Y. HIST. 261, 261-62 (1988).

[199] RAKOVE, *supra* note 63, at 262; *see* 1 FARRAND'S RECORDS, *supra* note 198, at 52 (statement of Rufus King); *see also* 2 FARRAND'S RECORDS, *supra* note 158, at 75 (statement of Caleb Strong); *id.* at 79 (statement of Nathaniel Gorham).

substitute."[200] Madison must have felt exasperated. He *had* suggested another "expedient"—the Council of Revision!—only to have Dickinson reject it.[201] Something was driving leading delegates towards a view of constitutional enforcement that involved adjudication in a court of law, regardless of whether they thought such a practice fully consistent with republicanism. Hence Dickinson's confusion.

A similar logic was at work in ratifying conventions. At the Virginia ratifying convention, for example, where the federal judiciary was extensively discussed, both federalists and anti-federalists advanced this position, but for different reasons.[202] The clearest example is a well-known speech by the young John Marshall, then holding a position on Richmond's hustings court, in which he defended Article III against attacks by George Mason and Patrick Henry.[203] The day before, Mason had argued that federal courts would supplant state courts, on the grounds that the jurisdiction of federal courts extended to all cases arising under federal law, and federal law was to be superior to state law.[204] Indeed, given that congress could enact laws concerning "every object of private property," federal courts would, in effect, "destroy the State Governments."[205] Marshall met the argument at what he thought its obvious point of weakness. "Has the Government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers?"[206] It was clear that the Constitution conferred no such authority on Congress. If, as Henry had suggested, Congress nevertheless did "make a law not warranted by any of the powers enumerated, it would be considered by the Judges as

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[200] 2 FARRAND'S RECORDS, *supra* note 158, at 299.

[201] *See* HAMBURGER, *supra* note 43, at 510-11; *see also* 1 FARRAND'S RECORDS, *supra* note 198, at 108-09 ("Dickerson [*sic*] – agt. it – you must separate the Leg. Jud. & E. – but you propose to give the Executive a share in Legislation – why not the Judicial – There is a difference – the Judges must interpret the Laws they ought not to be legislators. The Executive is merely ministerial . . . ."). In "Letters of Fabius," Dickinson apparently came around to judicial review, BERGER, *supra* note 144, at 64-65, but the text is ambiguous and must be read against Dickinson's statements in the convention. *See* PAMPHLETS OF THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 184 (Paul Leicester Ford ed. 1888) (observing that "the president, and the federal independent judges, [would be] so much concerned in the execution of the laws, and in the determination of their constitutionality").

[202] On the discussion of the judiciary at the Virginia convention, *see* MAIER, *supra* note 147, at 286-87; *see also* Bilder, *supra* note 75, at 551.

[203] *See* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1430-39 (John P. Kaminski, Gaspare J. Saladino et al. eds., 1993) [hereinafter 10 DHRC]; *see also* NELSON, MARBURY, *supra* note 48, at 43.

[204] 10 DHRC, *supra* note 203, at 1401-02.

[205] *Id.* at 1402.

[206] *Id.* at 1431.

an infringement of the Constitution which they are to guard. . . . They would declare it void."[207] Federal jurisdiction to adjudicate such cases was, said Marshall, "necessary." He explained:

> What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force. . . . To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the Judiciary? *There is no other body that affords such a protection*.[208]

Marshall's point does not deny that the people themselves interpret and enforce the constitution. He assumes the *opposite*—that the constitution might be enforced by the people themselves, acting 'out of doors.' Marshall's concern was with the violence and disorder that popular enforcement tended to create.[209]

Marshall made no mention of the president, and, indeed, it would have made little sense for him to do so. Mason had suggested that the federal courts would shield federal *executive* officers, who, he predicted, would be free to abuse the people of Virginia without legal consequence.[210] An appeal to the executive authority would have played right into Mason's hands. Just before the convention had taken up the federal judiciary, it had discussed Article II, where "Henry, Mason, [James] Monroe, and [William] Grayson raised one objection after another" to the president, who, they argued, "had too much power."[211] And although the federal judiciary might dominate state governments, Henry thought it plainly overmatched by its coordinate departments in the national government. It could not serve as a constitutional check, he said, as the Virginia state judiciary had against the excesses of the state assembly.[212] A presidential power of non-enforcement

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[207] *Id.*

[208] *Id.* at 1432 (emphasis added).

[209] In this respect, Marshall anticipates the concern with mobbing and protecting property rights that came to characterize the Federalist party in the second half of the 1790s. *See* KRAMER, *supra* note 33, at 109-11; NELSON, MARBURY, *supra* note 48, at 40.

[210] 10 DHRC, *supra* note 203, at 1404.

[211] MAIER, *supra* note 147, at 286; *cf.* RAKOVE, *supra* note 63, at 272-73 (describing the anti-federalist fear that "ambition or desperation would drive *individual* presidents to attempt to set themselves up literally as kings").

[212] 10 DHRC, *supra* note 203, at 1219 (The Honorable Gentleman [Edmund Pendleton] did our Judiciary honour in saying, that they had firmness to counteract the Legislature in some cases. Yes, Sir, our Judges opposed the acts of the Legislature. . . .

without an executive council would have worsened the imbalance. There was thus no reason to defend a non-enforcement power at the Virginia convention. A sensible delegate, like Marshall, argued precisely the opposite.[213]

The pattern of evidence after ratification buttresses this conclusion, just as it did above. Thus, following presentment by the First Congress of a bill to fix the seat of government in Washington D.C., "Junius Americanus" published a letter in *The Daily Advertiser*, despairing, for over four columns, about the bill's unconstitutionality.[214] As Junius viewed the matter, the Constitution committed to Congress alone the determination of when and where to meet, which the bill to fix the seat of government would violate when signed by the President.[215] Junius was unmoved by the suggestion that once enacted, the law would "inoperative" because "repugnant." "[T]his is however a mistaken idea," he said, "for it will have an operation, *unless formally annulled by the judiciary*, and it is impossible the construction of it can ever go before the federal courts."[216] Junius returned to the point repeatedly, and in language that evidenced a detailed view of the scope of the president's interpretative authority. Thus:

> Every law does not undergo the revision of the judiciary; this will certainly not; the President of the United States can alone arrest its progress. Having his sanction, the public will consider every part of the bill as valid, because they know he would not approve any bill which contained a syllable that was unconstitutional; the clause will then be deemed

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Are you sure that your Federal Judiciary will act thus? . . . Where are your land-marks in this Government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country [i.e., Virginia], that acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.").

[213] For other examples, see 10 DHRC, *supra* note 203, at 1197 (statement of Edmund Pendleton); *id.* at 1327 (statement of George Nicholas). Similar descriptions of the judiciary as the only institution capable of protecting the people from legislative violation of the constitution, without mention of presidential non-enforcement, occurred in New York, Connecticut and Massachusetts. *See* Bilder, *supra* note 75, at 551-52, and sources cited therein.

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

[215] *See* U.S. CONST., art. I, s. 4, 5. The one exception is the President's power to determine adjournment when the houses disagree. *See* Art. II, s. 3.

[216] Junius Americanus, *supra* note 214, at col. 4 (emphasis added). Junius does not explain why he thinks the matter could not become a case or controversy.

> binding, because every part of the bill must have its operation.[217]

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

The same set of assumptions animated constitutional argument within Congress. In the First Congress, for example, both proponents and opponents of the Bank of the United States assumed that the Supreme Court would adjudicate any question about the bank's constitutionality.[218] Madison wanted to avoid such an outcome; Elias Boudinot, in contrast, took comfort in the idea that "if, from inattention, want of precision, or any other defect, I should do wrong, there is a power on the government which can constitutionally prevent the operation of such a wrong measure."[219] Boudinot, of course, was not referring to the president, but to "the Judiciary of the United States, who may adjudge [the Bank law] to be contrary to the Constitution, and therefore void."[220]

The point was not confined to those who would later become Federalists. Indeed, as the Jeffersonian Republican party emerged in the mid-1790s, distrust of executive authority and of executive influence on the judiciary became a central pillar in their adaptation of English oppositional thought.[221] Consider the famous attack on judicial review in the Sixth

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[217] *Id.* at col. 2.

[218] WARREN, *supra* note 214, at 106.

[219] 2 ANNALS OF CONG. 1978 (1791) [hereinafter 2 ANNALS]. Boudinot's comment has had a long life. Wilson quoted it in *Lectures on Law*, Joseph Story in his *Commentaries on the Constitution*, as did Charles Warren in *Congress, the Constitution, and the Court*. WARREN, *supra* note 214, at 107-07; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 472 (1833); 1 WORKS OF WILSON, *supra* note 108, at 541-42.

[220] 2 ANNALS at 1978.

[221] *See* LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 52-63, 247-50 (1978) (describing the Republican focus, while in opposition to the Adams administration, on the danger of "patronage," "corruption," and "executive influence"); VILE, *supra* note 80, at 171 (discussing American hatred of "the corruption and [royal] influence in the British legislature"). This worry was not confined to influence on the legislature through 'placemen.' Republicans also objected to the service of Chief Justice Jay and Chief Justice Ellsworth as special ambassadors in the conflicts with Britain and France. *See* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY

Congress, by then-Senator Charles Pinckney. Introducing his proposal to prohibit plural office-holding by federal judges, Pinckney described the judicial power "either to execute [the laws] or not as they think proper," as "a dangerous right . . . a right in my judgment as unfounded and as dangerous as any that was ever attempted in a free government."[222] Just to bring the point home, Pinckney then asked his audience to imagine the implications for *executive* power. "What would be the consequences," he announced, "if the President could at any time get rid of obnoxious laws by persuading or influencing the judges to decide that they were unconstitutional and ought not to be executed?"[223] Of course, non-enforcement would obviate any need for stooping to *persuasion*. Pinckney, apparently, could not imagine such a thing, for it would have made nonsense of his point.

Even after the Republican party took control of the presidency and the congress, during the period in which Jefferson is commonly thought to have established the boundaries of presidential interpretative authority, Republicans in congress never mentioned the president in response to repeated assertions that only courts could protect the people from legislative excess. Examples of such claims by Federalists in the debate over repeal of the Judiciary Act are too numerous to discuss individually. To take one pedestrian example from the debate in the Senate, Aaron Ogden asked his fellow senators, "Suppose the legislature should pass bills of attainder, or an unconstitutional tax, where can an oppressed citizen find protection but in a court of justices firmly denying to carry into execution an unconstitutional law?"[224] Ogden's point assumes another department cannot provide similar protection. The argument was thought strong enough to become a Federalist refrain.[225] Some developed it to considerable lengths. In the

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JUDGES 152-53 (1997); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 74-75, 89-95, 118-19 (1995).

[222] 10 ANNALS OF CONG. 101 (1800) [hereinafter 10 ANNALS].

[223] *Id.* at 101.

[224] 11 ANNALS OF CONG. 175 (1802) [hereinafter 11 ANNALS].

[225] *See, e.g.*, *id.* at 56 (statement of Uriah Tracy) ("What security is there to an individual [from an ex post facto law]? None in the world but by an appeal to the Judiciary . . . ."); *id.* at 83 (statement of Gouverneur Morris) ("Suppose, in the omnipotence of your Legislative authority, you trench upon the rights of your fellow citizens. If the judiciary department preserve its vigor, it will stop you short. Instead of a resort to arms, there will be a happier appeal to argument."); *id.* at 530-31 (statement of Archibald Henderson) ("In vain may he hold out the Constitution and deny the authority of Congress to pass a law of such undefined signification"); *id.* at 574 (statement of John Stanley) ("Should, unhappily, a Legislature be found who . . . should transgress the bounds prescribed, what is the security of the citizen? . . . The Judiciary are our security."); *id.* at 690 (statement of

House, for example, James Bayard offered a particularly colorful version, which illustrates, very clearly, basic assumptions about the president's role in constitutional enforcement. Bayard said,

> Let me now ask if the power to decide upon the validity of our laws resides with the people? Gentlemen cannot deny this right to the people. I admit that they possess it. But if, at the same time, it does not belong to the courts of the United States, where does it lead the people? It leads them to the gallows. Let us supposed that Congress . . . pass an unconstitutional law. The people [subject to the law] contest the validity of the law. They forcibly resist its execution. *They are bought by the Executive authority before the courts upon charges of treason*. The law is unconstitutional, the people have done right, but the court is bound by the law, and obliged to pronounce upon them the sentence which it inflicts. Deny to the courts of the United States the power of judging upon the constitutionality of our laws, and it is vain to talk of it existing elsewhere.[226]

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

In written remarks added to the House record, Representative Jonathan Bacon did argue that "every officer and . . . every citizen" had an "inherent and indispensible duty" to "judge for themselves of the constitutionality of every statute on which they are called to act in their respective spheres."[227] Bacon supported his position with a version of the Standard Justification.[228] If one thinks of the law as directing or 'calling on' the president to enforce

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

[226] *Id.* at 646 (emphasis added).

[227] *Id.* at 982.

[228] *See id.* at 982-83.

it, then Bacon's position implies a power of non-enforcement.[229] Bacon's comment is significant. But the real *explanans* is why the point was made only *once* during the debate over repeal, and never on the floor.[230] Republicans could avail themselves of a number of different responses to Bayard. They could challenge the assumption that federal courts would actually provide a remedy for legislative violations of constitutional rights, and point to the courts' political conduct during the Sedition Act controversy. Naturally, some Republicans made this point.[231] They could argue that, whether or not the courts were fully 'independent' of legislative control, judges would continue to perform judicial review out of duty; some made this argument as well, drawing on experiences in state government.[232] And they could argue that a proper republican remedy for legislative excess was the corrective applied by the people themselves during election—precisely what had occurred in Jefferson's recent 'revolution'.[233] In the end, responses like these crowded out Bacon's view. It seems likely that, having nurtured such a profound distrust of executive authority during their decade in opposition, Republicans found it difficult suddenly to pivot and argue that the president possessed a rather broad authority to refuse to enforce the law. The received Republican view in 1802 was, rather, to distrust the executive, and to assume the judiciary would protect individuals

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[229] *See supra* Part I.B.

[230] Senator John Breckinridge's well-known defense of Congress's supremacy in determining the boundaries of legislative power, 11 ANNALS at 179, does not support non-enforcement, but implies an obligation to give effect to Congress's interpretation of the Constitution. *See infra* note 411.

[231] *See, e.g.*, 11 ANNALS at 661 (statement of John Randolph).

[232] *See, e.g.*, *id.* at at 698 (statement of Israel Smith) ("Whether the judge holds his office at the will of the President, or for one year, or during good behavior, it is equally his duty to decide a law void, which directly infringes the Constitution."); *id.* at 973 (statement of Joseph Varnum) ("[S]ir, notwithstanding [in New Hampshire] the entire dependence on the Legislature for the existence of the courts of common pleas, I cannot imagine that the independence of the judges has ever been affected by it. There is an honorable gentleman from that State now on this floor, a judge of one of those courts, who, with his associates, had the independence . . . to declare an act of the Legislature unconstitutional."). Varnum was likely referring to Abiel Foster, a representative from New Hampshire who served as a judge on the Court of Common Pleas for Rockingham County from 1784-88. *See* REID, LEGISLATING, *supra* note 55, at 29-30; *Biographical Directory of the United States Congress: Foster, Abiel (1735-1806)*, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000297. Notably, Foster had no legal training. *See* JOHN REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 24 (2004) [hereinafter REID, CONTROLLING].

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

from both legislative and executive excess.[234] This left them unable to rebut the Federalist assumption that the president would be exposed to the same partisan forces that produced the legislature's violation of the Constitution in the first place.[235]

C. A closer look at the Standard Justification

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

1. Constitutional agency

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

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[234] *See* Powell, *supra* note 178, at 1004 (observing that "a central Republican theme in the 1790s was opposition to the Federalist ideal of a strong executive"); *e.g.*, at 73 (Speech of David Stone) ("The objects of courts of law, as I understand them, are, to settle questions of right between suitors; to enforce obedience to the laws, and to protect the citizens against oppressive use of power in the Executive offices."). It was the Federalists who supported a broader executive authority, as even Jefferson recognized. In a letter to John Dickinson written just after the 1800 election, Jefferson wrote, "I consider the pure federalist as a republican who would prefe*r a somewhat stronger executive*; and the republican as one willing to trust the legislature as a broader representation of the people, and a safer deposit of power for many reasons." 9 THE WORKS OF THOMAS JEFFERSON 281 (Paul Leicester Ford ed., 1905) (emphasis added).

[235] These forces would align the president with the congress that, for example, passed a bill of attainder. *See* 11 ANNALS at 689 (statement of Benjamin Huger) ("From an ex post facto law, from a suspension of the habeas corpus in time of peace, from a bill of attainder, of what any other act of violence, however unconstitutional, *on the part of the Executive and Legislature*, where are we to look up for relief?" (emphasis added)). Representative Huger's example perfectly reverses an example Judge Frank Easterbrook adduced (200 years later) in support of non-enforcement—revealing how disparate Easterbrook's own assumptions are from those that guided those in the repeal debate. *See* Easterbrook, *supra* note 16, at 922-24.

are "not *mere servants of the Assembly*."[236] Being an agent of the people implied a duty to comply with their constitution. Since giving effect to an unconstitutional law meant serving the assembly instead of obeying the constitution, it followed that a judge must consider the constitution when deciding a case.[237] He could not close his eyes to it.

Even if we suppose that agency implies a duty to comply with the constitution, it does not follow that by giving effect to an unconstitutional law, a judge disobeys the constitution. We can see this by considering the implications of a simple separation of governmental functions. Suppose, for example, that the people give one agent or group of agents the power to enforce the law. We need not assume that the delegation is to a single person, or to persons within only one governmental 'branch'—it just needs to a delegation that *excludes* someone. Other agents lack this power. The agents without enforcement power are, by assumption, unauthorized to make their own determination of how the law should be enforced. They must accept the decisions of the agents given enforcement authority. *This does not make the non-enforcing agents subordinate*;[238] the non-enforcers have their own powers, and, as Madison put it, a "will of [their] own"—that is, an authority to determine how best to exercise those powers and what limits the constitution places on them.[239] It follows, then, that merely being a constitutional agent cannot immunize one from being subject to the decisions, and possibly the commands, of another agent. Indeed, judges could be such agents. The powers delegated to judges might not include the authority to consider the constitution and determine its meaning. That authority might have been given to some other agent; or it might have been given to no agent, and remain with the people themselves.[240] To know whether judges in fact have the authority to consider the constitution in the course of adjudicating cases, we need to know something more about the powers they were delegated. Only then can we conclude whether a judge who fails to consider the constitution 'disobeys' it.

This argument, premised on the separation of powers, would have been familiar to the framers as students of English oppositional politics.[241]

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[236] *To the Public*, *supra* note 103, at 148.

[237] *See supra* Part I.B.

[238] *See* Harrison, *supra* note 12, at 362-63, 380.

[239] THE FEDERALIST, *supra* note 32, at 280 (Federalist 51).

[240] *See id.* at 273-74 (Federalist 49).

[241] *See* VILE, *supra* note 80, at 43-44 (Herle-Ferne debate); *id.* at 75 ("In the first half of the eighteenth century the theory of mixed government was in the ascendency again . . . . But it was no longer the undifferentiated theory of mixed government that had preceded the Civil War. The ideas behind separation of powers were added to it so that each element of

Indeed, it is a recognizable variant of an argument Iredell himself made at the end of "To the Public." In response to the criticism that he had implied a power of judicial review not only in North Carolina's Superior Courts of Law and Equity, but also in the "county courts," whose justices of the peace probably lacked legal training, Iredell responded, "I admit it."[242] The county courts, he reasoned, "exercise . . . judicial power," and thus enjoyed its concomitant, judicial review.[243] Moreover, superior courts would hear appeals from the county courts. Yet Iredell balked at extending this power to refuse to enforce the law beyond the courts. He continued:

> The objection, however, urged by some persons, that sheriffs and other *ministerial* officers must exercise their judgment too, does not apply. For *if the power of judging lies with the courts*, their decision is final as to the subject matter. Did ever a sheriff refuse to hang a man, because he thought he was unjustly convicted of murder?[244]

Ministerial officers are not empowered, said Iredell, to judge whether those court orders comply with the constitution. This is because "*the power of judging lies with the courts*."[245] Sheriffs weren't given the power of judging, and in this respect they were subject to the decisions of those who were.[246] Judges on the state's superior courts, at whom Iredell's essay was aimed, were likely to be concerned about the scope of any duty to consider

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the mixed government might wield an independent and co-ordinate authority that gave it the ability to check the exercise of power by the other branches.").

[242] *To the Public*, *supra* note 103, at 149. On justices of the peace in royal North Carolina during the period immediately preceding the revolution, see SCOTT GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787, at 198 (2011).

[243] *To the Public*, *supra* note 103, at 149; *see* GERBER, *supra* note 242, at 196.

[244] *To the Public*, *supra* note 103, at 149.

[245] *Id.*

[246] *See* N.C. CONST. OF 1776, Decl. of Rights, art. IV. Iredell's argument applies by its terms to ministerial officers, but its implications extend beyond them. Iredell's premise is that "the power of judging lies with the courts." It does not lie elsewhere, as the provision in state's 1776 constitution separating powers confirms. Since the power of judging lies with the courts, and not elsewhere, it does not lie with *any* officer who is not "with the courts," whatever his rank. Indeed, Iredell may have been thinking of North Carolina colonial Governor Richard Everard, who in 1729 had refused to execute a sentence of death entered on a jury verdict in the colony's General Court. The effect, widely known to North Carolinians in the 1730s, was to undermine the courts and create "chaos." *See* 2 WILLIAM NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660-1730, at 96-97 (2012) (discussing King v. Smith, N.C. Gen. Ct. 1729, in Colonial and State Records of North Carolina 1886, Volume 2, 829).

the constitution.[247] If the duty were one that an officer had by virtue of holding *an* office (any office), then it would be a duty all officers had; but for all officers to be constantly duty-bound to act only on their own view of the constitution could be thought to invite disorder. North Carolina had been forced to dispatch the self-governing 'Regulators' with an army of several thousand men only fifteen years earlier.[248] Iredell's response to this concern was to distinguish *kinds* of constitutional agents according to the *powers* of their office. Those with an office requiring application of the law were duty-bound to consider the constitution when doing so. For the rest, merely being the people's agent carried no such requirement.

As noted above, disputants tended to merge the idea that constitutional agency implied a duty of obedience with other, related ideas about constitutional enforcement.[249] Thus, judicial review was sometimes likened to popular disobedience of an unconstitutional law.[250] The analogy suffers from the problem just described. One can assume, as Iredell does in "To the Public," that the people enforce the constitution on the basis of their understanding of its limits.[251] The idea is plainly compatible with the existence of different constitutional offices. An officer whom (let us suppose) the constitution obligates to implement the interpretations of another may be justified is refusing to obey an unconstitutional act, as an act of popular resistance. However, this authority *does not flow from his office*, and, consequently, the officer's use of the powers of his office to advance his own views is open to challenge. As Philip Hamburger has shown, and as I discuss below, by the 1790s there was significant concern about judges' use of written "resolutions" to express constitutional protest.[252] What required justification was the practice of enforcing the constitution within a court of law. One could accept that popular disobedience was occasionally justified, but maintain that judges were constrained by the commands of the assembly in discharging their official

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[247] *See To the Public*, *supra* note 103, at 149.

[248] *See, e.g.*, William Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1026-28 (2010).

[249] *See supra* notes 120-127, and accompanying text.

[250] *See, e.g.*, KRAMER, *supra* note 33, at 53, 54.

[251] *See To the Public*, *supra* note 103, at 147. Iredell resembles Wilson in this respect. 1 WORKS OF WILSON, supra note 108, at 421.

[252] *See* HAMBURGER, *supra* note 43, at 561 ("Exactly what sort of duty this required them [the judges involved in the "Remonstrance"] to resist they did not make clear, and if it was a general political duty to preserve their rights under the constitution rather than the distinctive duty of their office, they might be in trouble."). *See infra* notes 316-342, and accompanying text. There was also concern about federal judges exploiting their status and authority toward the political goals of the administration. *See infra* notes 427-436, and accompanying text.

duties.

2. The duty to apply the law

In effect, we are pushed towards the second version of the Non-Enforcement argument, premised on the nature of the duty to apply the law. If the Standard Justification is going to succeed, it is this idea that must do the work. Indeed, the leading defenses of judicial review in the ratification period make consistent use of the notion that a duty to apply the law is attached to the judicial office. For example, Iredell writes that a judge's consideration of the constitution, and his decision to privilege it above ordinary law, "is not a usurped or discretionary power, *but one inevitably resulting from the constitution of [his] office*."[253] Similarly, in Federalist 78, Hamilton asserts that it "belongs" to the judicial office to "ascertain [the constitution's] meaning as well as the meaning of any particular act proceeding from the legislative body."[254] In the influential case of Kamper v. Hawkins, which I discuss in detail below, Judge Tucker writes that the constitution must be "resorted to" anytime it is necessary "to expound what the law is," and that such "exposition it is the *duty and office of the judiciary* to make."[255] The key question is whether this duty also attaches to the executive office.

While the president does apply the law, doing so does not bring him within the ambit of the Standard Justification. This is because the Standard Justification does not turn merely on the application of general rules to specific situations. As we will see, a number of the leading defenses of judicial review reflect this point. Consider Chief Justice Marshall's version of the Standard Justification in Marbury v. Madison. As others have noted, Marshall's defense of judicial review in *Marbury* replicates the Standard Justification, which was, by the 1790s, widely accepted, even by Republicans.[256] Marshall thus begins his defense with the assertion that it is "emphatically the province and duty of the judicial department to say what

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[253] *To the Public*, *supra* note 103, at 148 (emphasis added).

[254] THE FEDERALIST, *supra* note 32, at 415.

[255] Kamper v. Hawkins, 3 Va. 20 (Gen. Ct. 1793) (Opinion of Tucker, J.).

[256] *See, e.g.*, HOBSON, *supra* note 110, at 55; SNOWISS, *supra* note 45, at 109. On the Republican acceptance of judicial review in 1803, see Michael McConnell, *The Story of* Marbury v. Madison: *Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 2 (Michael Dorf ed., 2004); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 16, 20 (2001); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 227 (1992); RICHARD ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 66 (1971); Warren, *supra* note 214, at 122-27, Corwin, *supra* note 144, at 570.

the law is."[257] This is Premise 1 of the Standard Justification, namely, a characterization of the judicial office that supports consideration of the constitution in the course of adjudication. The next sentence in the opinion justifies this characterization. "Those who apply the rule to particular cases," says Marshall, "must of necessity expound and interpret that rule."[258] "Cases" is not a throwaway term in this sentence. It does not mean "instances," "situations" or "occasions." Rather, as David Engdahl and Charles Hobson have argued, Marshall uses "case" in its legal sense, which embodies a vision of the form that a dispute takes within a court of law, and the norms that govern the litigation of such a dispute.[259] In particular, says Marshall, litigation of a dispute necessitates *expounding* the law ("those who apply the law to particular *cases* must of necessity *expound*"); and it is expounding the law that, in turn, requires the court to consider the constitution.[260]

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

> P1′. The duty of the executive power is to execute the laws of the state.
> P2. The constitution is a law of the state.
> P3. An unconstitutional act of the assembly is void, and thus not a law of the state.
> C′. If the executive power executes an unconstitutional act of the assembly, it does not execute the laws of the state, and thus it violates its duty.

The problem is with P1′. The duty of the executive power is to execute the laws of the state. The constitution is a law, but it is a *fundamental* law. Because it is fundamental, one must justify the president's consideration of the constitution in the course of satisfying his official duty to execute the law; one cannot simply assume that fundamental law may be enforced by the procedures and institutions used to enforce ordinary law.[261] Support for presidential consideration of the constitution had rested on a parallel to the judicial duty to apply the law. However, on closer inspection, the judicial

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[257] 5 U.S. (1 Cranch) 137, 177 (1803).
[258] *Id.*
[259] David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 310, 318, 325, 330 (1992); HOBSON, *supra* note 110, at 52.
[260] *See* BERGER, *supra* note 144, at 50-63.
[261] *See* SNOWISS, *supra* note 45, at 1-2.

office is concerned with applying the law to "cases," which requires "expounding" the law. In this way, the idea of a "case" and "expounding" the law figure essentially in the Standard Justification, but not in the Non-Enforcement Argument. I conclude that if there is a non-enforcement power, it must rest on some other basis for considering the constitution in the course of satisfying the duty to execute the law.

Does this make the president into an overgrown version of Iredell's ministerial sheriff? No. The president is not an inferior officer or an "errand boy."[262] He leads a coordinate department; he enjoys an authority to (independently) interpret the Constitution.[263] The president may give effect to his view of the Constitution in specific ways, but a list of these ways is not open-ended. It includes the power to issue vetoes, grant pardons, propose legislation, and to do other things as well, depending on the state of constitutional politics.[264] But the Non-Enforcement Argument can provide no support for adding to this list the power to execute the law, such as the Take Care Clause and (perhaps) the Article II Vesting Clause grant.[265] From the perspective of the founding era, at least, the president's executive power and his obligation to see that the law is faithfully executed extend only to *ordinary* law. The executive duty of the presidency is a ministerial duty—but the same is not true of the president's other powers and duties.

III. RECONSTRUCTING THE STANDARD JUSTIFICATION

The Standard Justification cannot be adapted to support a power of non-enforcement, because the argument turns on the judicial duty to expound the law. Judges expound the law in order to decide a case, which the president does not do. In the final Part of this article I fill out these assertions by examining the ideas of a "case" and "expounding" the law. The effort is preliminary. My aim is not to chart, exhaustively, the evolution of these ideas, or to document all the major usages of these terms in the period from 1780 to 1800. Rather, the aim is to essay an explanation

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[262] Harvey Mansfield, *The Ambivalence of Executive Power, in* THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 315-16 (1981).

[263] *See* Steilen, *supra* note 31, at 355-60.

[264] *See, e.g.*, Easterbrook, *supra* note 16, at 907-11; Naomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 544-53 (2009). On the relationship between constitutional politics and executive interpretative authority, see KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 1-27 (2007).

[265] On the Vesting Clause as a source of presidential interpretative power, see Lawson & Moore, *supra* note 13, at 1281-88. On the Take Care Clause as a source of power, see Easterbrook, *supra* note 16, at 919-22.

of how the framers could have believed that the president had a power to interpret the Constitution, but only courts the power to refuse to enforce unconstitutional law.

The key to the story I tell is the court itself. Traditionally, American jurisdictions distributed the adjudicatory function relatively widely. Judges shared interpretative power (to the extent they had it at all) with juries and with popular assemblies, through which the people gave effect to their understanding of the law.[266] This distribution changed in the last quarter of the eighteenth century, shifting away from popular assemblies and towards actors embedded within a court of law, primarily judges.[267] Of course, these shifts occurred at different times in different states, depending on the politics of the place. In most jurisdictions, however, courts better approximated widely held ideals about the role of reason in government than did the popular assemblies, which were driven by local politics.[268] In the eyes of reformers, courts of law were an attractive place to locate fundamental political decisions, and, in this sense, it is *forum* that best explains the legalization of constitutional dispute. Indeed, there is reason to believe that ideas we later came to hold about judges—for example, about the importance of their 'independence' from the legislature—were a product, in large part, of shared convictions about proper proceedings in a

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[266] On the jury, see Nelson, *supra* note 248, at 1003; REID, CONTROLLING, *supra* note 232, at 108-25; STIMSON, *supra* note 78, at 48-49, 59-60; NELSON, AMERICANIZATION, *supra* note 70, at 20-34. For recent discussions of assembly adjudication, see REID, LEGISLATING, *supra* note 55, at 9-10, 62-70; Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1463-75 (1998). An older discussion can be found in Corwin, *supra* note 144, at 556 & n.53.

[267] As this point suggests, the "judge v. jury" template adopted by most historical studies of interpretative authority is inadequate and in some cases quite distortive. After the Revolution, the jury's primary antagonist was not the judge, but the popular assembly, which eventually allocated the jury's interpretative authority to the judge to increase predictability and protect business interests. *See, e.g.*, NELSON, AMERICANIZATION, *supra* note 70, at 8. In other cases, judges and juries cooperated to enhance their collective interpretative authority; thus, New Hampshire judges of the 'common sense' school (mostly untrained laymen) sought to promote and protect jural decision-making in order to insulate regional courts from the controls of precedent and appellate review. *See, e.g.*, REID, CONTROLLING, *supra* note 232, at 24-26.

[268] *See* WOOD, EMPIRE, *supra* note 75, at 190-91 (discussing the effect of instructions on the politics of assemblies); *id.* at 298-99 (noting emphasis on reason in the law). Disappointment with adjudication by popular assemblies also drove the development of due process doctrine. Some of the early judicial review cases can be read as due process cases, where the animating idea is separation legislative and judicial functions. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1704-06, 1709-13 (2012).

court of law.[269] We can examine those convictions through a close analysis of the ideas of a "case" and "expounding." A "case" was a dispute shaped by the process of "forensic litigation" in a court of law. Deciding a case required the court to "expound" the law, in the sense that the court was supposed to show how its judgment was rooted in the law of the community, as opposed to the interests of judge or jury. Expounding the law, in turn, might require the court to engage in judicial review. It was thus the demands of the forum that distinguished the interpretative powers of the judiciary from those of the executive. The president did not decide cases or expound the law.

A. The idea of a "case"

I want to begin by examining the idea of a "case." By the 1790s, and probably earlier, "case" was regularly used to describe legal proceedings.[270] A "case" was a dispute that had assumed a form that made it properly resolvable within a court of law. It was a dispute "judicially determined," as it was sometimes put, rather than "extra-judicially."[271] As Marshall described the idea in a speech given in 1800 on the floor of the House,

> A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision . . . . [T]he other departments would

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[269] *See* G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J. LAW & PUB. POL'Y 643, 660-61 (2012) (reviewing GERBER, *supra* note 242). Keep in mind that judges is most American jurisdictions were not independent at the time the federal Constitution was ratified. *See* GERBER, *supra* note 242, at 327.

[270] *See* JAY, *supra* note 221, at 62-63; *e.g.,* 1 WORKS OF WILSON, *supra* note 108, at 513 ("The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions *in cases*, in which the manner or principles of this application are disputed by the parties interested in them." (emphasis added)). *But see* HAMBURGER, *supra* note 43, at 536-37 (arguing that "case" had a wider meaning in the 1780s).

[271] JAY, *supra* note 221, at 151-52 (discussing New York Governor John Jay's request for an advisory opinion from state judges and their refusal); Bloch, *supra* note 18, at 594 & n.107 (discussing the Invalid Pension Act cases); *e.g.*, Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in JAY, *supra* note 221, at 179-80 ("The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to.").

> be swallowed up by the judiciary. . . . By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.[272]

The key distinction in the passage is between a "case" and a "question." A "question" would appear to be any reasonably unsettled proposition in the law.[273] A "case," in contrast, is a kind of dispute.[274] It is distinguished by the "shape" it has taken, namely, a shape that makes "judicial decision" possible. So what makes it possible to resolve a dispute by judicial decision? At the very least, the court must be able to enter a valid judgment, which means, says Marshall, that the parties to the dispute must be "reached by [the court's] process, and bound by its power," and the court must have jurisdiction to make an "ultimate decision" about the rights at issue. But, in addition, Marshall argues that the dispute "must assume a legal form, for forensic litigation, and judicial decision." In other words, it must be suited for resolution in a court of law, using the procedures and tools employed in that forum to resolve disputes.

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[272] 4 THE PAPERS OF JOHN MARSHALL 95-96 (Charles T. Cullen & Leslie Tobias eds., 1984) [hereinafter 4 MARSHALL PAPERS].

[273] *See* HAMBURGER, *supra* note 43, at 537 ("[W]hereas in law a 'cause,' 'case,' or controversy ordinarily referred to a particular dispute, a 'question' usually alluded to a more abstract disagreement, which rose above a particular legal dispute and thus might just as well be debate by a philosopher or a politician.").

[274] At times in his lengthy address, Marshall uses "case" in its loose sense of 'particular circumstance.' *See, e.g.*, 4 MARSHALL PAPERS, *supra* note 272, at 95 ("This Mr. Marshall said led to his second proposition, which was—That the *case* was a *case* for executive and not judicial decision." (emphasis added)). Nevertheless, I follow David Engdahl and Charles Hobson in identifying "case" as the relevant term, and not "case in law," which Marshall also used in his 1800 speech. *See* Engdahl, *supra* note 259, at 311 n.103 & 318, 325-26; HOBSON, *supra* note 110, at 52; *see also* JAY, *supra* note 221, at 62-63 ("[I]n that period [i.e., the late 1780s], 'controversy' commonly was used interchangeably with the word 'case' in reference to litigation."). Samuel Johnson's 1792 dictionary identifies both legal and non-legal meanings for "case," but no entry for "case in law." *See* JOHNSON'S DICTIONARY 1792. "Case in law" could be understood as a legal case *at law*—i.e., subject to the common law or the law of the state. A key question is whether one can, without begging the question, interpret "case" in *Marbury* as referring to a dispute in court, rather than simply 'particular circumstances.' Engdahl has argued that one can, based in part on other occurrences of "case" in *Marbury*. *See* Engdahl, *supra* note 259, at 325-26.

This definition of "case" played a crucial role in Marshall's defense of President Adams against charges that the president had usurped judicial authority.[275] The term thus perfectly captures the distinction between executive and judicial interpretative authority. Adams had received a diplomatic request to extradite a man, Thomas Nash, accused of participating in a mutiny aboard a British ship. After considering the request, he transmitted his own "advice and request" to the federal judge with jurisdiction over the matter, asking the judge to deliver Nash to the British government. The judge held a *habeas* hearing, in which Nash desperately claimed to be an American by the name of Jonathan Robbins. Nevertheless, the judge complied with the request to hand over Nash/Robbins, whom the British promptly had transported to Jamaica, court-martialed and hanged. House Republicans were outraged.[276] They introduced a resolution censuring Adams for answering "questions" about the meaning of federal law, a federal treaty and the Constitution—authority they believed was reserved under Article III for the federal courts—and for interfering "in a case where those courts had already assumed and exercised jurisdiction."[277] In response, Marshall argued that the Constitution did not actually give federal courts jurisdiction over all such "questions," as the resolution maintained, but only over "cases."[278] To claim an exclusive authority over questions arising under federal law, treaties, and the Constitution would lead the judiciary to usurp executive authority. "A variety of legal questions must present themselves in the performance of every part of Executive duty," Marshall observed, "but these questions are not therefore to be decided in court."[279] The questions in this case were "questions of law, but they were questions of *political law*," while the grant of jurisdiction to the federal courts "had never been understood, to confer on that department, *any political power* whatever."[280]

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[275] *See* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 369-70 (1999); Engdahl, *supra* note 259, at 304-14.

[276] Republicans tended to credit Nash's claim to be an American citizen, which Dellinger and Powell suggest had some merit. *See* Dellinger & Powell, *supra* note 275, at 369 n.11 (citing Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLS. 99 (1975)). Republicans were undoubtedly primed to take offense by what they perceived to be the Adams administration's pro-British leanings. *See* Engdahl, *supra* note 259, at 307-09.

[277] 10 ANNALS at 533.

[278] 4 MARSHALL PAPERS, *supra* note 272, at 95 (emphasis added).

[279] *Id.* at 103

[280] *Id.* (emphasis added). Walter Dellinger and Jeff Powell rightly emphasize the idea of "political law" in Marshall's defense, which casts an important light on the first two issues in *Marbury*, written by Marshall only three years later. *See* Dellinger & Powell,

Marshall's defense shared much in common with an earlier defense of presidential authority against similar charges of usurpation, which he cited in his speech.[281] Writing in 1793 as "Pacificus," Alexander Hamilton had defended President Washington's authority to proclaim the United States a neutral in the war between Britain and France, and, as he had stated, "under no obligations of Treaty, to become an associate" of one warring power or the other.[282] In response to the objection that such a determination should have been made by the "Judiciary Department", Pacificus maintained that "the province of that Department is to *decide litigations in particular cases*," and that while it could interpret treaties, it should do so "only in litigated cases; that is, where contending parties bring before it a specific controversy."[283] The judicial department had "no concern with pronouncing upon . . . *external political relations*."[284]

At bottom, then, what made a dispute resolvable by judicial decision was that it was non-political. "Cases" were non-political. We will see that this idea was widely held.[285] It was also a point of foundational importance for Marshall; Charles Hobson has argued that "the separation of law and politics was perhaps the fundamental proposition underlying Marshall's jurisprudence."[286] The question is what *made* a case non-political. How did a mere dispute *become* non-political, and thus a full-blooded case? The answer lies in the process of "forensic litigation" that characterized procedure in courts of law. It was forensic litigation that "shape[d]" and

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supra note 275, at 371, 373-74.

[281] *See* 4 MARSHALL PAPERS, *supra* note 272, at 103-04.

[282] Alexander Hamilton, Pacificus Number I (June 29, 1793), *in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, at 9 (Morton Frisch ed., 2007); *see also* George Washington, The Proclamation of Neutrality (Apr. 22, 1793), *in* PACIFICUS-HELVIDIUS, *supra*, at 1; CASTO, *supra* note 221, at 73; JAY, *supra* note 221, at 156.

[283] Pacificus I, *supra* note 282 (emphases added).

[284] *Id.* (emphases added). Subsequently, in one of the Virginia debt cases, John Jay took the view that courts were incompetent to judge a treaty void for non-performance. *See* JAY, *supra* note 221, at 164. Jay wrote, "On comparing the principles which govern and decide the necessary validity of a treaty, with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial, and that the latter *are of a political nature*. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments which are charged with the political interests of the state." 13 F. Cas. 1059, 1062 (C.C.D.Va. 1793) (emphasis added); see also Ware v. Hylton, 3 U.S. 199, 260 (1796) (Opinion of Iredell, J.) ("These are considerations of policy, . . . certainly incompetent to the examination and decision of a Court of Justice.").

[285] *See infra* notes 383-384, 413-418, and accompanying text.

[286] HOBSON, *supra* note 110, at 52; *see also* NELSON, MARBURY, *supra* note 48, at 59-60.

"form[ed]" a dispute into one that *could* be resolved in a non-political way. It did this, ideally, by limiting the discretion of the judge. Litigation replaced unbounded or even prudential political discretion with *legal discretion*, and it was the exercise of legal discretion that distinguished "judicial decision."[287] As Hobson summarizes the idea, "[a]s long as [judicial] creativity was perceived to operate within the confines of legal discretion, judges were not 'legislators.'"[288] Litigation could do this because it was, in the common law tradition, an oral practice of "deliberative reasoning and argument in an interlocutory, and indeed forensic, context."[289] Using the tools of rhetoric, grammar, and logic, in open disputation in a public forum, the parties and the judge could shape the dispute into one that a judge or jury could resolve neutrally, according to recognized community standards.[290] What emerged in this process, Marshall said later, was "human reason applied by courts, not *capriciously*, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things."[291]

These ideas were linked to movements for institutional reform in the 1780s and 1790s, particularly those aimed at state court systems. Virginia is an outstanding example, and events in that state shed light on why the

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[287] *See* Kent, *supra* note 49, at 942 ('[T[he interpretation or construction of the Constitution is as much a JUDICIAL act, and requires the exercise of the same LEGAL DISCRETION, as the interpretation or construction of a law."). Jeff Powell examined the history of the expression "legal discretion" in some detail in his important article, "The Political Grammar of Early Constitutional Law." *See* Powell, *supra* note 178, at 1006 ("'Discretion' in the judicial context thus had little to do with choice; it was, rather, the court's skillful exercise of judgment in discerning and applying correctly the rules of law."); *id.* at 1007 ("[L]egal discretion and politics were usually differentiated sharply."); *cf.* HAMBURGER, *supra* note 43, at 135-36 (describing Coke's distinction between the discretion of the individual man and the discretion of the law).

[288] HOBSON, *supra* note 110, at 35. For the development of this idea on the national level in the early nineteenth century, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 135-55 (1991 ed.).

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

[290] *See* MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE, 1760-1850, at 58-64 (1991); Postema, *supra* note 289, at 7-10; Boyer, *supra* note 289, at 50-60. Note that Lobban, Postema, and Boyer are all describing generally Cokean views of the common law, whereas Marshall was much more of a Blackstonian deductivist.

[291] Livingston v. Jefferson, 1 Brockenbrough 207 (U.S. Cir. Ct., Va. 1811) (emphasis added).

idea of a "case" was significant to Marshall.[292] Formally, after 1776 Virginia had a three-tiered system of courts, with its "Court of Appeals" serving as a court of last resort, the "General Court" as a central court of civil and criminal jurisdiction, and county courts headed by justices of the peace at the bottom.[293] But, in reality, Virginia had an extremely decentralized court system, since the county courts handled nearly all litigation, as well as a wide variety of administrative matters.[294] Indeed, Virginia justices of the peace had long controlled almost every important issue of county policy—including tax levies, licensing, agricultural inspections, and road maintenance.[295] Nor did the system admit of any ready controls. Appeals from the county courts to the General Court were possible, but might take "six or seven" years.[296] Justices of the peace were formally appointed by the governor, but in reality had long been permitted to nominate their own successors, which they used to perpetuate the influence of their families and associates.[297] The result was a kind of 'country' aristocracy. Unsurprisingly, this aristocracy conducted their courts in a homespun and sometimes inquisitorial manner. While William Nelson has argued that early royal Virginia quickly adopted the common law in order to encourage private investment,[298] trained lawyers that came to Virginia before the turn of the eighteenth century complained loudly about the lack of sophistication and procedural informality at all levels of Virginia courts, but especially the county courts.[299] Justices were untrained in the common law, mixed law and politics, and were essentially unchecked

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[292] On reform efforts in Virginia, see F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828, at 12-33 (1994); A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, at 161-202 (1981). Similar reform efforts occurred in New Hampshire, but about a decade later. *See* REID, LEGISLATING, *supra* note 55, at 24-70; REID, CONTROLLING, *supra* note 232, at 119. There were reform and counter-reform movements in Pennsylvania and Georgia as well. *See* WOOD, EMPIRE, *supra* note 75, at 425-431; REID, LEGISLATING, *supra* note 55, at 7-23.

[293] *See* GERBER, *supra* note 242, at 60; THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 193 (3d Am. ed. 1801). In addition, coordinate to the General Court were a Court of Admiralty and a Court of Chancery.

[294] MILLER, *supra* note 292, at 24-25.

[295] *See* James Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal System of British America*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580-1815), at 560 (Michael Grossberg & Christopher Tomlins eds., 2008).

[296] ROEBER, *supra* note 292, at 196 (quoting VA. INDEP. CHRONICLE (Mar. 28, 1787)).

[297] Henretta, *supra* note 295, at 560.

[298] 1 WILLIAM NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND 1607-1660, at 36-37 (2008).

[299] See the sources described in ROEBER, *supra* note 292, at 57-60; Henretta, *supra* note 295, at 571.

by any republican authority.

In the 1780s, as reform efforts struggled along, Marshall practiced law before the Virginia General Court and the Court of Appeals, as well as the state's Court of Chancery. It was in his practice before the central courts that Marshall developed the approach to litigation for which he later became well known.[300] Almost invariably, Marshall's strategy was to identify relevant high-level principles, and then deduce from those principles the proper result in the instant case—a distinctively Blackstonian version of forensics.[301] What made the approach so forceful was the impression of 'logical' or 'geometric' certainty that Marshall was able to convey, which suggested a severe constraint on the discretion of the judge or jury.[302] Reform proposals that would create intermediate assize or district courts, staffed by central court judges, promised to encourage the growth of these litigation methods, and perhaps even bring trained lawyers and common law procedures to the county courts.[303] This would enhance the republican legitimacy of those courts, by reinforcing "an emerging distinction between 'legislative will' and 'justice' . . . [which] became the foundation of a conception of judicial independence and discretion that was consistent with the republican belief in the sovereignty of the people."[304]

The movement for reform of Virginia's courts was also connected to developments in the state's assembly. Like the popular assemblies of several other states, described above, the Virginia General Assembly in the 1780s was riven by party disputes, divided in its case along 'country' and reform lines.[305] Justices of the peace, sitting as a significant voting bloc in the Virginia House of Delegates, worked to protect the interests of indebted rural planters against the interests of merchants and creditors in the state's population centers.[306] The country party pushed through measures to

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[300] HOBSON, *supra* note 110, at 30-33, 42-43; *see* NELSON, MARBURY, *supra* note 48, at 43.

[301] *See* HOBSON, *supra* note 110, at 32-33; LOBBAN, *supra* note 290, at 57-61 (describing Blackstone).

[302] *See* HOBSON, *supra* note 110, at 32-33.

[303] *See, e.g.*, ROEBER, *supra* note 292, at 197.

[304] HOBSON, *supra* note 110, at 39; *see also* ROEBER, *supra* note 292, at 166-69; WHITE, *supra* note 288, at 129 ("American judges were conceded to be the expositors of common law rules, but since the rules themselves needed to retain their consonance with fundamental principle, exposition was not the same as lawmaking.").

[305] *See* ROEBER, *supra* note 292, at, 33-61, 178-79; WOOD, CREATION, *supra* note 45, at 191. For the effect of party politics in other state assemblies, *see supra* notes 68-71, and accompanying text.

[306] Henretta, *supra* note 295, at 589; *see* MILLER, *supra* note 292, at 12-16; HOBSON, *supra* note 110, at 38.

prevent the efficient collection of debt and derailed proposals that would have made it possible for British and American creditors to collect even principal in a timely fashion.[307] The party supported its measures in the familiar language of the English opposition, ably deployed by Patrick Henry—less government meant less corruption—but to the eyes of reformers, like Marshall and Madison, the "laws were passed merely to satisfy the interest of a majority."[308] Court reform at the state level was thus crucial not only because it could grease the skids for debt-collection policies reformers thought vital, but because it promised to create an institution for collective decision-making that would give effect to "human reason," rather than the passion and self-interest that gripped the assembly.[309] In the terminology of the period, courts could play a decisive role in ensuring the rule of "public opinion"—that is, "*the reason* of the public," rather than the passion of a bare majority.[310] The key to securing a government founded on public opinion was to encourage both the communication of ideas *and* their evaluation in open forums suited to subjecting the organic sentiment of the people to the scrutiny of reason.[311] While this may have been a traditional function of popular assemblies, it was not one well served by assemblies in

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[307] One example of impeding collection is Virginia's practice of assuming private debts. *See* 13 F. Cas. 1059 (C.C.D.Va. 1793); JAY, *supra* note 221, at 162-65.

[308] MILLER, *supra* note 292, at 13, 15-16.

[309] Again, there is a striking parallel to draw between judicial review and the development of due process doctrine according to Chapman & McConnell. As Chapman & McConnell tell it, the idea that due process prohibited legislative adjudication grew out of a sense that the legislative process was incapable of providing the kinds of pre-deprivation protections that existed in courts of law. *See, e.g.*, Chapman & McConnell, *supra* note 268, at 1712, 1716, 1729-32. The many sources quoted and described by John Reid show that Chapman and McConnell underestimate the degree to which state assemblies continued to exercise adjudicatory authority well into the 1800s, at least in New Hampshire, but probably in other states as well. *See, e.g.*, REID, LEGISLATING, *supra* note 55, at 7-11, 61-70.

[310] The quoted language is, of course, from Federalist 49. THE FEDERALIST, *supra* note 32, at 276; *see also* KRAMER, *supra* note 33, at 114; Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WILLIAM & MARY Q. 925, 948 (2002) (distinguishing public opinion and majoritarianism).

[311] *See, e.g.*, Sheehan, *supra* note 310, at 938; KRAMER, *supra* note 33, at 114. Wood has argued that the leadership role provided by gentlemen in the process of forming public opinion was essentially gone by 1800, and that the more horizontal, democratic theory that took its place was premised on the idea that a collision of ideas would result in the emergence of truth. Gordon Wood, *The Democratization of Mind in the American Revolution*, *in* LEADERSHIP IN THE AMERICAN REVOLUTION: PAPERS PRESENTED AT THE THIRD SYMPOSIUM, MAY 9 AND 10, at 82 (1974). This notion of a 'collision of ideas' fit naturally with the classical account of litigation in common law courts as "deliberative reasoning and argument in an interlocutory, and indeed forensic, context." *See supra* note 289, and accompanying text.

the 1780s.[312] Yet it was a purpose that (properly reformed) courts of law could serve—and that they naturally *should* serve, in light of the process of litigation. Because forensic litigation forced the parties publicly to test their claims against one another, before a neutral decision-maker, according to community standards, it would be difficult for party politics to control the outcome of a case.[313] In this sense, courts of law could discipline legislative will by channeling that will within boundaries set by the reason of the political community.[314]

B. Kamper v. Hawkins and judicial resolutions

To be sure, such a role for courts would require significant changes to the actual practices of many American judges. If the authority of the judge was attached to the case, then it threw into doubt the legitimacy with which the judge acted *outside* legal proceedings, as he often did in the decades prior to the Revolution. Consequently, as the justification for judicial review matured in the 1790s, the idea of the "case" began to figure more prominently. Kamper v. Hawkins illustrates this proposition. *Kamper* was the "best known and most influential" discussion of judicial review in the years before *Marbury*.[315] The leading opinions in *Kamper*—those written by Judge Spencer Roane and Judge St. George Tucker—defend judicial review in terms familiar from "To the Public."[316] Yet the most important issue in the case was *not* judicial review. Instead, it was what judicial acts were legally authoritative.

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[312] *See* THE FEDERALIST, *supra* note 32, at 48-51 (Federalist 10). For this function of the popular assembly, see Sheehan, *supra* note 310, at 939. Until the middle of the eighteenth century, most colonial assemblies in American had conducted themselves like courts. *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 54 (1943); Alison Olson, *Eighteenth Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 559 (1992).

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

[314] This is what distinguishes "public opinion" theory from mixed government theory. In mixed government theory, the departments of government contend with each other politically, and in so doing limit government; in the theory of "public opinion," in contrast, governmental power is not limited by contending political forces, but by reason, given effect by appropriate institutional design. *See* Sheehan, *supra* note 310, at 931.

[315] KRAMER, *supra* note 33, at 100.

[316] *See* SNOWISS, supra note 45, at 53; HOBSON, *supra* note 110, at 65.

The case in *Kamper* arose out of a 1792 act of the Virginia General Assembly altering the state's system of district courts, which the reform party had eventually succeeded in pushing through.[317] District courts were then staffed on the model of a circuit system, by judges sitting on the state's central General Court.[318] The act of 1792 gave these judges an authority to stay proceedings by issuance of an injunction, apparently in an effort to "decentralize chancery jurisdiction."[319] The arrangement raised a number of constitutional questions. Among these, the most important was the status of the district courts relative to the assembly. As Judge Tucker put it, the district courts were "legislative," in the sense that the assembly had created them; yet they would exercise powers under the 1792 reform that the state constitution had impliedly given to courts independent of the assembly.[320] Such an arrangement threatened to undermine the state's commitment to the separation of powers.[321]

Arguably, the judges had a precedent they could use to invalidate the questionable provisions in the 1792 act. The act of 1788 creating the district courts had originally staffed them using judges commissioned to sit on the state's Court of Appeals.[322] This arrangement significantly increased the workload of Court of Appeals judges, who viewed it as an end-run around judicial salary protections in the state's constitution.[323] In April 1788, several months before the district court term was to begin, Court of Appeals judges refused to appoint district court clerks, preventing the district courts from operating.[324] They defended their action in a "Respectful Remonstrance of the Court of Appeals," which argued that the

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[317] GERBER, *supra* note 242, at 65. The district courts were intermediate courts, which Madison and other reformers had finally succeeded in creating in the late 1780s. *See infra* notes 322.

[318] *See* 13 THE STATUTES AT LARGE, A COLLECTION OF THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 430 (1823) [hereinafter LAWS OF VIRGINIA].

[319] HOBSON, *supra* note 110, at 45; *see* LAWS OF VIRGINIA, *supra* note 318, at 432-33. Virginia law granted jurisdiction over causes in chancery to the high court of chancery, which was staffed by judges in chancery. *Id.* at 413. The 1776 Constitution made judges in chancery independent of the assembly. *See* VIRGINIA CONST. OF 1776.

[320] *See* Kamper v. Hawkins, 3 Va. 20, *8 (Gen. Ct. 1793) (Opinion of Tucker, J.).

[321] *See* VIRGINIA CONST. OF 1776. Virginia was unique in this regard. GERBER, *supra* note 242, at 61.

[322] *See* GERBER, *supra* note 242, at 64; ROEBER, *supra* note 292, at 193-201.

[323] HAMBURGER, supra note 43, at 560; *see* Cases of the Judges, 8 Va. (4 Call) 135 (Ct. App. 1788).

[324] HAMBURGER, supra note 43, at 562.

1788 act was an unconstitutional diminution of salary.[325] Along the way, the "Remonstrance" observed that the state constitution "seems to require" judges of the different constitutional courts to be distinct persons—a principle that the 1792 district court act arguably violated.[326] The judges closed with an appeal to the assembly for reform—and, failing that, to the people themselves, "whose servants both [the judges and legislators] are."[327]

The *Kamper* court was thus possessed of a friendly precedent. Yet there was disagreement on the bench as to whether "Remonstrance" was a proper legal authority at all, since it had not decided a case.[328] As Judge James Henry put it, "the question did not then come before the court in a judicial manner," but had been "taken up as a general proposition." "Remonstrance" was, wrote Henry, not an opinion in "an adjudged case, to be considered a binding precedent," but instead "an appeal to the people," which "looked like a dissolution of the government."[329] To Henry's eye, "Remonstrance" was not an exercise of proper judicial authority, but an act of resistance producing a sort of governmental shutdown. The "Remonstrance" judges had acted out of a duty to prevent violations of the state constitution, but this 'political' duty differed from the duty of the judicial office.[330] Henry's caution on this point might be explained by the state assembly's reaction to "Remonstrance," which was to strip the Court of Appeals of jurisdiction and to staff an entirely new high court.[331] Judge Henry had sat on the Court of Appeals in 1788 and signed the "Remonstrance"; after the assembly stripped the court of its jurisdiction, he accepted a commission on the General Court, whose judges now had no power to hear appeals. The experience likely encouraged a distinction between freestanding 'resolutions' and judicial review in the context of a case.[332]

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[325] Cases of the Judges, 8 Va. at *4.

[326] *Id.* at *6; *see Kamper*, 3 Va. at *5-6 (Opinion of Nelson, J.). The argument was that General Court judges were made into judges in chancery by the act's grant of injunctive power.

[327] *Cases of the Judges*, 8 Va. at *7.

[328] HAMBURGER, supra note 43, at 559-60; *see* Treanor, *supra* note 43, at 513 ("The Cases of the Judges were not actual cases.").

[329] *Kamper*, 3 Va. at *12 (Opinion of Henry, J.).

[330] HAMBURGER, supra note 43, at 561. *But see* GOEBEL, *supra* note 85, at 129 (treating Remonstrance as an authority for judicial authority to determine constitutionality).

[331] *See* HAMBURGER, supra note 43, at 570-71. William Treanor points out that technically the Court of Appeals judges resigned, and insisted that they had done so freely. *See* Treanor, *supra* note 43, at 514.

[332] Judge Tyler also sat on both the "Remonstrance" and *Kamper* courts. While Tyler did not take up the precedential value of the "Remonstrance" expressly, he did write, "I

Others on the *Kamper* court, however, disagreed with Judge Henry and thought the "Remonstrance" a binding legal precedent.[333] Judge Tucker observed that "decisions of the supreme court of appeals in this commonwealth . . . are to be resorted to by all other courts, as expounding, in their truest sense, the laws of the land."[334] He then turned to "the authority of a previous decision of that court, on a similar question"—the "Remonstrance"—and described it as the outcome of something like litigation in a court of law. He quoted court records, which read, "On consideration of a late act of assembly, . . . after several conferences, and upon mature deliberation, the court do *adjudge* that clerks of the said [district] courts ought not now to be appointed."[335] Tucker observed that the Court of Appeals could hardly have avoided the issue, since the 1788 act obligated the judges to hire clerks, thereby forcing them to consider the constitutional issues the act raised. The judges "found themselves obliged to decide, whatever temporary inconveniences might arise, and in that decision to declare, that the constitution and the act were in opposition."[336] Such a declaration did not pass beyond conventional judicial powers, since, as the Court of Appeals itself had explained, "when they [i.e., the judiciary] decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law."[337] Thus, while Tucker could not plausibly argue that the "Remonstrance" had actually decided a case, he could argue that the process resembled adjudication enough to make the "Remonstrance" an authoritative expression of the law.

Tucker's notion of judicial duty—the duty to expound the law in the course of adjudication—then became the centerpiece of his and Judge Roane's famous defenses of judicial review. Their defenses are thus best understood as describing institutional contours for that power. Tucker

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will not in an extra-judicial manner assume the right to negative a law . . . but if by any legal means I have jurisdiction of a cause, in which it is made a question how far the law be a violation of the constitution, and therefore of no obligation, I shall not shrink from a comparison of the two, and pronounce sentence as my mind may receive conviction.—To be made an agent, therefore, for the purpose of violating the constitution, I cannot consent to.—*As a citizen, I should complain of it; as a public servant, filling an office in the one of the great departments of government, I should be a traitor to my country to do it*." *Kamper*, 3 Va. at *16 (Opinion of Tyler, J.) (emphasis added).

[333] HOBSON, *supra* note 110, at 45.

[334] *Kamper*, 3 Va. at *27.

[335] *See id*. at *28 (emphasis is Tucker's).

[336] *Id.*

[337] *Id.*

begins with the principal objection to locating this power in courts: the assumption that the constitution is "a rule to the *legislature only*, and not to the *judiciary*, or the *executive*, [and thus] neither the executive nor the judiciary can resort to it."[338] This view, he says, is a concomitant of the English system, in which the constitution is determined by usage alone, making acts of Parliament constitutive of fundamental law. English courts of law thus have no choice, Tucker says, but to "*receive* whatever *exposition* of [the constitution] the legislature might think proper to make."[339] American courts of law, in contrast, need not accept the legislature's view. Since American constitutions are written, they govern judges "on every occasion, where it becomes necessary to expound *what the law is*."[340] To expound the law, judges have to examine the constitution, since the constitution is "the first law of the land." Indeed, observes Tucker, under the Virginia constitution's provision for separation of powers, "the duty of expounding must be *exclusively* vested in the judiciary."[341] Tucker thus appears to believe that both the judiciary and the executive can "resort" to the constitution, but only judges "expound" it. Roane makes a similar argument.[342]

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

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[338] *Id.* at *22.

[339] *Id.*

[340] *Id.* For the written character of American constitutions as crucial, see HOBSON, *supra* note 110, at 65. On interpreting constitutions, *compare* Snowiss, *supra* note 74, at 236, *with* Alfange, *supra* note 45, at 341. As far as I can tell, the Snowiss of 2003 agrees with Alfange that expounding the law requires examining the constitution.

[341] *Kamper*, 3 Va. at *22 (emphasis added). Notably, Tucker had advanced the same position in 1782, his argument in The Case of the Prisoners. *See* Treanor, *supra* note 87, at 522-23, 554-55.

[342] *See Kamper*, 3 Va. at *7 (Opinion of Roane, J.) ("It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them. . . . In expounding laws, the judiciary considers *every* law which relates to the subject: would you have them to shut their eyes against that law which is of the highest authority of any . . . ?").

simply an inheritance of English ideas.[343] By intrinsically connecting review to the adjudication of a case, Tucker effectively narrowed the judicial office. Outside the confines of a case, the judge acted only as a citizen—not as a 'magistrate,' or officer of the government, the role he had played before the Revolution and in the first decade after. In effect, then, the *forum* was shaping the *office*; the American court of law was creating the American judge.

C. "Expounding" the law, and its variants

By the turn of the century it was widely understood that the core function of a court of law was to decide cases. Deciding cases required courts to "expound" the law. As Marshall put it in *Marbury*, those who apply a legal rule to cases, "must of necessity expound and interpret that rule."[344] What did it mean, in the late eighteenth century, to "expound" a legal rule?

To "expound" a rule was not merely to state it or describe it. As Philip Hamburger has shown, judges in the English tradition had an authority to *explain* the law,[345] and this idea, which retained currency through the

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[343] *See* HAMBURGER, *supra* note 43, at 283 ("As in England, so in each American state, a constitution made with the authority of the people was part of the law of the land, and the judges had a duty to decide in accord with the law of the land, including the constitution. Mich was different after 1776, but these basics and what they required of judges remained largely the same.") To be sure, Hamburger acknowledges and describes the transformation in the practices of American judges, *see id*. at 536-74, but it is unclear how those developments are supposed to understood in light of his basic thesis that judicial review emerges out of "the common law ideals of law and judicial duty . . . taken together," *id.* at 17. The office of the early American judge was not a strictly judicial office; it was the office of a *magistrate*, and in acting, the American judicial magistrate drew on his political authority and his position as a community leader. *See supra* note 295; NELSON, MARBURY, *supra* note 48, at 12-14. In my view, when reformers sought to position courts of law as checks on popular assemblies in the mid-1780s, the English common-law ideals Hamburger describes—which the elite understood and accepted, even if those ideals did not describe the actual practices of courts—served as a convenient vocabulary for pressing their case.

[344] 5 U.S. (1 Cranch) 137, 177 (1803).

[345] *See* HAMBURGER, *supra* note 43, at 219-20 ("At common law, when judges explained their judgments, they reasoned or exercised judgment with the authority of their office."). The Middle English term from which "expound" derived connoted a sort of public explanation of meaning. *See* MIDDLE ENGLISH DICTIONARY (2001) (definitions 1 and 2 of "expôunen"), *available at*: http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=byte&byte=52963536&egdisplay=open; OXFORD ENGLISH DICTIONARY 2013 ("expound"). The English term came by way of the French "espondre"; the Anglo-Norman Dictionary defines "espondre" as meaning "to explain, interpret," "to mean, signify," and "to fulfill." ANGLO-NORMAN DICTIONARY (2007), available at: http://www.anglo-

eighteenth century, was sometimes expressed with "expound." Samuel Johnson's 1768 and 1792 English dictionaries define "expound" as meaning "To explain; to clear; to interpret," and "to examine, to lay open."[346] Late-eighteenth century American legal sources confirm this usage, in some cases by interchanging "explain" with "expound." For example, in the notes that lawyer St. George Tucker prepared in 1782 for his argument in Commonwealth v. Caton, he asserts that it is "incontrovertible . . . that the power properly belonging to the Judiciary Department, is, *to explain* the Laws of the Land as they apply to particular cases."[347] Eleven years later, now on the bench, Judge Tucker reasoned in *Kamper* that the constitution should be resorted to "on every occasion, where it becomes necessary *to expound* what the law is," and that "the duty of expounding must be exclusively vested in the judiciary."[348] Other prominent jurists also interchanged the terms, or interchanged "explain" with terms like "construe" or "construct."[349] Overall, usage was somewhat uneven; but there was, nevertheless, a substantive difference between explaining and merely restating a rule, or simply defining its terms. A court explaining the law might equitably reject an expression's plain meaning in favor of one suited to the intent of the legislature or the purpose of a legal instrument.[350]

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norman.net/gate/index.shtml?session=SAB119369T1391560465. The Latin form "exponere," from which the French derived, had a similar meaning. OXFORD ENGLISH DICTIONARY 2013 ("expound").

[346] *See* JOHNSON'S DICTIONARY (3d ed. 1768); JOHNSON'S DICTIONARY (10th ed. 1792). The 1792 dictionary defines "interpret" as meaning "to explain; to translate; to decipher; to give a solution of," which is largely the same as the 1768 definition.

[347] Treanor, *supra* note 87, at 552 (emphasis added).

[348] *Kamper*, 3 Va. at *22 (emphasis added).

[349] *See, e.g.*, Turner v. Turner's Ex'r, 4 Call 234 (Va. 1792) (Pendleton, P.) ("It is the business of the legislators to make the laws; and of the judges to expound them. Having made the law, the legislative have no authority afterwards to explain its operation upon things already done under it."). "Explain" might also be used interchangeably with "construe" or "construct." *See* THE ANTIFEDERALIST, *supra* note 176, at 310-11 (Essay XI) ("The cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it. . . . This article vests the courts with authority . . . to explain [the constitution] according to the rules laid down for construing a law."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.) ("I am under a necessity to give a construction or explanation of the words '*ex post facto* law' because they have not any certain meaning attached to them."). In a later period, John Reid quotes Daniel Webster as describing law as "composed of received rules and received explanations." REID, CONTROLLING, *supra* note 232, at 39.

[350] *See, e.g.*, Cole v. Clayburn, 1 Va. 262 (1794) (argument of attorney Duval) (arguing that a will could "with propriety receive a different exposition. It is not unusual, in the construction of wills, and even of deeds, to enlarge, or limit the meaning of particular words, so as to fit them to the subject on which they are meant to operate, and to avoid contradiction or absurdity"); THE ANTIFEDERALIST, *supra* note 176, at 311 (Brutus Essay

Pressed to its limits, explaining was clearly a creative act. As the authors of an open letter criticizing the decision in Rutgers v. Waddington fumed, rather than "speak the plain and obvious meaning of the law," a court could "explain it to mean anything or nothing."[351] Similar criticisms were directed at judicial "construction."[352] In this sense, "expounding" or "construing" or "constructing" the law was not merely restating it or defining its key terms.[353]

Yet expounding the law was also not changing the law. It was consistent with obeying the law. "A constitution," said Madison in a late letter, "is to be expounded and obeyed, not controlled or varied."[354] Delegates at the federal convention repeatedly insisted that "the power of making ought to be kept distinct from that of expounding the laws," a basic principle in Montesquieu's version of separation of powers.[355] Outside the

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XI) ("By [the grant of equity jurisdiction], "they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."). Philip Hamburger has argued that expounding in this sense was limited to equitable rules of interpretation. HAMBURGER, supra note 43, at 336-56. This is consistent with Blackstone, but I doubt the practice can be cabined in this way. Whatever the black letter law, the lines separating equitable and common law doctrines of interpretation were historically porous. *See* Boyer, *supra* note 289, at 71-79. Unsurprisingly, then, it is often unclear whether a court is invoking an equitable or common law doctrine of interpretation. *See, e.g.*, THE 1 BILL OF RIGHTS, *supra* note 89, at 424-28 (argument of James Varnum in Trevett v. Weeden); Ham v. M'Claws, 1 Bay 93, 1 S.C.L. 93 (S.C. Com. Pls. Gen. Sess. 1789).

[351] LAW PRACTICE OF HAMILTON, *supra* note 88, at 314.

[352] *See, e.g.*, THE ANTIFEDERALIST, *supra* note 176, at 316 (Brutus Essay XII).

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

[354] Letter from James Madison (June 25, 1831), *in* 4 ELLIOT'S DEBATES: THE DEBATE IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 615 (Jonathan Elliot ed., 2d ed. 1836). Madison's usage of "expound" was arguably broader than the dominant usage, but this appears to be less the case in his late writings. See also Chisholm v. Georgia, 2 U.S. 419, 448 (1793) (Opinion of Iredell, J.) ("[T]he distinct boundaries of law and Legislation may be confounded, in a manner that would make Courts arbitrary, and in effect makers of a new law, instead of being (as certainly they alone ought to be) expositors of an existing one.").

[355] 5 ELLIOT'S DEBATES: THE DEBATE IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 345 (Jonathan Elliot ed., 2d ed. 1836) (statement of Caleb Strong); *see also id.* at 345 (statement of Elbridge Gerry) (arguing that the proposed Council of Revision "was making the expositors of the laws the legislators, which ought never to be done"). On the origin of this principle in Montesquieu, see GWYN, *supra* note 80, at 105.

convention, as well, reformers argued that the powers to expound and to make law should be placed in different hands.[356] If expounding and its variants were thought to be creative acts, then, their creativity operated within certain limits, set by the norms of the explanatory process. That process involved fitting a legal rule into a more comprehensive body of law. "In expounding the laws," said Judge Roane in *Kamper*, "the judiciary considers every law which relates to the subject."[357] In this respect, Roane was mimicking Blackstone, who observed at the outset of the *Commentaries* that the "academical expounder of the laws . . . should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities."[358] Classical common law had aimed merely at local coherence between the present case and earlier decisions, as determined by the judge in deliberation with the parties; but American courts under the influence of Blackstone and then Mansfield became more ambitious and 'scientific.'[359] They sought to formulate the "principles" behind decisions, and then forced those principles into a kind of system or overarching theory (sometimes organized around a "keyword"), from which an outcome in the present case could be deduced.[360] As Brutus described it, "the court must and will assume certain principles, from which they will reason, in forming their decisions."[361] Ten years later, in 1798, Jesse Root was even more

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[356] *See, e.g.*, REID, LEGISLATING, *supra* note 55, at 32 ("[W]e think it our duty solemnly to protest against . . . the dangerous precedent of one person holding the aforesaid offices, being at the same time a Legislator in New-Hampshire, and Judge of the Federal Court . . . where as Judge he may explain and interpret laws which as Legislator he assisted to make . . . ." (quoting Jeremiah Smith, Osbourne's Spy, Jan. 13, 1790)).

[357] *Kamper*, 3 Va. at *7.

[358] BLACKSTONE, COMMENTARIES I, 35.

[359] On the classical common law, see LOBBAN, *supra* note 290, at 57-58; GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 31-37 (1986). On American jurisprudence, see REID, CONTROLLING, *supra* note 232, at 104; Daniel Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1058-59 (2002); HOBSON, *supra* note 110, at 34-35; WHITE, *supra* note 288, at 79, 81-82. On the institutionalist tradition in which Blackstone wrote, see JOHN LANGBEIN, RENEE LETTOW LERNER ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 839 (2009).

[360] *See* Hulsebosch, *supra* note 359, at 1051; Powell, *supra* note 178, at 965; S.F.C. Milsom *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUDS. 1, 9 (1981); Treanor, *supra* note 43, at 526 (describing Justice Paterson's charge in Vanhorne's Lessee v. Dorrance).

[361] THE ANTIFEDERALIST, *supra* note 176, at 316 (Essay XII); *accord* 2 DHRC, *supra* note 146, at 451 (statement of James Wilson) ("When [an unconstitutional law] comes to be discussed before the judges—when they *consider its principles* and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void." (emphasis added)).

deductive; he argued that the "principles" and "precepts" of the common law "enable[] us, to explain the laws, construe contracts and agreements, to distinguish injuries, and to determine their degree and the reparation in damages which justice requires."[362] In this context, the rather modest observation that authorities were inconsistent, or mutually "repugnant," became a matter of central importance, because it served to measure the degree to which legal rules could be regarded as part of the same system.[363] Ultimately this is what distinguished "expounding" the law from making it. Expounding was not stipulating additional law, but explaining how a judgment followed from (and thus was *part of*) existing law, which itself enjoyed republican legitimacy.[364]

Expounding the law thus occupied a middle ground between restating the law and making it.[365] It was neither, but instead a sui generis form of creative-deductive explanation. The appearance of this idea complicates, to some extent, our understanding of the transformation in the American common law at the turn of the nineteenth century. According to the leading account of that transformation, associated principally with Morton Horwitz and William Nelson, American courts turned away from a static private-law regime that enforced shared community values, towards an instrumental conception of law that was flexible and relatively tolerant of self-interested conduct..[366] Under the former regime, we are told, judges were bound by a strict doctrine of precedent, and their task was merely to *discover* preexisting law; by the turn of the century, a new ideology had emerged in which judges could openly describe themselves as *making* law.[367] Expounding, however, fits into neither of these categories; it was neither

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[362] JESSE ROOT, THE ORIGIN OF GOVERNMENT AND LAWS IN CONNECTICUT (1798).

[363] *See* GOEBEL, *supra* note 85, at 141 ("[I]t seems nearly inevitable that the power to expound statutes would be manipulated to encompass constitutional repugnancy. The precedents for judicial interpretation of legislative intent were many of them old and well pedigreed and so much a part of the accepted common law technique of adjudication as to minimize political objection."); *cf.* Bilder, *supra* note 75, at 512-13, 541-55 (relating repugnancy to judicial review).

[364] *See* HOBSON, *supra* note 110, at 39; Chapman & McConnell, *supra* note 268, at 1748-49 (discussing Kent's opinion in Dash v. Van Kleeck); *cf.* WHITE, *supra* note 288, at 79 (American legal commentators in the first decades of the nineteenth century "set out . . . to establish themselves as professional guardians of republican principles, persons whose special knowledge of 'legal science' enabled them to recast law in conformity with the assumptions of republican government.")

[365] *See* Bilder, *supra* note 52, at 1141-42.

[366] *See* Hulsebosch, *supra* note 359, at 1052; Horwitz 1992, 7-9, 22-26; Nelson 1974, 36-37, 143-44, 163-64.

[367] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 8, 23 (1992 ed.); NELSON, AMERICANIZATION, *supra* note 70, at 19-20, 171-72.

discovering the law nor making it. Expounding was creative, but without amounting to an expression of will. It was creative *reason*. In this way, "expounding" captures the judge's effort to instruct litigants untrained in the mysteries of the law on how they ought to conduct themselves as members of the community.[368] A republican judge could not persuade litigants to comply with the court's judgment by *making* public law—his office did not extend so far. He had to show litigants how that judgment was rooted in *their* law, including their fundamental law, in order to give it traction.[369]

The proposition that expounding the law means explaining it makes sense of much of what the framers said on the topic. First, it makes sense of why the framers "almost invariably" related expounding to judicial review.[370] As Elbridge Gerry put it, "exposition of the laws . . . involved a power of deciding on their Constitutionality."[371] The point came up repeatedly at the Philadelphia convention, as delegates tried to sort through their views on the proposed Council of Revision.[372] The only delegate to deny the connection was John Mercer, who likely rejected judicial review altogether.[373] Outside the convention, as well, the connection between expounding the law and judicial review was drawn, again and again—by Brutus,[374] by Hamilton in Federalist 78, [375] and later by Judge Roane in *Kamper*,[376] among many others. In Hamilton's hands it took on a highly

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[368] *Cf.* Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 733 (1969) (comparing seventeenth-century English legal literature to scientific literature in this respect).

[369] In this sense, expounding the law was part of a larger judicial project of serving as the community's "republican schoolmaster." *See generally* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1969 SUP. CT. REV. 127. I discuss Lerner's important essay further below. *See infra* Part III.D.

[370] Corwin, *supra* note 144, at 561; *see also* BERGER, supra note 144, at 55-56.

[371] 1 FARRAND'S RECORDS, *supra* note 198, at 97.

[372] 2 FARRAND'S RECORDS, *supra* note 158, at 73 (statement of James Wilson); *id.* at 78 (statement of George Mason); *cf. id.* at 76 (statement of Luther Martin) ("As to the Constitutionality of laws, that point will come before the Judges in their proper official character.").

[373] *Id.* at 298; *see* BERGER, supra note 144, at 63. Dickinson might be added to this list. *See supra* notes 200-201, and accompanying text.

[374] THE ANTIFEDERALIST, *supra* note 176, at 316 (Essay XII) ("[T]he courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution . . . .").

[375] THE FEDERALIST, *supra* note 32, at 414-16.

[376] *Kamper*, 3 Va. at *7("[I]t is the province of the judiciary to expound the laws . . . . It may say . . . that an act of assembly has not changed the Constitution, though its words are expressly to that effect.").

'positive' character; expounding the law became the task of 'interpreting conflicting statutes,' a label that was, perhaps, easier to swallow.[377] But this point, which is often made, should not obscure Hamilton's description of what a court of law actually does when it interprets a statute. Hamilton says that the court must determine whether the statute can be made to cohere with "the laws," meaning *all* laws, including the constitution ("fundamental law"), which the court does by describing the statute's "sense."[378] Hamilton's 'interpreting' judge thus does much more than give meaning to the words of a statute. As Dean Alfange has argued, drawing on Judge Gibson's influential dissent in *Eakin v. Raub*, simply applying a legal rule to a case need not involve the constitution at all.[379] Hamilton's judge is much more ambitious. He locates the statute within a state's comprehensive body of law, which forces him to determine whether there is "an irreconcilable variance" between the statute and the constitution. Only then can he adjudge the lawful outcome in the case. It is this process that, as Gerry put it, "involves" a power of determining whether the statute is constitutional.

Second, this account of expounding the law explains why most framers associated exposition with courts of law alone, and, in particular, with judges. Here the evidence is considerable, as others have noted.[380] There were three powers of government, said the *Address* of the 1781 New Hampshire constitutional convention: "The legislative, or power of making laws—The judicial, or power of expounding and applying them to each particular case—And the executive, to carry them into effect."[381] The idea became commonplace in the late 1780s. As described above, a principal objection in Philadelphia to the Council of Revision was that it might interfere with a judge's determination of constitutionality in his capacity as an "expositor[] of the law."[382] Rufus King worried that judges who had participated in the legislative process could not "expound the law as it

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[377] *See, e.g.*, SNOWISS, supra note 45, at 77-78.

[378] THE FEDERALIST, *supra* note 32, at 415, 416.

[379] Alfange, *supra* note 45, at 424-25 (citing Eakin v. Raub, 12 Sergeant & Rawle (Pa. 1825) (Gibson, J., dissenting)); *cf.* GOEBEL, *supra* note 85, at 111 ("The effect of the declarations that nothing repugnant to the constitution [was] in the law hitherto observed or the common law, as the case might be, was to require the courts to make what amounted to political decisions.").

[380] *See, e.g.*, Suzanna Sherry, *The Intellectual Background of Marbury v. Madison*, *in* ARGUING MARBURY V. MADISON 51 (Mark Tushnet ed., 2005).

[381] REID, LEGISLATING, *supra* note 55, at 27 (quoting *An Address of the Convention for Framing a New Constitution of Government for the State of New-Hampshire* 7 (1781)).

[382] *See supra* notes 198-201, 371-372. The quoted language comes from 2 FARRAND'S RECORDS, *supra* note 158, at 73 (statement of James Wilson).

should come before them, free from the bias of having participated in its formation."[383] Others agreed, but nothing similar was said of the president.[384] In the years that followed, leading jurists repeatedly expressed the view that it was the role of the judiciary to expound the law. The idea appeared in Pendleton: "It is the business of the legislators to make the laws; and of the judges to expound them."[385] In Roane: "It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them."[386] In Tucker: "This exposition it is the duty and office of the judiciary to make."[387] And in Iredell: Courts "alone ought to be expositors of an existing [law]."[388] Variations on the theme included a judicial duty to "declare the law" or to "construe" it, although the term "declare" might also be used to express older ideas about the judicial discovery of law.[389] The ideas were not limited to federalists or to supporters of judicial review.[390] In a 1788 letter to James Madison opposing judicial review, Alexander White wrote, "The duty of the judges,

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[383] 1 FARRAND'S RECORDS, *supra* note 198, at 98.

[384] *E.g.*, 2 FARRAND'S RECORDS, *supra* note 158, at 75 (statement of Caleb Strong) ("The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws."); *id.* at 79 (statement of Nathanial Ghorum) ("Judges ought to carry into the exposition of the laws no prepossessions with regard to them."); BERGER, supra note 144, at 61 (adding Charles Pinckney to this list); *accord* THE FEDERALIST, *supra* note 32, at 395 (Federalist 73) ("It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws."). King again expressed the view that judges were expositors during the debate over Jay's appointment to head a delegation to England. "[T]he judge in this business on their opinion should a new Treaty be made will become a legislator, and on his return will assume the Judicial Chair, and be the Expositor and Judge of his own legislation." CASTO, *supra* note 221, at 89.

[385] Turner v. Turner's Ex'r, 4 Call 234 (Va. 1792) (Opinion of Pendleton, J.); *see also* Kennon v. McRoberts, 1 Washington 99 (Va. Ct. App. 1792) (Opinion of Pendleton, J.) (Judges "disclaim all legislative power to change the law, and assume our proper province of declaring what the law is.").

[386] *Kamper*, 3 Va. at *7.

[387] *Id.* at *21.

[388] Chisholm v. Georgia, 2 U.S. 419, 448 (1793) (Opinion of Iredell, J.).

[389] *See, e.g.*, Commonwealth v. Caton, 4 Call 5, 8 Va. 5 (1782) (Opinion of Wythe, J.) ("[T]he tribunals, who hold neither [the power of the purse nor the sword], are called upon to declare the law impartially between them."); *Address of Melancton Smith's Committee* (1784) ("The design of courts of justice in our government, from the very nature of their institution, is to declare laws, not to alter them."), *in* LAW PRACTICE OF HAMILTON, *supra* note 88, at 314; Henry Lee, *Report on the Minority on the Virginia Resolutions* (Jan. 22, 1799), *in* 5 THE FOUNDERS' CONSTITUTION 138-39 (Philip B. Kurland & Ralph Lerner eds., 2001) ("It is their province [i.e., the federal courts' province], and their duty to construe the constitution and the laws, and it cannot be doubted, but that they will perform this duty.").

[390] *See* Powell, *supra* note 178, at 981 ("[T]here was general agreement, over a broad range of political and constitutional opinion, about the special responsibility of the judiciary in constitutional interpretation.").

men holding office for life and exempt from legislative punishment, was to expound the laws."[391]

If one thinks of expounding as a kind of deductive explanation, then the logic that gripped this generation of commentators is not hard to understand. Judges heard cases; cases were disputes presented forensically; these disputes were supposed to be resolved neutrally, i.e., without bias or favoritism; expounding the law was a means for the judge to do so, and to publicly demonstrate the fact. By expounding the law, the court could show that its resolution of the case followed from the law of the community, rather than political prejudice, passion or whim. Courts of law were suited to expounding because of the nature of forensic litigation, discussed above;[392] and judges were suited to expounding because, said Oliver Ellsworth, they had "a systematic and accurate knowledge of the Laws."[393] At least, they were supposed to. That was the aim of reformers in Philadelphia, Virginia, New Hampshire, and elsewhere, who hoped to place trained lawyers on the bench, presiding over courts conducted according to (adapted) common law procedures.[394] In a sense, "expounding" the law was a descriptive claim that embedded within it a series of normative claims—about the way proceedings in a court of law ought to be conducted, about the role of judges and juries in these proceedings, and about the institutional function of courts within government—each associated with its own movement for reform. The *actual* practices of American courts were, at least in some states, distant from reformer ideals.[395] In jurisdictions like New Hampshire, those opposed to reform drew on deep feelings of anti-

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[391] Letter from Alexander White to James Madison (Aug. 16, 1788), *in* 11 THE PAPERS OF JAMES MADISON 233 (Robert A. Rutland ed., 1977); *cf.* REID, CONTROLLING, *supra* note 232, at 117 ("[A] jury empanelled is a tribunal independent of the Court, as the Court is of the Jury—each independent in their own department . . . it is the duty of the Court to sum up the evidence, and expound the law to the Jury—that after the Jury return their verdict, the Court have no right to set it aside . . . ." (quoting N-H GAZETTE (Dec. 12, 1820))).

[392] *See supra* notes 286-291, and accompanying text.

[393] 2 FARRAND'S RECORDS, *supra* note 158, at 73-74.

[394] *See* REID, CONTROLLING, *supra* note 232, at 95-130 (describing the reform movement in New Hampshire and the counter-reform movement based on "common sense jurisprudence"); REID, LEGISLATING, *supra* note 55, at 122-34 (discussing New Hampshire Judge Jeremiah Smith). For Virginia, see *supra* notes 292-313, and accompanying text. On the expectations of national reformers, see JAY, *supra* note 221, at 60-61. However, to the extent that Stewart Jay describes the expectations of those at Philadelphia as growing out of the settled practices of American courts, I disagree with the analysis.

[395] *See* LAWRENCE FRIEDMAN, HISTORY OF AMERICAN LAW 51-59 (3d ed. 2005); Tarr, *supra* note 269, at 652-61. In some cases, reformers would pronounce an independent and strong federal judiciary necessary to protect liberty, while accepting a dependent and weak judiciary at home. *See* REID, LEGISLATING, *supra* note 55, at 62, 111, 115-20.

professionalism to support what John Reid has called a "common sense jurisprudence," in which the jury largely determined the law.[396] To the extent that jurors were regularly expected to make substantive judgments about the law—say, because they had received different charges from the different judges sitting in a case—juries could be said to share in the power of expounding the law.[397] This role only atrophied with time.[398]

Even among reformers, expounding the law was not universally associated with judges or courts of law. At Philadelphia, Madison repeatedly used the term to describe the interpretative activity of the president and the national legislature. For example, he observed that judicial independence was important to prevent judges from "attempting to cultivate the legislature . . . and thus render the Legislature the virtual expositor, as well as the maker of the laws."[399] Madison then drew a comparison between the executive and the judiciary: "The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others."[400] In Madison's mind, all three departments expounded the law. This view reappeared in Federalist 44, where Madison assured his audience that Congress's ability to extend its power beyond constitutional limits would depend "[i]n the first instance . . . on the executive and judicial departments, which are to expound and give effect to the legislative acts."[401] As a member of the First Congress, during the debate on the president's removal power, Madison argued that "an exposition of the constitution may come with as much propriety from the Legislature, as any other department of the Government," at least "as it relates to a doubtful part of the constitution."[402]

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[396] *See* REID, CONTROLLING, *supra* note 232, at 18-32, 108-10.

[397] By another view—the view held by many reformers—juries were not applying legal rules at all, but deciding cases on an ad hoc basis, according to "passion" or "prejudice." *See* REID, LEGISLATING, *supra* note 55, at 24; REID, CONTROLLING, *supra* note 232, at 32.

[398] *See* FRIEDMAN, *supra* note 395, at 19; HORWITZ, *supra* note 367, at 28-29. This may be because the power of the jury to determine the law was regarded by some as a centerpiece of republican government, John Adams is the obvious example here. *See, e.g.*, STIMSON, *supra* note 78, at 78-84.

[399] 2 FARRAND'S RECORDS, *supra* note 158, at 34.

[400] *Id.*; *see also id.* at 430 ("Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."). As Philip Hamburger has noted, in this speech Madison uses "case" to mean something broader than action or litigation. HAMBURGER, supra note 43, at 541-43.

[401] THE FEDERALIST, *supra* note 32, at 247.

[402] 1 ANNALS OF CONG. 479 (1789); *see* WARREN, *supra* note 214, at 99-102; Corwin,

It is clear that Madison did not associate expounding with courts alone. He was in the minority in this regard, so I am content to leave the matter at that.[403] Still, it should be noted that there is some support for the view that Madison did recognize the distinctive role courts played in *explaining* law, as opposed to its "exposition," which was a matter committed, in Madison's usage, to each of the coordinate departments. As early as the Virginia ratifying convention, for example, Madison observed that it was "a misfortune that, in organizing government, the explication of its authority should be left to any of its coordinate branches. . . . There is a new policy of submitting it to the judiciary of the United States."[404] Much later, he connected this explanatory role to the nature of proceedings in a court of law. Madison observed that it was in "the judicial department" that constitutional questions generally found "their ultimate discussion and operative decision," noting that "the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them" over the other departments.[405] Arguably, then, late in his life Madison connected judicial review to judicial explanation of the law, just as his peers had. By that date, the movements to standardize legal procedure, to professionalize the judiciary and the bar, and to develop a body of 'scientific' American legal literature had firmly taken root.[406]

D. "Expounding" during the Repeal Act debate

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

There is little question that most of the congressmen who spoke on the subject of judicial power during the Repeal Act debate thought it was the

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supra note 144, at 563-64. The view was not confined to Madison. *See* Powell, *supra* note 178, at 975-76.

[403] *See* HAMBURGER, *supra* note 43, at 548-52.

[404] 3 ELLIOT'S DEBATES, *supra* note 120, at 532.

[405] Letter From James Madison (1834), *in* 4 LETTERS AND OTHER WRITINGS OF MADISON 349-50 (1865).

[406] *See* WHITE, *supra* note 288, at 154-56; REID, LEGISLATING, *supra* note 55, at 162.

role of the judiciary to expound the law. Federalists broached the issue as they tried to describe, in lurid detail, the implications of what they regarded as a Republican effort to undermine judicial independence. As Jonathan Mason put it, the federal judiciary had been made independent because it was their duty "to expound and apply the laws."[407] And it was this duty, said Mason, which implied a power of judicial review: "the duties which they have to perform, call upon them to expound not only the laws, but the Constitution also; in which is involved the power of checking the Legislature."[408] Thus the basic elements of the discussion at Philadelphia were reproduced. For the most part, Republicans were willing to grant these assumptions,[409] but, at times, they insisted on making express the understanding that expounding and judicial review were limited to the adjudication of cases. Thus, Robert Wright of Maryland "admitted . . . that judges ought to be the guardians of the Constitution, so far as questions were constitutionally submitted to them . . . [but] he had not supposed the judges were intended to decide questions not judicially submitted to them, or to lead the public mind in Legislative or Executive questions."[410] A few Republicans pressed further; Jefferson's close ally in the Senate, John Breckinridge, argued for something like legislative supremacy in determining the extent of congressional power,[411] and in the House, John Randolph delivered a characteristically sardonic defense of what might be called Virginia-style 'common-sense jurisprudence', along with a legislative power to expound the law.[412]

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[407] 11 ANNALS at 32.

[408] *Id.*; *see also id.* at 180-81 (statement of Gouverneur Morris); *id.* at 574 (statement of John Stanley); *id.* at 788-89 (statement of Roger Griswold).

[409] *See* WARREN, *supra* note 214, at 126; Engdahl, *supra* note 259, at 320.

[410] 11 ANNALS at 115.

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

[412] 11 ANNALS at 654-55 ("And here permit me to express my satisfaction, that gentlemen have agreed to construe the Constitution by the rules of common sense. This mode is better adapted to the capacity of unprofessional men, and will preclude the gentleman from arrogating to himself, and half a dozen other characters in this Committee, the sole right of expounding that instrument . . . . Indeed, as one of those who would be unwilling to devolve upon that gentleman the high-priesthood of the Constitution, and patiently submit to technical expositions which I might not even comprehend, I am peculiarly pleased that we are invited to exercise our understandings in the construction of this instrument."); *accord id.* at 531-33 (statement of Robert Williams) (arguing for

Yet if most Republicans agreed that it was the role of courts to expound the law, including fundamental law, then they ought to be concerned, reasoned Federalists, that repeal would undermine this function by *politicizing* the judiciary. Thus the same institutional vision for the courts was present. James Ross warned that "[i]nstead of an august and venerable tribunal, seated above the storms and oscillations of faction . . . you have a transient, artificial body, without a will or understanding of its own, impelled by your own machinery."[413] Since principled judges would "never consent to become the tools and victims of factions," they would refuse to take office, leaving the federal courts to be piloted by "the dregs of the law."[414] In the House, Bayard took up the point, linking judicial independence to the framers' effort "to curb the fury of party."[415] "No menacing power should exist," argued Samuel Dana, "to bias [judges'] decisions by the influence of personal hopes and fears."[416] Without judicial independence, there would be little prospect of a neutral exposition of the law, eliminating "the further security [that] the judicial power" provided beyond elections alone.[417] The point gained momentum as Federalists sought to draw into the debate the logic that had moved delegates at Philadelphia to reject the Council of Revision. A dependent court, they argued, could not fulfill its expository function, and thus, its constitutional function of giving effect to 'public opinion' over the passion of the majority. As Benjamin Tallmadge reminded the representatives, "passion and party views too frequently mislead the judgment and obscure the understanding. A sober and dispassionate corrective becomes, therefore, absolutely necessary. Your tribunals of justice afford the necessary relief."[418]

Almost no one was willing to concede the conclusion. In private conversation, radicals like William Branch Giles might argue that the

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legislative and executive power to interpret the Constitution).

[413] 11 ANNALS at 167.

[414] *Id.* at 167.

[415] *Id.* at 650.

[416] *Id.* at 920.

[417] *Id.* at 926 (statement of Samuel Dana).

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

federal courts should be "political."[419] In larger gatherings, however, Giles would take the opposite position.[420] And most Republicans responded by turning the argument against the Federalists, pointing with disapproval to the political conduct of federal judges in the crisis of 1798-99.[421] The move was a natural one, since the dominant Republican criticism during the crisis had been that Federalist judges "were partial, vindictive, and cruel," "obeyed the President rather than the law, and made reason subservient to their passion."[422] Here the logic of court reform, which aimed to de-politicize courts of law, would work in favor of Republicans. Federal judges who engaged in politics while on the bench could now expect impeachment.[423] Indeed, avoiding a wave of judicial impeachments was one of Marshall's primary aims in *Marbury*.[424] His strategy, as others have shown, was to draw a substantive distinction between law and politics, and to limit the domain of the courts to the former.[425] Judicial review was tied to the core task of deciding "particular cases," i.e., disputes capable of *non-political* resolution, thus reinforcing the narrowed judicial office that emerged from court reform efforts in Virginia, and which was described in *Kamper* by Judges Tucker and Roane.[426]

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[419] *See* REID, LEGISLATING, supra note 55, at 107. Reid treats Giles as representative of the Republican view in 1800 of judicial independence, *see id.* at 106, which I think is a serious mistake.

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

[421] Indeed, the principal Republican complaint about Federalist judges was that they had *become* political. *See, e.g.*, O'Fallon, *supra* note 256, at 234; BANNING, *supra* note 221, at 255, 256. Republicans were angered by judges political grand jury charges, WOOD, EMPIRE, *supra* note 75, at 261-62; CASTO, *supra* note 221, at 128-29, by their actions barring juries from deciding on the constitutionality of the Sedition Act, Engdahl, *supra* note 259, at 297; HAINES, *supra* note 91, at 191-92, or defendants from calling witnesses in defense, WOOD, EMPIRE, *supra* note 75, at 261; CASTO, *supra* note 221, at 166-67, and by judges invoking the common law of libel, which (unlike the Sedition Act) did not admit truth as a defense, WOOD, EMPIRE, *supra* note 75, at 260; Alfange, *supra* note 45, at 350-51.

[422] 1 WARREN, *supra* note 418, at 191.

[423] This was the Republican theory of the Pickering impeachment, and explains their steadfast denial that Judge Pickering was suffering from some form of mental illness. *See* REID, LEGISLATING, supra note 55, at 90-109.

[424] *See* Jed Glickstein, *Note, After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 574-75 (2012); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE 306 (1989).

[425] *See, e.g.*, NELSON, MARBURY, *supra* note 48, at 60-67.

[426] *See supra* Part III.B.

While the effect of judicial politics on the *Marbury* opinion is well known, what is less appreciated, but just as important, is its effect on the judicial office itself. Indeed, the danger this generation perceived in a politicized judiciary is best evidenced by the fate of so-called "extrajudicial activities," in which federal judges often assumed an expressly political function.[427] In the period immediately before 1800, the most visible of these activities was the Supreme Court Justices' practice of delivering "political charges" while riding on circuit.[428] Political charges were charges delivered to grand juries in which the judge might defend (or criticize) the president's administration, or offer his own views on the political controversies of the day.[429] The practice had a significant history in America. Grand juries had long been used as a bidirectional point of influence: both as a means for government to shape public opinion, and as a means for the leading members of the community to present the government with complaints about its officers' nonfeasance and corruption.[430] The Revolution deepened the government's need for this institution, primarily as a means to convince the people to honor their obligations under law.[431] Yet it also transformed the understanding and practice of political charging, by giving it an *educational* function firmly rooted in republican theory.[432] In Ralph Lerner's memorable phrase, the Supreme Court became a kind of "republican schoolmaster," whose justices, riding on circuit, were tasked with ensuring that the people understood their rights and duties—knowledge necessary not only to making appropriate choices as voters and jurors, but, ultimately, to ensuring the survival of republican government.[433]

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[427] The two leading examples of extrajudicial activity that took on political content and function in the late 1790s are political charges and advisory opinions, but there were a variety of other activities as well, including ex officio service. *See generally* Maeva Marcus & Emily Van Tassel, *Judges and Legislators in the New Federal System*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert Katzman ed., 1988). On the issue of advisory opinions, see JAY, *supra* note 221, at 149-70, Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 145-58.

[428] *See* Lerner, *supra* note 369, at 129-55, CASTO, *supra* note 221, at 127-29.

[429] *See* Lerner, *supra* note 369, at 127-28.

[430] *See, e.g.*, John Cushing, *The Judiciary and Public Opinion in Revolutionary Massachusetts*, *in* LAW AND AUTHORITY IN COLONIAL AMERICA 168 (George Athan Billas ed., 1965); ROEBER, *supra* note 292, at 176-77.

[431] *See* David J. Katz, *Note, Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s*, 14 CARDOZO L. REV. 1045, 1056-62 (1993). This was also true at the state level, as judges used grand jury charges to legitimize proposed or recently ratified state constitutions. *See* Cushing, *supra* note 430, at 175-76.

[432] *See* Lerner, *supra* note 369, at 127-32, 147; Katz, *supra* note 431, at 1060-61.

[433] Lerner, *supra* note 369, at 127-32; *see also* Marcus & Van Tassel, *supra* note 427, at 32. As Shannon Stimson has shown, the petit jury also had an educational function in republican theory. People were educated by serving on the jury with their peers—but also had to be educated in order to serve appropriately. STIMSON, *supra* note 78, at 88.

Yet the political charge was a delicate task, and it could be badly mishandled by the wrong judge in the wrong circumstances.[434] It required the judge to "travel[] out of the line of Business," and to offer remarks that were, in the words of Chief Justice John Jay to one jury, "not . . . very pertinent to the present occasion."[435] By the late 1790s, it was difficult for nationally minded judges to engage in political charging without stirring the anger of an audience inclined towards Jeffersonian principles.[436] And if the matter was difficult to handle for those with judgment and tact, then *a fortiori* it was impossible to handle for men like Justice Samuel Chase, whose blunderbuss charges resulted in his own impeachment.[437] During the Chase trial, neither party was willing to defend political charging; Chase's own counsel dutifully announced to the Senators that he was "one of those who have always thought, that political subjects ought never to be mention in courts of justice."[438]

The practice of political charging, then, could not be maintained. It was inconsistent with the emerging understanding of judges and of courts of law in a republic. If judges were duty-bound to decide cases by expounding the law, and if this process was to be a non-political one, then federal judges could not maintain a statesman's diet of political activity.[439] The same

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[434] Lerner, *supra* note 369, at 155 ("The manner in which the judge performed his duties was of decisive importance. . . . It took high political finesse to use the grand jury charge as a means of political education."). Even at the height of political charging, grand juries rarely returned responsive indictments, and a Justice could even acknowledge that he expected none. There was a staged quality to the whole affair. *See* Katz, *supra* note 431, at 1052, 1055.

[435] Lerner, *supra* note 369, at 133; *see also* Marcus & Van Tassel, *supra* note 427, at 32.

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

[437] *See* Lerner, *supra* note 369, at 152-55.

[438] *Id*. at 154.

[439] Wood, *supra* note 30, at 165 ("The legalization of fundamental law and the development of judicial review went hand in hand with the demarcation of an exclusive sphere of legal activity for judges. If determining constitutional law were to be simply a routine act of legal interpretation and not an earth-shaking political exercise, then the entire process of adjudication had to be removed from politics and from legislative tampering. After 1800, judges shed their traditional broad and ill-defined political and magisterial

tension led to the demise of other extrajudicial activities with a political character, such as advisory opinions.[440] In theses cases and others, judges would have to give up the politics. What they received in exchange was an understanding of their role within republican government that made sense of judicial independence and of the legalization of constitutional dispute. That understanding recognized in courts alone a power to refuse to enforce unconstitutional laws.

CONCLUSION

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

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

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roles . . . and adopted roles that were much more exclusively legal.").

[440] *Cf.* Wheeler, *supra* note 427, at 152-53 (describing a similar development in the case of advisory opinions, and concluding, "The advisory relationship for which Washington and Jefferson hoped also threatened the judicial process itself. For one thing, in stating the law extrajudicially, the Court would not be stating the law through the process best designed to secure a true interpretation of it. Courts reach decisions through a process designed to formulate the issues sharply. They are aided by counsels' debate . . . . Absent those arguments, the decisions stood a greater chance of being in error. More important, the Justices thought they would retain a bias toward an opinion once publicly stated.").

Second, while other arguments in support of a non-enforcement power are possible, it seems unlikely that there is a colorable *originalist* argument to that end. As I have argued, there is little evidence that the framers thought the Standard Justification supported a presidential power to refuse to enforce unconstitutional laws. The same argument applies to the Article II Vesting Clause, the Oaths Clause, or the Take Care Clause, which are the textual foundations most often recruited to support non-enforcement. The framers were at least as good as we are at drawing inferences, and if they believed the Vesting Clause (or whatever) supported a power of non-enforcement, they should have concluded so. We have no record that they did. More than that, we have no record that they did despite the evidence that they had reason to draw the conclusion. If the concern that led to the development of judicial review was the politics of 'passion' that, at various points during the period, infected the legislature, the executive could have served as a check just as much as the judiciary.

Third, the Standard Justification rests on ideas about the forum of a *court of law*, not about *judges* per se. This is important for understanding how judicial review could emerge in a system that regarded constitutions as a special kind of law—fundamental law—that "differed in kind" from ordinary law, inasmuch as they were an act of the people regulating the government.[441] I have not argued here that the constitution was legalized because of an English tradition that featured the judge as the repository of fundamental law, which he applied against the sovereign in his common law court (assuming there was such a tradition). American practices were somewhat different. Fundamental law was legalized in the 1780s because of independently held convictions about proper proceedings in a court of law, and about the role courts could and should play in giving effect to 'public opinion,' ideas which derived from the political experience of the 1780s and the French Enlightenment, as much as the common law tradition.[442] These ideas pinned the legitimacy of republican government to "the reason of the public," and after the Revolution forensic litigation seemed a natural vehicle in which to determine and apply this reason. Since it was supposed to be the *public's* reason, not the *court's*, it was crucial that the judge faithfully expound the law rather than make it. That distinction has proved difficult to maintain.

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[441] *See* SNOWISS, *supra* note 45, at 90.
[442] *See supra* notes 285-314, and accompanying text.