

ARTICLES

JOHN MARSHALL'S CONSTITUTION: METHODOLOGICAL PLURALISM AND SECOND-ORDER *IPSE DIXIT* IN CONSTITUTIONAL ADJUDICATION

by
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This Article provides a comprehensive treatment of the constitutional jurisprudence of the Marshall Court (1801–1835), addressing its relationship to contemporary originalism. Until recently, there seemed to be no need for such a study. With the move from intentionalism to textualism in the 1980s, originalists came to understand their movement as an innovation and a reaction against the perceived excesses of the Warren and Burger Courts. Originalists did not claim that originalist methodology informed nineteenth-century constitutional adjudication.

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Recently, however, originalists have made claims that constitutional adjudication in the United States has always been originalist. This Article maintains that such claims are doubly misleading. First, the Marshall Court invoked the Framers' intentions but never undertook any investigation into those intentions. Second, this rhetorical intentionalism by no means predominated as the Marshall Court's governing interpretive approach. Rather, that approach was pluralist. Historical reasoning, common law precedent, and what I call second-order ipse dixit pronouncements featured prominently in the constitutional adjudication of the Marshall Court.

The constitutional text rarely provided clear constraints on the Marshall Court's discretion because, to borrow language from New Originalists, their cases arose in the "zone of construction" where original meaning "runs out." Justices chose among plausible arguments about the Constitution's meaning. At key points, the Justices simply declared what the law was, not without justification, but also not based on evidence of the Framers' intent or the original meaning of the constitutional text.

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I. INTRODUCTION: THE QUESTION OF ORIGINALISM IN THE NINETEENTH CENTURY

Most scholarship on originalism, written both by originalists and non-originalists, acknowledges that the movement was a response to the perceived excesses of the Warren and Burger Courts.¹ Until recently, most originalists recognized that originalism is a twentieth-century invention, not without its historical antecedents, but not realized as a comprehensive approach to interpretation until about 200 years after the Framing. In his charming and candid defense of his own version of originalism, Justice Scalia acknowledged as much:

It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to

¹ See, e.g., Robert N. Clinton, *Original Understanding, Legal Realism and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1261 (1987) (noting that after the 1950s, "judicial conservatives . . . became uncomfortable with the naked exercises of raw judicial power employed by a federal judiciary that had come to accept the realists' vision of the judicial role"); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247 (2009) (explaining that the "sweeping decisions of the Warren Court" led conservatives "to insist that the Constitution be interpreted to give effect to the intent of the Framers"); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 (2007) [hereinafter Griffin, *Rebooting*] (observing that originalism "was driven by concerns that the Warren and Burger Courts had gone too far," particularly in the realms of substantive due process and equal protection); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 552–54 (2006) (describing modern conservative jurisprudential thought as a response to the judicial activism of the liberal Warren Court); Lee Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 881 (2011) (describing originalism as a "subversive movement" and acknowledging that "[o]riginalist arguments first appeared in modern form in the 1970s"). Robert Bork dates the movement away from originalism back to the *Dred Scott* decision. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990) (crediting *Dred Scott* with inventing the concept of substantive due process). However, Bork acknowledges that the debate over originalism first became acute during the Warren and Burger Courts. *Id.* at 130. Raoul Berger similarly saw the Warren Court as a qualitative departure from the Court's traditional role. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 305–06 (rev. ed. 1977) (noting that while the *Lochner* Era Court negated legislation, the Warren Court went further in initiating legislative policy from the bench).

mean.²

While some early originalists claimed that constitutional adjudication before the New Deal was largely informed by originalist instincts,³ critical literature quickly undermined that claim,⁴ and so-called New Originalists, writing since the 1990s, largely abandoned it.⁵

Recently however, in Senate testimony in support of the nomination of Neil Gorsuch to succeed Justice Scalia on the Supreme Court, originalist scholar Lawrence Solum observed: “For most of American history, originalism has been the pre-dominate view of constitutional interpretation.”⁶ Increasingly, originalists have begun to echo Solum’s claim.⁷

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) [hereinafter Scalia, *Lesser Evil*].

³ See, e.g., CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 4 (rev. ed. 1994) (contrasting the nineteenth-century tradition of judicial “interpretation” with judicial “legislation” beginning in the *Lochner* era); BERGER, *supra* note 1, at 373–79 (characterizing Justice John Marshall as a strict constructionist who attempted to give effect to the Framers’ original intent); BORK, *supra* note 1, at 22–24 (arguing that Justice Marshall’s opinion in *Marbury v. Madison* was motivated by a desire to preserve the Constitution’s original purposes).

⁴ See, e.g., Clinton, *supra* note 1, at 1220 (concluding that “originalist interpretation . . . constituted neither a predominant nor exclusive interpretive methodology” in early constitutional adjudication); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 906–07 (1985) [hereinafter Powell, *Original Understanding*] (pointing out the Federalists’ view that the intentions of the drafters of the Constitution would not be legally relevant because they were “mere scribes” appointed to draft an instrument for the people); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 664 n.14 (1987) (citing Supreme Court cases going back to 1819 that reject the originalist position that “constitutional change can occur legitimately only through the formal amendment process”).

⁵ See, e.g., Larry D. Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 908 (2008) (“The idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s.”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–12 (1999) [hereinafter Barnett, *Originalism for Nonoriginalists*] (dating the advent of originalism to the writings of Edwin Meese and Robert Bork); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (conceding that, for much of U.S. history, “originalism was not a terribly self-conscious theory of constitutional interpretation”).

⁶ Statement of Lawrence B. Solum, Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States (Mar. 23, 2017), <https://www.judiciary.senate.gov/imo/media/doc/032317%20Solum%20Testimony.pdf>.

⁷ See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 259, n.36 (2013) [hereinafter MCGINNIS & RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION*] (calling originalism “the dominant philosophy of interpretation” into the early twentieth century); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 34 (2012) (claiming that Marshall “routinely displayed originalist tendencies”); Steven G. Calabresi, *The Tradition of*

One version of contemporary originalism asserts that, while originalism is not the exclusive mode of constitutional interpretation, it sits atop a hierarchy and prevails when interpretive modalities conflict.⁸ That characterization does not fit the methodology of the Marshall Court. By that definition, Marshall was no originalist. He was a non-hierarchical methodological pluralist. Moreover, I argue that the opposition between originalism and non-originalism does not help us characterize the constitutional jurisprudence of the Marshall Court. The opposition is unhelpful because: (1) it is not a real opposition; (2) originalism is a family of theories that has grown so capacious as to lose its usefulness as a description of an interpretive approach; and (3) it is a fundamental error of historical methodology to attempt to read the past in light of contemporary debates. The current project seeks to understand the interpretive methods of the Marshall Court in its own terms.

On the first point, Jack Balkin has helpfully deconstructed the opposition between originalism and living constitutionalism,⁹ but the two approaches were never so far apart as their adherents sometimes assume.¹⁰ In an uncharacteristic, non-combative moment, Justice Scalia conceded that most non-originalists are moderate and that little separates a moderate non-originalist from his own “faint-hearted” originalism.¹¹ When faced with a case of first impression in which the Constitution’s text is at least suggestive of a resolution, originalists and non-originalists do not differ.¹²

the Written Constitution: Text, Precedent, and Burke, 57 ALA. L. REV. 635, 646 (2006) (characterizing Marshall’s opinions in *Gibbons* and *McCulloch* as an “attempt at a textual and originalist interpretation”); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2725 (2003) (seeing originalist textualism as implicit in Marshall’s opinion in *Marbury*).

⁸ William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2353 (2015) [hereinafter Baude, *Originalism*] (contending that interpretive methods “are hierarchically structured, with originalism at the top of the hierarchy”).

⁹ “Living constitutionalism” is one term placed in opposition to originalism, but not all non-originalists are living constitutionalists. I use the former term to denote interpretive approaches that treat the Constitution as a “living” document that must be interpreted differently in different time periods in light of historical developments.

¹⁰ See JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*] (reconciling originalism and living constitutionalism through a “text and principle” approach); see also Colby & Smith, *supra* note 1, at 246 (arguing that living constitutionalism provides a good description of the evolution of originalist methodology).

¹¹ Scalia, *Lesser Evil*, *supra* note 2, at 862.

¹² See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 25 (2009) (averring that all non-originalists “explicitly assign original meaning or intentions a significant role in the interpretive enterprise”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 236 (1980) (noting that even non-originalists accord “presumptive weight to the text and original history”); David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) (“[I]t

Both begin their analyses with an attempt to discern the text's original meaning.¹³ However, as we shall see, in the Marshall Court constitutional adjudication often took place in what contemporary New Originalists call the "zone of construction"¹⁴ in which original meaning "runs out."¹⁵ In such circumstances, even today, the lines between originalism and non-originalism are fuzzy.¹⁶ The fact that the Marshall Court's opinions include invocations of original meaning does not make them any more originalist than the opinions by Justices who think that the Constitution protects a fundamental right to privacy in the contexts of family planning and same-sex marriage.¹⁷

is never acceptable to announce that you are ignoring the text . . .").

¹³ Non-originalists supplement historical evidence with other interpretive tools, including: "history, tradition, precedent, purpose and consequence." STEVEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005); *see also* DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 6 (2009) (advocating judicial restraint through adherence to precedent, process constraints, and internalized norms).

¹⁴ *See* Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMMENT.* 119, 128 (2010) (arguing that once interpretive tools are exhausted, constitutional decision-makers operate within a zone of construction, where they undertake "a particularly political task, a creative task involving normative choices in a realm of constitutional indeterminacies").

¹⁵ *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL'Y* 65, 69 (2011) (acknowledging that the meaning of the Constitution sometimes runs out and that "[o]riginalism is not a theory of what to do when original meaning runs out"); Lawrence B. Solum, *Semantic Originalism* 1, 19 (*Ill. Pub. Law & Legal Theory Research, Paper Series No. 07-24*, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id_1120244 (observing that when the meaning of the constitutional text is underdetermined, original meaning "runs out" and must be supplemented with constitutional construction).

¹⁶ *See* ERIC J. SEGALL, *ORIGINALISM AS FAITH* 98–99 (2018) (arguing that Solum's two originalist principles play a very small role in the zone of construction and thus do not help judges decide hard constitutional questions).

¹⁷ Some self-styled originalists have offered defenses of Supreme Court decisions that have traditionally been treated as the poster children of non-originalism. Jack Balkin provides an originalist defense of abortion rights. Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 292 (2007) [hereinafter Balkin, *Abortion*]. Will Baude contends that originalist reasoning informed Justice Kennedy's majority opinion in *Obergefell v. Hodges*. Baude, *Originalism, supra* note 8, at 2382; *see also* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 *U. MIAMI L. REV.* 648, 648 (2016) (concluding that state laws that prohibit same-sex marriage violate the original meaning of the Fourteenth Amendment). Most originalists do not think that the Constitution provides a basis for either abortion rights or same-sex marriage. Originalist Justices Scalia and Thomas reject the idea that the Constitution as originally understood protects a right to privacy in the context of reproductive rights or a right to same-sex marriage. *See, e.g.*, *Obergefell v. Hodges*, 135 *S. Ct.* 2584, 2632–37 (2015) (Thomas, J., dissenting) (maintaining that the Constitution, as an originalist matter, provides no basis for the recognition of a right to same-sex marriage); *id.* at 2628 (Scalia, J., dissenting) (maintaining that the original meaning of the Fourteenth Amendment could not provide a basis for prohibiting

On the second point, the term “originalism” today encompasses an extended family of methodological approaches.¹⁸ Solum has offered a definition of originalism, comprising two components. First, the “fixation thesis” affirms that the meaning of each constitutional clause “is fixed at the time [it] is framed and ratified.”¹⁹ Second, the “constraint principle” stands for the view that the constitutional text’s meaning should constrain those who interpret, implement, and enforce constitutional doctrine.²⁰ That is, originalists seek to find the original meaning and, having found it, treat it as dispositive of constitutional disputes.

Solum’s definition leaves room for a great deal of variation among originalists.²¹ Originalists can, and often do, disagree on how particular cases ought to be decided.²² Some originalists refuse to comment upon particular cases, reluctant to permit such details to interfere with the elaboration of their theoretical models.²³

bans on same-sex marriages); *Gonzalez v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (reiterating the view that “the Court’s abortion jurisprudence . . . has no basis in the Constitution”).

¹⁸ One critic of originalism has identified 72 different theoretical strains within the originalist camp. Berman, *supra* note 12, at 14; *see also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 719–20 (2011) (listing various strains within originalism, including original intent, original meaning, subjective and objective meaning, actual and hypothetical understanding, standards and general principles, differing levels of generality, original expected application, original principles, interpretation, construction, normative and semantic originalism); James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 670 (2012) (arguing that originalists are united only in their rejection of moral readings of the Constitution).

¹⁹ Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (2013) [hereinafter Solum, *Unwritten Constitution*]. The implications of Jonathan Gienapp’s work on the fixation thesis have not yet emerged. Gienapp contends that the Framers did not think of the Constitution as having a fixed meaning in 1789, but that they came to do so over the course of the 1790s. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 9–11 (2018). However, originalists who adhere to the fixation thesis can, consistent with Gienapp’s thesis, do so based on fidelity to how the Framers came to think of the Constitution in the 1790s or based on normative theory untethered to the accidents of history.

²⁰ Solum, *Unwritten Constitution*, *supra* note 19, at 1942.

²¹ James Fleming finds that this characteristic of originalism renders it a “family of theories” rather than a coherent approach to constitutional theory. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 435 (2013).

²² *See* D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N.U. L. REV. 529, 548 (2016) [hereinafter Telman, *Originalism*] (providing examples of basic questions that divide originalist scholars and of cases in which Justices Scalia and Thomas, both originalists, came to different conclusions or concurred with one another based on completely different reasoning).

²³ *See* William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 108 (2016) (“In our theoretical work we’ve tried to avoid getting sucked into specific historical or

However, even Solum's definition is not capacious enough to encompass all variants within contemporary originalism.²⁴ Some critics of originalism maintain that modern originalism, to the extent that it has abandoned its emphasis on judicial restraint, does little more than provide a theoretical foundation for conservative judicial activism.²⁵ In sum, where originalists and critics of originalism cannot agree on the contours of the movement, one can always manufacture an argument that the Marshall Court embraced originalism. If the task is to understand the Marshall Court's interpretive methodology, however, originalism does not provide a helpful rubric.

This Article is a work of history, primarily concerned with reconstructing a past historical epoch's approach to interpretation. As Leopold von Ranke, the founder of the modern study of history, put it, the historian's task is to treat every historical epoch as "immediate to God"; that is, the historian's interest is to treat each historical period for its own sake without an eye to its continuing relevance to the present.²⁶ Ranke's admonition is aspirational. Inevitably, the past holds out to us the hope that we might learn lessons from it, and we cannot escape the temptation to seek out solutions to current problems in the wisdom of bygone eras. However, the preferred historical method is inductive, allowing the evidence to shape one's perception of the past rather than imposing one's own constructs onto historical materials.

In this Article, I focus on the Marshall Court's recourse to what I am calling second-order *ipse dixit*. The Marshall Court's approach to interpretation was pluralistic and non-hierarchical. Where different interpretive modalities could not be reconciled, the Justices would arrive at a crossroads. Because they gave authoritative priority to no particular interpretive approach, they made snap decisions. The Marshall Court did not explain its preference for one particular interpretive choice; they did not engage the reasoning that might have led them to follow a different path.

doctrinal controversies, as that might detract from our arguments about *theory*."). Lawrence Solum and Lee Strang are two additional examples of originalist scholars who, despite voluminous writings, rarely apply their theories to specific cases.

²⁴ See Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 156–57 (2017) (imagining originalists operating in a legal system without a written constitution).

²⁵ See, e.g., MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW, 19–43 (2020) (comparing originalism to a Shibboleth that signals conservatism rather than adherence to any particular methodological approach); SEGALL, *supra* note 16, at 103–15 (characterizing contemporary originalism as encouraging a form of judicial activism that would have offended first-generation originalists).

²⁶ See LEOPOLD VON RANKE, ÜBER DIE EPOCHEN DER NEUEREN GESCHICHTE: VORTRÄGE DEM KÖNIGE MAXIMILIAN II VON BAYERN IM HERBST 1854 ZU BERCHTESGADEN GEHALTEN 59–60 (Theodor Schieder & Helmut Berding eds., Oldenbourggesellschaft 1971) (1906) ("[J]ede Epoche ist unmittelbar zu Gott, und ihr Wert beruht gar nicht auf dem, was aus ihr hervorgeht, sondern in ihrer Existenz selbst, in ihrem Eigenen selbst." ("Every epoch is immediate to God, and its value is not measured by what emerged out of the epoch; rather, its value rests on the epoch's existence, on its very self.)) (Author's translation).

Their most crucial decisions did not turn on the original meaning of the Constitution; they may not have turned on *legal* reasoning at all. What reasoning was involved occurred, as it were, off-stage, outside the bounds of the written opinion. Only the result of that reasoning made its way into the law.

In its constitutional adjudication, the Marshall Court drew on existing traditions for common-law and statutory interpretation, which were pluralistic and non-hierarchical. Part II lays out some concepts that I apply to my analysis of the opinions of the Marshall Court. First, I introduce the concept of meta-interpretive issues that originalism cannot resolve. Second, I outline the Marshall Court's non-hierarchical methodological pluralism. That pluralism explains why I think the third concept, second-order *ipse dixit*, played a significant role in the decisions of the Marshall Court. Part III puts Justice Marshall's jurisprudence in the context of his biography and his vision of the Court's role. Marshall managed to resolve major political questions through legal opinions that somehow retained their legitimacy as applications of legal principles rather than exercises in judicial legislation.

Part IV provides examples of the methodological pluralism that characterized the Marshall Court's opinions and shows how seeming appeals to text, to intentions, or to the Constitution's objects and purposes concealed *ipse dixit* decision making. It then examines in detail two iconic constitutional opinions of the Marshall Court: *Marbury v. Madison* and *McCulloch v. Maryland*. These cases illustrate Marshall's non-hierarchical pluralism at work and exemplify the vital role of second-order *ipse dixit* in his opinions. Part V concludes by noting that both originalists and non-originalists lay claim to Marshall's legacy. Both can do so with some justification, but mining Marshall's interpretive approach for evidence to support current interpretive trends misses much that is rich and strange in constitutional interpretation during the Early Republic. But John Marshall's Constitution remains our Constitution. Many of his holdings and dicta have become background assumptions that inform constitutional adjudication to this day.

Although I discuss some other nineteenth-century Justices here, I focus on John Marshall's approach. The resulting picture serves as a proxy for a complete survey of constitutional adjudication in the nineteenth century and the first third of the twentieth. This heuristic device seems justified in light of John Marshall's commanding influence. David Schwartz, whose revisionist scholarship upends some common assumptions regarding Marshall's legacy nonetheless acknowledges Marshall's current status:

John Marshall is widely regarded as the greatest jurist in American history . . . John Marshall is the "father of American constitutional law" . . . It was Marshall who established the Court's prestige and made the Court an institutional player in the nation's constitutional politics. Marshall's constitutional rulings

tended to be cases of first impression . . . giving Marshall the historical reputation of the original and authoritative “Expounder of the Constitution.”²⁷

Some attention will also be dedicated to Joseph Story because his treatise on the Constitution²⁸ was of such central importance in the development of nineteenth-century constitutional law.²⁹

II. DEFINING THE CONCEPTUAL FIELD: INTERPRETIVE PLURALISM AND SECOND-ORDER *IPSE DIXIT* REASONING

The constitutional issues that came before the Marshall Court arose either in the interstices between clear constitutional provisions or in areas where clear constitutional commands could be read to conflict. Some of these issues, while foundational, could not be resolved through an appeal to the Constitution’s original meaning. Moreover, contrary to some originalists’ claims,³⁰ the Marshall Court did not privilege textualist or intentionalist modalities of constitutional interpretation. The Court’s approach was pluralistic and non-hierarchical; the Court made use of the interpretive tools that it adapted from traditions of common-law and statutory interpretation. Like skilled craftsmen, the Justices chose the interpretive tools that they

²⁷ DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF McCULLOCH V. MARYLAND 2* (2019).

²⁸ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (1833).

²⁹ See, e.g., Morgan D. Dowd, *Joseph Story and the American Constitution by James T. McClellan*, 72 COLUM. L. REV. 954, 959 (1972) (listing Chancellor Kent and John Marshall as the only two figures who could rival Story’s influence); *id.* at 960 (observing that many of Story’s “pronouncements about a national system of law are firmly fixed as part of our constitutional heritage”); H. Jefferson Powell, *Joseph Story’s Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1285–86 (1985) (calling Story’s treatise the most massive and most widely discussed treatise on constitutional law in the antebellum period).

³⁰ Not all originalists care whether originalism informed the interpretive practices of the Early Republic. Nor need they; originalism may have normative value even if the Framers did not embrace it. They may not have. Robert Bork acknowledged, “From the establishment of the federal judiciary at the end of the eighteenth century, some judges at least claimed the power to strike down statutes on the basis of principles not to be found in the Constitution.” BORK, *supra* note 1, at 15. Some originalists recognize multiple interpretive modalities and argue that contemporary constitutional decision-makers are bound only to use the interpretive tools available at the framing. See MCGINNIS & RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION*, *supra* note 7, at 116 (presenting their argument for “original methods originalism”). Other originalists proclaim that we are bound by the original meaning of the Constitution as lawfully amended. See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019) (defending their “inclusive” originalism, which argues that originalists recognize our “original law” as it has been lawfully changed). Such versions of originalism can be reconciled with my understanding of the Marshall Court’s interpretive methodology to the extent that we can agree on the range of interpretive modalities available to judges at the time of the Framing.

regarded as best suited to the problems they needed to address.

The Justices of the Marshall Court established no hierarchy among interpretive modalities. As a result, where interpretive modalities supported different conclusions, the Court's decision to favor one modality over another was not determined by legal reasoning. That is, one cannot, and the Justices did not, appeal to positive law to justify a choice among available interpretive strategies.³¹

Because the Marshall Court was committed to establishing the function of the federal courts as neutral arbiters of the law, the Justices did not highlight their appeals to extra-legal considerations. They stated their positions rather than arguing for them; they dismissed contrary positions rather than engaging them. Crucial constitutional judgments turned on extra-legal *ipse-dixit* decisions. These decisions can be reconciled with some version of original meaning. However, because original meaning was contested, contrary *ipse dixit* decisions would have been equally consistent with original meaning.

A. *Meta-Interpretive Issues in the Marshall Court*

The Constitution was the first of its kind. There was no consensus about the interpretive method or methods appropriate to this unique document.³² Faced with specific questions of constitutional interpretation on which the Framers themselves were sharply divided, the early Justices made interpretive choices that were not dictated by the Constitution itself and were constrained, but not determined, by general interpretive canons.³³ The Justices were not far enough removed from the time of the founding for there to be occasion to introduce the notion of a living constitution. But, as Jonathan Gienapp's work indicates, the Framers did not subscribe to

³¹ See HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY § 45 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1934) (calling the law a frame without a picture); HANS KELSEN, PURE THEORY OF LAW 353 (Max Knight, trans., 2d ed. 1967) (arguing that legal norms provide the frame within which various interpretations can arise; however, those interpretations do not involve cognition and application of higher norms but only exercises of will in the furtherance of legal policy).

³² See, e.g., Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 159–61 (2014) (rejecting the notion that interpretive methodologies appropriate to state constitutions could be applied to the federal Constitution and stressing ways in which the unique nature of the latter called for different interpretive approaches); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 560–78 (2003) [hereinafter Nelson, *Interpretive Conventions*] (discussing different interpretive traditions at the time of the Framing).

³³ See Lash, *supra* note 32, at 154–65 (describing methodological heterodoxy in constitutional interpretation at the time of the drafting and ratification of the Constitution and during the Early Republic).

the notion that the Constitution could have a fixed meaning and purpose in 1789.³⁴ That idea slowly took root during debates over the Constitution's meaning in the 1790s.³⁵

The Marshall Court's constitutional decisions addressed not only interpretive issues but also meta-interpretive issues. That is, the Justices addressed subjects of interpretation that also provided the framework for resolving other interpretive issues.³⁶ Meta-interpretive frames establish the parameters within which constitutional decision makers can resolve particular interpretive issues. In *Marbury v. Madison*, for example, the meta-interpretive frame was the question of judicial review of legislative and executive actions.³⁷ In *McCulloch v. Maryland*, the Court addressed dual meta-interpretive issues entailing the extent of Congress's implied powers and the scope of state sovereignty.³⁸ Because the Framers reached no consensus on any of these meta-interpretive issues, originalism cannot resolve them. Constitutional decision makers had to resort to sources of authority other than the Constitution's original meaning, such as their own political, pragmatic, or theoretical commitments in order to resolve them.

Differences between originalists and non-originalists may amount to disagreements about when or how often original meaning runs out.³⁹ In the Marshall Court, because interpretation took place within a non-originalist meta-interpretive frame, original meaning ran out before interpretation began.⁴⁰

B. *Non-Hierarchical Interpretive Pluralism*

During the Framing and the Early Republic, there were no fixed rules for the interpretation of a written constitution. Caleb Nelson elaborates:

Did such a document trigger the rules of interpretation applicable to an ordinary statute? To a treaty? To a contract? Might different aspects of the Constitution implicate different sets of preexisting conventions, so that a hybrid

³⁴ GIENAPP, *supra* note 19, at 9–12.

³⁵ See *id.* at 1–19 (introducing his thesis that the conception of the Constitution as fixed was not inevitable and was developed in the course of debates among the Founders in the 1790s).

³⁶ D. A. Jeremy Telman, *All That Is Liquidated Melts into Air: Five Meta-Interpretive Issues*, 24 BARRY L. REV. 1, 5 (2019).

³⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 177 (1803).

³⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁹ Telman, *Originalism*, *supra* note 22, at 551.

⁴⁰ In a related article, I have argued that the pre-Marshall Court also operated in a zone of construction in which original meaning ran out. See D. A. Jeremy Telman, *Originalism and Second-Order Ipse Dixit Reasoning in Chisholm v. Georgia*, 67 CLEVELAND ST. L. REV. 559, 559 (2019) [hereinafter Telman, *Originalism and Second-Order Ipse Dixit Reasoning*] (identifying the question of state sovereignty as the meta-interpretive issue dividing the Court).

approach was appropriate? Could special canons of construction, not applicable to any ordinary legal documents, be derived from the Constitution's unique context and purpose? If so, what were those canons? The answers to these questions were far from clear, and members of the founding generation expressed a variety of different views.⁴¹

For example, Nelson cites an 1820 case from a South Carolina court in which the judge lamented: "The Constitution of the United States . . . is so unlike those instruments for which the common law has provided rules of construction, that a Court must always feel itself embarrassed whenever called upon to expound any part in the smallest degree doubtful."⁴²

In his treatise on the Constitution, Joseph Story concluded that disagreements about the Constitution's meaning resulted from "the want of some uniform rules of interpretation expressly or tacitly agreed on by the disputants."⁴³

While this Article does not argue that the Marshall Court never engaged in textualist or intentionalist interpretive methodologies, those methods did not predominate. As a result, tensions do exist between early nineteenth-century constitutional adjudication and forms of contemporary originalism that privilege one interpretive modality over others.⁴⁴ The Marshall Court's non-hierarchical interpretive pluralism is inconsistent with John McGinnis and Michael Rappaport's "original methods originalism," to the extent that that approach excludes modalities that were common during the founding era.⁴⁵

⁴¹ Nelson, *Interpretive Conventions*, *supra* note 32, at 555–56.

⁴² *Id.* at 569 (citing *M'Clarín v. Nesbit*, 11 S.C.L. (2 Nott & McC.) 519, 520 (S.C. Const. App. 1820)).

⁴³ STORY, *supra* note 28, at 304.

⁴⁴ Not all forms of originalism require a choice or a preference. McGinnis and Rappaport find intentionalism and textualism equally valid. See MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, *supra* note 7, at 137 (finding substantial support for textualism and some support for intentionalism in the evidence of the interpretive approach of the Framers).

⁴⁵ McGinnis and Rappaport argue that constitutional construction was not an original method. See John O. McGinnis & Michael R. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 773 (2009) [hereinafter *Original Methods*] ("[A]dvocates of construction have not provided evidence that anyone embraced construction at the time of the Constitution's enactment, and we have been able to find none."). However, William Baude and Stephen Sachs, who likewise offer a version of original methods originalism, think construction was an original method. See Baude, *Originalism*, *supra* note 8, at 2357–58 (acknowledging that originalists turn to construction or liquidation to resolve ambiguities or vagueness in the constitutional text); William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1118 (2017) (finding the distinction between construction and interpretation "both real and useful"). McGinnis and Rappaport also argue that living constitutionalism was not an original method. *Original Methods*, *supra* note 45, at 788–92.

The Justices of the Marshall Court engaged in nine well-recognized interpretive modalities: textualism, intentionalism, structuralism, purposivism (teleology), and appeals to precedent, history, morals, logic, or common sense, which may also entail pragmatic considerations.⁴⁶ Like Philip Bobbitt, I acknowledge that there may be additional modalities,⁴⁷ but these seem to be the main ones. The Justices freely deployed whichever interpretive modality struck them as fitting for the case. They frequently combined interpretive modalities as all supporting the same outcome, but one can see from the arguments of counsel and from responses in the political press that the interpretive modalities did not always coalesce.

C. *Second-Order Ipse Dixit*

If first-order *ipse dixit* is unreasoned decision making, second-order *ipse dixit* involves an unreasoned choice between or among equally valid interpretive options. Lacking either precedent or evidence of a clear consensus among the Framers, Justices of the early Court often had recourse to second-order *ipse dixit* decisions in constitutional adjudication. Second-order *ipse dixit* judgments are not without justification, but they are decisions made at a crossroad where the arguments in favor of one path or another are equally valid. The judge decides simply by choosing one of two equally viable options. In the opinions of the Marshall Court, the Justices asserted the correctness of their chosen path and ignored alternatives or waived them away with incredulity.

1. *Cases of First Impression and Second-Order Ipse Dixit*

A pluralistic approach to interpretation permits judges to exercise, consciously or unconsciously, considerable discretion.⁴⁸ Where different interpretive approaches

The claim is empirical, and I cannot address it fully in this space. Because McGinnis and Rappaport say they find no evidence of construction, only a few counterexamples are necessary to suggest that their review of original methods is either incomplete or conceptually flawed. While the example is not clear-cut, Joseph Story provides evidence that the Framers considered a change in circumstances as grounds for ignoring a statute's commands:

We find it laid down in some of our earliest authorities in the common law, and civilians are accustomed to a similar expression, *cessante legis praemio, cessat et ipsa lex* [the law itself ceases if the reason for the law ceases]. Probably it has a foundation in the exposition of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature is to be regarded and followed.

STORY, *supra* note 28, at 350. The context makes clear that Story thinks the Latin maxim applies to the Constitution, which suggests an endorsement of something like living constitutionalism. See Telman, *Originalism and Second-Order Ipse Dixit Reasoning*, *supra* note 40, at 569 n.52.

⁴⁶ Telman, *Originalism and Second-Order Ipse Dixit Reasoning*, *supra* note 40, at 570.

⁴⁷ See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 8 (1982) [hereinafter BOBBITT, *CONSTITUTIONAL FATE*] (acknowledging that his list of interpretive modalities might not be complete and that it could be supplemented).

⁴⁸ See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE*

can lead to different results, the judge may choose the approach that accords with her own sense of justice, practicality, or fairness to the parties to the dispute. To this day, even originalists have articulated no hierarchy of interpretive modalities that could cabin judicial discretion.⁴⁹

Because case law now significantly hems in judges' discretion, *ipse dixit* judgments are less common today, or at least, harder to identify. Still, they are not unheard of. Philip Bobbitt relates a story of a troubled Judge Friendly who sought counsel from Judge Learned Hand on how to resolve a difficult case.⁵⁰ According to Bobbitt, Learned Hand's advice was, "Damn it, Henry, just decide it! That's what you're paid for."⁵¹ Bobbitt agrees. In difficult cases, Bobbitt acknowledges that interpretive modalities do not constrain the judge. "The case must be *decided*."⁵²

2. *Varieties of Ipse Dixit*

Judges never reveal their *ipse dixit* methods by announcing as the ground for their decision: "Because I say so." Moreover, because judges want their reasoning to sound in law rather than in other normative realms, they are unlikely to volunteer the non-legal reasons that guide them in their legal analysis. Instead, judges disguise their *ipse dixit* as other things. *Ipse dixit* thus can be hard to identify, and it can take many forms.

Judges sometimes invoke the Framers' intentions when they are actually just

OF LAW 34 (1996) (arguing that Marshall learned from his time as a Virginia practitioner "that judges in the ordinary course of deciding cases had broad discretion to determine what the law was, compelled as they were to choose from a variety of sources").

⁴⁹ John McGinnis and Michael Rappaport do not explain how their "original methods" originalism resolves issues when different interpretive modalities lead to contradictory results. See *Original Methods*, *supra* note 45, at 752 (introducing their conclusion that living constitutionalism and constitutional construction were not among the original methods, but that ambiguity and vagueness could be resolved by considering evidence of history, structure, purpose, and intent). William Baude recognizes a hierarchy with originalism at the top. See Baude, *Originalism*, *supra* note 8, at 2353 (contrasting his organization of interpretive methods with the "flat" organization offered under pluralist theories). However, Baude's is an inclusive originalism, embracing multiple interpretive modalities. See *id.* at 2352 (describing an "inclusive" originalism that recognizes "the validity of other methods of interpretation or decision"). Moreover, Baude concedes "a certain amount of [judicial] discretion both in articulating the rules and in deciding whether to apply them in a particular case." *Id.* at 2360. Jack Balkin maintains that lawyers and judges who "embrace multiple interpretive theories" may "adopt a hierarchical ordering," but he does not seem to think such a hierarchy is necessary, nor does he say what it is. Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 217 (2018) [hereinafter Balkin, *Arguing About the Constitution*].

⁵⁰ PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 167 (1991).

⁵¹ *Id.*

⁵² *Id.*

ascribing their own interpretation to the Framers. In the early nineteenth century, when no reliable records of the debates at the Constitutional Convention or the ratification assemblies existed, judges relied on their own memories or on accounts of those debates to establish intention.⁵³ Another form of *ipse dixit* can look like textualism. A judge can provide a dispositive textual interpretation while ignoring or downplaying the significance of a rival textual interpretation of similar plausibility. Moreover, teleological interpretations can exist in tension with textual readings, and the Marshall Court availed itself of both, thus enabling the Justices to favor textual or teleological approaches based on *ipse dixit* hunches.

In the early Court, appeals to the Framers frequently served as both a prelude and a disguise for *ipse dixit* pronouncements. Justices in the Early Republic would frequently state that they wanted to discern the intentions of the Framers, but they rarely made specific references to Framing-era texts.⁵⁴ In most cases, when nineteenth-century Justices invoked the Framers or the Constitutional Convention or the ratification conventions, they would not specify a Framing-era text, a part of the Constitutional Convention, or the ratification convention of a particular state.⁵⁵ Justices rarely referenced documents from the period beginning with the convening of the Constitutional Convention in 1787 through the ratification of the Bill of Rights in 1791.⁵⁶ Early Justices drew on their own recollections of the founding events, but those recollections were by no means always in accord.

The early Court's failure to research the intentions of the Framers is unsurprising, given that the source materials that make originalism possible today were not available to nineteenth-century judges. The first scholarly edition of the proceedings of the Constitutional Convention did not appear until 1911.⁵⁷ Because most twenty-first-century originalists are more concerned with original public meaning than they are with original intent, the more important documents relate not to the

⁵³ Telman, *Originalism and Second-Order Ipse Dixit Reasoning*, *supra* note 40, at 573.

⁵⁴ See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 231 (1995) (calling appeals to the Framers "a literary device"); Lorianne Updike Toler & J. Carl Cecere, *Pre "Originalism,"* 36 HARV. J.L. & PUB. POL'Y 277, 308–09 (2012) (concluding that in its first 100 years, the Supreme Court specifically referenced individual Framers only 21 times, and most of those refer to influential people from the Framing era who did not actually participate in the Framing, or to Framers who wrote in their personal capacity).

⁵⁵ Toler & Cecere, *supra* note 54, at 310.

⁵⁶ See *id.* at 304–05 (finding that less than 10% of citations to historical materials reference materials from the period of the Framing). Early on, Paul Brest noted that "if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law . . . explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents." Brest, *supra* note 12, at 234.

⁵⁷ See generally 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

drafting of the Constitution in Philadelphia, but to its ratification in the several States. But the record of ratification in the states is no better. The first comprehensive scholarly account of ratification was published in 2010.⁵⁸ Even today, the documentary record relating to ratification is incomplete.⁵⁹

The record of deliberations relating to the Bill of Rights is also problematic. The first Congress discussed the Amendments, so we know something of the issues up for debate.⁶⁰ However, the congressional debates leave many fundamental issues unresolved.⁶¹ Moreover, the final text was the product of a committee that kept no minutes of its proceedings and of a vote in the Senate, whose deliberations were secret by design.⁶² We know almost nothing of the state deliberations concerning the adoption of the Bill of Rights.⁶³

Justices in the Marshall Court sometimes invoke the Framers' intentions when they are actually just ascribing their own interpretation to the Framers.⁶⁴ While the Supreme Court frequently invokes the intentions of the Framers in constitutional adjudication,⁶⁵ through the nineteenth century, the Court rarely sought after or

⁵⁸ PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010) (discussing previous scholarship on ratification, the best of which consisted of two edited collections that appeared in 1988 and 1989 but which devoted separate chapters to the ratification process in each state and thus missed part of the story).

⁵⁹ See *id.* at xiii–iv (describing the way Federalists conspired to create a one-sided record of the ratification debates that favored their perspective).

⁶⁰ See generally *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* (Helen E. Veit et al. eds., 1991).

⁶¹ See, e.g., Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 *MISS. L.J.* 1, 155 (2007) (observing that the legislative history does not clarify whether “due process” was intended to incorporate common-law standards); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 *MO. L. REV.* 1, 9 (2007) (noting that the legislative history does not clarify whether Congress intended for the Bill of Rights to apply to the states); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 *U. CHI. L. REV.* 1513, 1533 (1987) (calling the legislative history of the Bill of Rights “exceptionally unreliable”).

⁶² See RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 235, 237 (2006) (noting that “little is known about the debate” in the Senate that winnowed the Bill of Rights down from seventeen Amendments to twelve because “the Senate met behind closed doors until 1794, and thus the record of their discussion is sparse”).

⁶³ See Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 *COLUM. L. REV.* 1369, 1424 (1991) (citing multiple authorities).

⁶⁴ See Christopher L. Eisgruber, Marbury, *Marshall, and the Politics of Constitutional Judgment*, 89 *VA. L. REV.* 1203, 1221 (2003) (noting that John Marshall derived “the Framers’ intent from his theory of constitutional purposes, not the other way around”).

⁶⁵ See Toler & Cecere, *supra* note 54, at 302–03 (finding that roughly 60% of the Court’s

ruled based on those intentions.⁶⁶

3. *Ipsse Dixit as a Descriptive, Not a Normative Term*

Second-order *ipse dixit* decisions are not arbitrary decisions. Judges are constrained through the usual mechanisms including history, precedent, prudential considerations, logic, and common sense. Our common law legal culture entails extensive judicial elaboration of the legal reasoning that leads to the holding. This tradition of discursive rationality constrains judges in ways that the political branches are not constrained. Legislation may be the product of horse-trading and back room deals. Executive officers exercise considerable discretion and, absent scandal and investigation, need not explain their actions or inaction, or even their decision-making processes. Judges, by contrast, must justify their rulings, and they do not want their reputations as apolitical and impartial arbiters of legal disputes tainted by aspersions of political partisanship, conflicts of interest, or reasoning to a pre-ordained result. Politicians, journalists, and judges empowered to challenge precedent will scorn and ridicule partisan or poorly reasoned judicial opinions.⁶⁷

In addition, Jack Balkin has argued persuasively that judges are bound by something akin to a fiduciary duty of good faith interpretation which exerts its own constraining pull on judges.⁶⁸ Balkin's version of originalism requires fidelity to constitutional principles but not to the Framers' original expectations regarding how the constitutional text would be applied in specific situations.⁶⁹

I do not intend the phrase *ipse dixit* in a pejorative sense, nor do I think *ipse dixit* reasoning is inconsistent with Balkin's idea of constitutional fidelity. Moreover, *ipse dixit* reasoning is neither originalist nor living constitutionalist reasoning. Equally importantly, *ipse dixit* reasoning is not opposed to originalism or living constitutionalism. Originalists and non-originalists both engage in second-order *ipse dixit* reasoning. During the Early Republic, second-order *ipse dixit* reasoning predominated because so many constitutional cases raised issues of first impression on which the Framers were divided. In such situations, the originalism/non-originalism

statements regarding its own interpretive method in cases of constitutional first impression are best described as intentionalist).

⁶⁶ See *id.* at 303 (concluding, upon closer inspection, that the Justices may have been doing something other than actually relying on the intention of the Constitution's creators).

⁶⁷ On the influence of public opinion on the Court, see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

⁶⁸ See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 103–04 (2011) (arguing that fidelity to the text is the entire point of interpretation and arguing that judges and lawyers, whether or not they understand themselves as originalists, adhere to constitutional fidelity).

⁶⁹ See Balkin, *Abortion*, *supra* note 17, at 295 (explaining that fidelity to the Constitution means fidelity to the words and their underlying principles, but not to original intended or expected applications).

divide does little explanatory work.⁷⁰

III. JOHN MARSHALL: ESTABLISHING THE RULE OF LAW

John Marshall's Constitution is, to a remarkable extent, our Constitution.⁷¹ Twenty-first century courts continue to follow his bold, sweeping judgments.⁷² In addition to his doctrinal rulings, he also established the federal judiciary as a co-equal branch of government and established the Supreme Court's authority "to say what the law is."⁷³

Marshall's accomplishments are especially surprising given the federal judiciary's insignificance at the end of the eighteenth century. When John Marshall joined the Supreme Court in 1801, it was not a well-regarded institution;⁷⁴ it certainly was not co-equal with the political branches.⁷⁵ While the Court's authority was not

⁷⁰ See *supra* note 12.

⁷¹ Joseph Story suggested that Marshall's epitaph should be, "[h]ere lies the expounder of the Constitution." JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION xi (1996) [hereinafter SMITH, JOHN MARSHALL]; see, e.g., *id.* at 2 (calling John Marshall's great decisions "the ABCs of American constitutional law"); see also JOEL RICHARD PAUL, WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 1 (2018) ("None of the founding generation of American leaders had a greater impact on the American Constitution than John Marshall"); JAMES BRADLEY THAYER, JOHN MARSHALL 57 (1901) (rating Marshall in the field of constitutional law "preëminent,—first, with no one second").

⁷² See, e.g., PAUL, *supra* note 71, at 3 (crediting Marshall with having conceived "virtually every foundational doctrine of constitutional law that has guided the United States for two centuries."); Peter J. Smith, *The Marshall Court and the Originalist Dilemma*, 90 MINN. L. REV. 612, 614–15 (2006) [hereinafter Smith, *Originalist Dilemma*] (listing among Marshall's enduring contributions to doctrine: a broad construction of the Necessary and Proper Clause; the notion of a dormant Commerce Clause; the advent of the Supreme Court's authority to review state courts; the establishment of federal jurisdiction over suits against state officers; and the narrow construction of States' immunity from suit in federal court).

⁷³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

⁷⁴ See, e.g., DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 3 (1985) (noting that the early Court had a small case load and that its "modest record" tends to get overlooked); WOLFE, *supra* note 3, at 39 (contending that the Court in the eighteenth century had not established itself "as a powerful institution among the federal government's separated branches"); Smith, *Originalist Dilemma*, *supra* note 72, at 614 (observing that during the first decade of the new republic, constitutional issues were generally addressed in the political branches rather than in the courts).

⁷⁵ CASTO, *supra* note 54, at 247; see also SMITH, JOHN MARSHALL, *supra* note 71, at 2–3 (saying of the pre-Marshall Court, its "authority was vague and its caseload was light"); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 33 (1993) (citing "its relative unimportance" as the pre-Marshall Court's outstanding characteristic); William W. Van Alstyne, *A Critical Guide*

challenged, neither was it frequently exercised.⁷⁶ Before 1801, the federal courts adjudicated 61 cases.⁷⁷ The institution was so little considered that the designers of the new capital city gave no thought to creating a building for the Supreme Court,⁷⁸ and the Marshall Court held proceedings in five different buildings, including some very humble settings.⁷⁹

The requirement that Justices ride circuit, which involved unpleasant and even dangerous carriage journeys on unreliable roads,⁸⁰ undoubtedly contributed to the difficulty of recruiting qualified people to the position.⁸¹ Numerous leading statesmen of the 1790s declined appointment to the Court, and several Justices resigned from the Court to accept safer and more prestigious positions in state government.⁸² In defending the creation of 16 new circuit courts in 1801, Gouverneur Morris pointed out that without them, the President should seek out men as Supreme Court nominees with “the agility of a postboy” rather than the “learning of a judge.”⁸³

to *Marbury v. Madison*, 1969 DUKE L.J. 1, 2 (1969) (invoking the 1805 impeachment of Justice Samuel Chase and calling the Court “a most fragile institution”).

⁷⁶ See PETER CHARLES HOFFER ET AL., *THE SUPREME COURT: AN ESSENTIAL HISTORY* 48 (2007) (finding just over 40 cases reported between 1790 and 1801); see also CURRIE, *supra* note 74, at 3–58 (discussing, on average, about one decision of the pre-Marshall Court per year, suggesting that about a dozen of those cases had constitutional ramifications); WOLFE, *supra* note 3, at 39 (stating that the pre-Marshall Court decided only four important constitutional cases).

⁷⁷ See 1 GEORGE J. LANKEVICH, *THE FEDERAL COURT, 1787–1801* viii (1986) (noting that the courts “disposed of” an additional 18 cases).

⁷⁸ PAUL, *supra* note 70, at 377–78 (describing the Court’s fifth courtroom since Marshall became Chief Justice, “a cramped, oddly shaped triangular room” located under the U.S. Capitol building “in an obscure corner of the basement”).

⁷⁹ See *id.* at 3 (noting that the Court’s first Washington, D.C. home was in the basement of the U.S. Capitol). After the British burned Washington in the War of 1812, Congress did not rebuild the Supreme Court’s chamber, leaving the Justices to “fend for themselves” and “hold hearings in the home of the court clerk.” *Id.* at 326–27.

⁸⁰ See Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 6 (1998) [hereinafter *SERIATIM*]; *id.* at 6, 22 n.17 (citing sources on the difficulties of circuit riding). Marshall himself was injured when his stagecoach overturned on his way to Washington from Richmond. As a result, he was absent at the start of the Court’s 1812 term. THAYER, *supra* note 71, at 55.

⁸¹ See LANKEVICH, *supra* note 77, at 258 (suggesting that Justice Thomas Johnson likely resigned from the Court in January 1793 in order to escape the obligation to ride circuit).

⁸² See *id.* at x (naming John Jay and John Rutledge as having left the bench to serve in state governments); *id.* at 34 (describing a letter in which President Washington invited both Charles Pinckney and Edward Rutledge to join the Court and observing that both declined); *SERIATIM*, *supra* note 80, at 2–3 (naming Charles Pinckney, Alexander Hamilton, and Patrick Henry among those who declined and John Rutledge and John Jay among those who resigned).

⁸³ 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 60 (1919).

In the ugly transition from John Adams's Federalist administration to Jeffersonian Republicanism, warring factions treated the judiciary as their political plaything. Having lost the election of 1800, the Federalists attempted to transform the hitherto "meager and somewhat inconsequential"⁸⁴ judiciary into a brake on the Republican movement for sweeping political change. The lame-duck Federalist Congress passed the Judiciary Act of 1801, which expanded the judiciary and enabled President Adams to name Federalists to newly-established judicial posts.⁸⁵ Once in power, the Republicans introduced a countermeasure, passing the Judiciary Act of 1802, which repealed the Federalists' Judiciary Act of 1801.⁸⁶ Soon after John Marshall was appointed Chief Justice in 1801, the newly-elected Republican Congress prevented his Court from overturning that Act by legislatively cancelling the Court's sittings scheduled for 1802.⁸⁷

John Marshall very quickly transformed many aspects of the Court. He replaced the Court's tradition of having the Justices deliver their opinions *seriatim* with unanimous opinions in most cases.⁸⁸ Marshall's habit of writing the majority of the opinions himself put the imprimatur of the Chief Justice on the Court's judgments, enhancing the prestige of both the Court and its Chief Justice.⁸⁹ The Marshall Court asserted its authority to say what the law is. In addition to the one federal law invalidated in *Marbury v. Madison*, the Court exercised its power to invalidate state laws on at least 14 occasions.⁹⁰

Marshall's authority as an interpreter of the Constitution seems both obvious

⁸⁴ WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 57 (2000) [hereinafter NELSON, *MARBURY*]; see also Charles F. Hobson, *John Marshall, the Mandamus Case and the Judiciary Crisis*, 72 *GEO. WASH. L. REV.* 289, 291 (2003) ("The judiciary's prospects were not auspicious in 1801.").

⁸⁵ See SMITH, *supra* note 71, at 302–03 (describing the Judiciary Act's merits but also acknowledging that it was rightly seen as a partisan measure that enabled the outgoing President, John Adams, to stock the federal bench with devoted Federalists).

⁸⁶ NELSON, *MARBURY*, *supra* note 84, at 58.

⁸⁷ See James M. O'Fallon, *The Politics of Marbury*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 17, 26 (Mark A. Gerber & Michael Perhac eds., 2002) (describing how the Republican Congress eliminated the June 1802 sitting of the Court and reduced its annual sittings from two, in June and December, to one in February). Congress's worries were not justified. The Supreme Court upheld the Judiciary Act of 1802 in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), decided five days after *Marbury. Id.* at 27.

⁸⁸ See *SERIATIM*, *supra* note 80, at 20.

⁸⁹ Telman, *Originalism and Second-Order Ipse Dixit Reasoning*, *supra* note 40, at 579; see PAUL, *supra* note 71, at 236 ("During his thirty-four years as chief justice, Marshall personally wrote 547 opinions. Of these, 511 were unanimous.").

⁹⁰ William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 *MICH. L. REV.* 893, 893 (1978).

and bewildering. His authority is obvious, because as a participant in revolutionary events and in the ratification debates, Marshall was well positioned to provide authoritative interpretations of the Constitution.⁹¹ His influence is bewildering because the Marshall era dawned as the sun set on the fortunes of his Federalist party.

Non-hierarchical interpretive pluralism and resorting to second-order *ipse dixit* decision-making characterized the Marshall Court as they did its predecessor Courts.⁹² Nonetheless, during Marshall's Chief Justiceship the Court came to be seen as a unique protector of the Constitution and the Republic, at least by some. A commentary from 1827 illustrates this view:

In the city of Washington there exists a power, visible only two or three months in the year; a power without arms, without soldiers, without treasure; whose only weapon is the moral force of reason and truth, and yet to whose decisions the whole country submissively bows. This power is the venerable Bench of the Supreme Court of the United States.⁹³

The Supreme Court achieved this reputation during the Marshall era because most politically-engaged Americans were persuaded that although members of the Court might have their partisan opinions, in its constitutional rulings the Court looked only to the law.⁹⁴ In so doing, as Bill Nelson has pointed out, the Court acted "strategically."⁹⁵ In *Marbury v. Madison*, for example, Justice Marshall proclaimed in dictum: "the Court's authority to enforce the law, lectured the [P]resident for violating it,"⁹⁶ and then refused to enforce the law on jurisdictional grounds.⁹⁷ The result, "a judgment acceptable both to the [P]resident and to Congress,"⁹⁸ established the Court's power, including its power to check the political branches in the future.⁹⁹ However, the Court wisely chose not to exercise that power against the

⁹¹ *Infra* notes 103–18.

⁹² See Telman, *Originalism and Second-Order Ipse Dixit Reasoning*, *supra* note 40, at 571–78 (discussing interpretive pluralism and second-order *ipse dixit* reasoning in the eighteenth-century Supreme Court).

⁹³ James Kent, *Kent on American Law*, 1 AM. Q. REV. 162, 179 (1827); see also G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* 459 n.143 (1991) (calling such commentary characteristic of the writings on the Court in the early nineteenth century).

⁹⁴ *Id.* at 777; see also NELSON, *MARBURY*, *supra* note 84, at 59 (stressing the extent to which the Justices of the Marshall Court achieved their goals by distinguishing between the domains of law and politics).

⁹⁵ *Id.* at 70.

⁹⁶ *Id.*

⁹⁷ See THAYER, *supra* note 70, at 77 (stating that *Marbury* decided only that "the court had no jurisdiction to do what they were asked to do in that case").

⁹⁸ NELSON, *MARBURY*, *supra* note 84, at 70.

⁹⁹ Thayer credits Marshall's introduction of unanimous opinions as having given "the judicial department a unity like that of the executive." THAYER, *supra* note 70, at 54–55.

sitting President, his Secretary of State, or the Republican-dominated Congress.¹⁰⁰

Although Marshall regarded the law as something apart from politics, he nonetheless used the law to achieve political ends. Regularly, Marshall's interpretive method entailed *ipse dixit* reasoning that enabled him to interpret the Constitution in good faith but also in accordance with his nationalist perspective on the Constitution. In the service of both ends, Marshall and his Federalist allies on the bench manipulated procedural rules to get issues before the Court and to decide those issues in the absence of a clear case or controversy.¹⁰¹ In *Marbury*, he did so in a self-conscious effort to strengthen the Court and the judicial branch. *Marbury's* audacity led Corwin to describe it as a "deliberate partisan *coup*."¹⁰² If it was a *coup*, it was a subtle one. Marshall's ruling did nothing to revive his flagging party.

A. *Marshall as Framer and Partisan*

As one of his biographers puts it, John Marshall was "most assuredly" a "child of the revolution."¹⁰³ Marshall joined the revolution in 1775 as a newly-commissioned, 19 year-old Lieutenant in the Culpeper minutemen.¹⁰⁴ He saw his first military action in December of that year, taking on British regulars outside of Norfolk on the orders of Colonel Patrick Henry.¹⁰⁵ As a member of Washington's Continental line, Marshall rose to the rank of captain and served as a deputy judge advocate attached to Washington's staff. Captain Marshall fought in the Pennsylvania campaign in 1777 and endured the following winter in Valley Forge,¹⁰⁶ remaining a military man until 1781.¹⁰⁷ Bill Nelson contends that this wartime experience was important in three ways: it made Marshall a committed nationalist, a protégé of Washington, and a leader and a shaper of consensus.¹⁰⁸

By the following year, Marshall was both a practicing attorney in Richmond and a member of Virginia's House of Delegates.¹⁰⁹ At the age of 32, Marshall, now

¹⁰⁰ NELSON, MARBURY, *supra* note 84, at 63.

¹⁰¹ See U.S. CONST. art. III, § 2, cl. 1 (limiting the courts' jurisdiction to enumerated cases and controversies). For examples, see *infra* Part III. C.

¹⁰² EDWIN S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS 9 (1963).

¹⁰³ R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 1 (2001).

¹⁰⁴ *Id.* at 2–3.

¹⁰⁵ *Id.* at 3–4.

¹⁰⁶ *Id.* at 21–22.

¹⁰⁷ *Id.* at 29.

¹⁰⁸ NELSON, MARBURY, *supra* note 84, at 41–42.

¹⁰⁹ NEWMYER, *supra* note 103, at 39.

a committed Federalist,¹¹⁰ became, in James Madison's estimation, the fifth most influential delegate at the Virginia constitutional ratification convention.¹¹¹ Once the Constitution went into effect, Marshall became one of the leading defenders of the Washington administration in the Virginia legislature.¹¹² He spoke on behalf of the policies that were most offensive to the Jeffersonian Republicans, including the foreign policy culminating in the Jay Treaty.¹¹³ At Washington's urging, Marshall ran for and narrowly won election to Congress in 1799,¹¹⁴ despite the declining fortunes of the Adams administration and the unpopularity of the Alien and Sedition Acts, which Marshall rather weakly opposed.¹¹⁵ Marshall's service in the House of Representatives was short-lived, but it cemented his relationship with President Adams, whose positions he defended.¹¹⁶ President Adams showed his appreciation by appointing Marshall Secretary of War and, four days later, Secretary of State.¹¹⁷ Marshall was in that position only nine months before Adams appointed him Chief Justice.¹¹⁸

If Marshall's revolutionary credentials enhanced his authority, his nationalist credentials should have undermined it. As Albert Beveridge put it, "American nationalism was Marshall's one and only great conception and the fostering of it the purpose of his life."¹¹⁹ One possible explanation for Marshall's influence notwithstanding his party affiliation is that he was well liked across the political spectrum.

¹¹⁰ See *id.* at 51 (describing Marshall as "strongly federal").

¹¹¹ See *id.* at 50 (noting the impressive competition given the composition of the Virginia Convention). This estimation is a bit hard to credit, as Marshall made only three relatively short speeches during the 25 days of debate. *Id.* at 55.

¹¹² See *id.* at 106, 109 (discussing Marshall's role in organizing a pro-administration rally in response to a visit to Richmond by Edmond-Charles Genet, the new French minister to the United States, and his efforts defending the Jay Treaty in the Virginia legislature).

¹¹³ See *id.* at 109 (describing Marshall as assuming "the leadership of the Federalists of Virginia"); PAUL, *supra* note 70, at 104–05 (describing Marshall's defense of the Jay Treaty).

¹¹⁴ NELSON, MARBURY, *supra* note 84, at 46. See NEWMYER, *supra* note 103, at 124 (noting that Marshall won the election by 108 votes).

¹¹⁵ PAUL, *supra* note 71, at 180–81 (quoting Marshall's letter to the *Virginia Herald* in which he stated that, had he been in Congress, he would have opposed the Alien and Sedition Acts not because they violated the First Amendment but because they were "useless").

¹¹⁶ See NELSON, MARBURY, *supra* note 84, at 47 (discussing Marshall's role defending President Adams' position in the Nash/Robbins affair); see also PAUL, *supra* note 71, at 191 (detailing Marshall's arguments in the Nash/Robbins affair, culminating in his characterization of the President as the "sole organ" of United States foreign relations).

¹¹⁷ See NELSON, MARBURY, *supra* note 84, at 48.

¹¹⁸ NEWMYER, *supra* note 103, at 112.

¹¹⁹ BEVERIDGE, *supra* note 84, at 1; see also THAYER, *supra* note 71, at 90 (proclaiming that Marshall's "great service to the country . . . was that of planting the national government on the broadest and strongest foundations"); WHITE, *supra* note 93, at 2 (clarifying that eighteenth-century nationalism was "oriented primarily toward preserving the federal government against

He was elected to the Virginia House of Delegates in 1795 despite the fact that he did not run and instead endorsed another candidate.¹²⁰ During the campaign through which Marshall won election to Congress, he was the subject of personal attacks as a “closet aristocrat.”¹²¹ Patrick Henry, whom Marshall had opposed in the Virginia ratification convention, wrote a letter of support, professing his love for Marshall based on his actions “as a Republican, [and] as an American.”¹²²

Marshall was a Federalist whom a Republican could love. Bill Nelson explains that he was a moderate, in the line of Washington and Adams and opposed to Hamilton’s radical wing of the Federalist Party.¹²³ Such distinctions seemed to matter little in the nasty presidential campaign of 1800. Nonetheless, when Marshall was appointed Chief Justice, he was confirmed with “the enthusiastic support of all fifteen Jeffersonian Republicans.”¹²⁴ In part, Marshall’s appeal was a product of his personality. He was charming and gracious by all accounts. Patrick Henry rushed to Marshall’s defense not only because of his service to his country but because of his “always pleasant” temper and disposition and his unquestioned “talents and integrity.”¹²⁵

Marshall’s republican charms were lost on Jefferson himself, who set out to eradicate “the spirit of Marshallism” from the Supreme Court.¹²⁶ Their enmity is

centrifugal encroachments, and only secondarily toward expanding national power”).

¹²⁰ NEWMYER, *supra* note 103, at 109.

¹²¹ *Id.* at 126.

¹²² *See id.* at 126–27, n.81 (quoting Letter from Patrick Henry to Archibald Blair (Jan. 8, 1799), in 1 PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 592–93 (William W. Henry ed., Charles Scribner & Sons 1891)). Marshall’s version of republicanism requires further elucidation. Marshall’s jurisprudence fused classical republicanism with other intellectual traditions, including liberalism, natural law, the common law, and American exceptionalism. *See* WHITE, *supra* note 93, at 51–52 (summarizing the additional traditions that the Marshall Court fused with republican ideology). Marshall adjusted the mixture in light of cultural change. *See id.* at 49 (noting three modifications of classical republicanism: “the proposition that political activity should be nonpartisan and reflect hierarchical social relationships, the proposition that economic activity should simultaneously protect property rights and be responsive to commerce, and the proposition that republican institutions were expected to decay with time”).

¹²³ *See* NELSON, *Marbury*, *supra* note 84, at 41–71 (describing Marshall’s moderation in negotiating the crises brought about by the election of 1800 and leading to *Marbury v. Madison*).

¹²⁴ *Id.* at 51. The Republican enthusiasm for Marshall seems to have had as its proximate cause Marshall’s decision not to oppose Jefferson’s election to the Presidency. *Id.*

¹²⁵ *See* PAUL, *supra* note 71, at 184 n.5 (quoting Letter from Patrick Henry to Archibald Blair (Jan. 8, 1799), in 1 PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 592–93 (William W. Henry ed., Charles Scribner & Sons 1891)).

¹²⁶ *See* NEWMYER, *supra* note 103, at 146–209 (chronicling numerous stand-offs between Marshall and Jefferson and highlighting the personal enmity between the two Virginians).

emblematic of the problems of originalism: conflicts between Jefferson's administration and the Marshall Court turned on the major players' fundamental disagreements as to the meaning of the Constitution and the nature of the polity it had created.¹²⁷ Marshall's efforts to build consensus on the Court in "an effort to conceal cultural tensions and divisions"¹²⁸ were effective, in large part due to his force of character and charm,¹²⁹ until the rise of Jacksonian democracy.¹³⁰ Still, Marshall's most significant contributions to constitutional interpretation endured, in terms of the scope and nature of judicial review, the status of the federal judiciary as a co-equal branch of government, and the meaning of key constitutional provisions.

B. The Courts, the Law/Politics Distinction, and Federalism

The Marshall Court demanded equal dignity for the federal judiciary, asserting its own status as a co-equal branch of government and permitting federal judicial review of state law. For Marshall, Article III embodied the great political principle that "the legislative, executive, and judicial powers, of every well-constituted government, are co-extensive with each other . . ."¹³¹ In the face of "admonitions" that the exercise of federal jurisdiction over state legislation inflicted a wound on the dignity of sovereign states,¹³² Marshall again invoked the law/politics distinction and grimly noted that courts have no choice but to exercise jurisdiction when the duty to do so is a legal mandate.¹³³

Marshall's world view and his political views are best evidenced in his opinions upholding popular sovereignty over compact theory, property rights, and the principle of judicial review. *Marbury* established judicial review, while also setting the

¹²⁷ See *id.* at 176 ("At the core of [Jefferson and Marshall's] dispute lay the unexplored terrain of republican law itself The Constitution, rather than settling the matter, had, since ratification, become the focus of the debate.").

¹²⁸ WHITE, *supra* note 93, at 73.

¹²⁹ PAUL, *supra* note 71, at 298–99, 307 (describing Marshall's ability to win over the Justices whom Jefferson and Madison had appointed to oppose him).

¹³⁰ See SMITH, *supra* note 71, at 3 (acknowledging that Marshall's efforts to build a consensus and to keep the judiciary above the political fray were less successful during the Jackson administration than they had been during Jefferson's).

¹³¹ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818 (1824); see also *Cohens v. Virginia*, 19 (6 Wheat.) U.S. 264, 384 (1821) ("[T]he judicial power of every well constituted government must be co-extensive with the legislature, and must be capable of deciding every judicial question which grows out of the constitution and laws.").

¹³² See *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 437 (1830) ("In the argument, we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity . . .").

¹³³ See *id.* at 438 ("This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.").

stage for the property law decisions that followed, because Marshall treated *Marbury's* position as Justice of the Peace as a vested property right.¹³⁴ *Marbury* also set out Marshall's view of the Court's limited powers of judicial review. The Court could review the legality of legislative decisions, and federal courts could order executive officers to perform their functions, but the Court would not decide political questions.¹³⁵

Marshall endeavored to present his decisions as straightforward applications of legal rules.¹³⁶ He thus intended to distinguish law from politics.¹³⁷ In law, a judge exercises discretion and chooses among legal doctrines, arguments and modalities of interpretation, but the judge does not reach legal conclusions based on policy.¹³⁸ As he put it in *Osborn v. Bank of the United States*, "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion . . ." ¹³⁹ Chris Eisgruber describes Marshall as having created a "distinctly judicial form of politics"—that is, one that requires judges to make "controversial judgments about publicly contested questions of justice and the common good."¹⁴⁰ Marshall's Court strove to do so in a way that was not overtly partisan and contributed to the image of the Court as an institution that simply said what the law was.

And yet, Marshall's apolitical approach to judging was hemmed in on all sides by political considerations. Bill Nelson understands Marshall's approach in *Marbury* as an effort to avoid embroiling "the Court in a political rather than a purely legal matter."¹⁴¹ But Nelson also acknowledges that Marshall was engaged in a political calculus. Granting *Marbury* the mandamus order he sought "could have ended at

¹³⁴ See NELSON, MARBURY, *supra* note 84, at 79 (discussing *Marbury* as a precursor to Marshall's takings decisions in *Fletcher v. Peck* and *Dartmouth College*).

¹³⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 170 (1803) (stating that a citizen may assert legal rights against the executive but that the courts will never entertain "[q]uestions, in their nature[,] political").

¹³⁶ See NEWMYER, *supra* note 103, at 378 (arguing that Marshall's aim was to "make the Court first and foremost a legal institution," a prominent theme in *Marbury*, *McCulloch*, and *Cohens*); WHITE, *supra* note 93, at 197 (noting that "the [Marshall] Court was clearly making political decisions, but it presented these decisions in the official, purportedly neutral, language of the law").

¹³⁷ See Eisgruber, *supra* note 64, at 1229 (noting that Marshall's law/politics distinction assumes an ability to distinguish an exercise of judgment from an exercise of will, which modern readers might view skeptically).

¹³⁸ See NELSON, MARBURY, *supra* note 84, at 3–4 (viewing *Marbury* as embodying the view that only sovereign entities could decide policy, while courts could only apply laws in existence).

¹³⁹ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824).

¹⁴⁰ Eisgruber, *supra* note 64, at 1205.

¹⁴¹ NELSON, MARBURY, *supra* note 84, at 63.

best with Madison's refusal to obey the Court's order and at worst with Congress's impeachment of Chief Justice John Marshall . . ."¹⁴² As two *Marbury* scholars put it, "[a]lthough Marshall claimed to be eliminating political questions from review by the Court, in reality he assumed for the Court the critical power to determine which issues were political and which were law."¹⁴³ The dynamic in *Stuart v. Laird* was similar.¹⁴⁴ The Federalist-dominated Court upheld the Republican Congress's Judiciary Act of 1802.¹⁴⁵ The Justices might not have survived the conflict with the Jeffersonians had they ruled otherwise.¹⁴⁶

Marshall strategically deployed Blackstone and invoked the common law in order to bolster his claim that he stood for nothing other than the rule of law.¹⁴⁷ But his opinions included bald, unapologetic statements of Marshall's partisan view of the Framers' intention to form "a close and firm [u]nion," a union that "cannot exist without a government for the whole" and which would "disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent [s]tates."¹⁴⁸ He denounced the "[p]owerful and ingenious minds" that promoted, with "refined and metaphysical reasoning," state sovereignty and thus induced doubt as to "safe and fundamental principles."¹⁴⁹ Those principles were the *ipse dixit* bedrock of Marshall's constitutional jurisprudence, and he applied them in cases as "tests of the arguments to be examined."¹⁵⁰

Marshall put this methodology into action in *McCulloch v. Maryland*¹⁵¹ and *Cohens v. Virginia*¹⁵² by rejecting compact theory and, by implication, the legal doctrines (nullification) and documents (the Virginia and Kentucky Resolutions) that it spawned.¹⁵³ In *Cohens*, he also read the Eleventh Amendment narrowly to permit

¹⁴² *Id.*

¹⁴³ Susan L. Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301, 336 (1986).

¹⁴⁴ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

¹⁴⁵ See *id.* at 309 (finding "no words in the constitution to prohibit or restrain" Congress from reforming the judiciary as was done in the Judiciary Act of 1802).

¹⁴⁶ NELSON, *MARBURY* *supra* note 84, at 69.

¹⁴⁷ See, e.g., NEWMYER, *supra* note 103, at 165 (emphasizing rule of law themes and reliance on Blackstone in *Marbury v. Madison*); *id.* at 188 (describing Marshall's opinion discrediting the Wilkinson affidavit in the cases of Bollman and Swartwout, Burr's alleged co-conspirators, as a "*Marbury*-like lecture" directed at Jefferson on the rule of law); *id.* at 190 (characterizing the Burr trial as the "climax to Marshall's decade-long battle with Jefferson to make constitutional interpretation the business of judges and lawyers, not politicians").

¹⁴⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821).

¹⁴⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824).

¹⁵⁰ *Id.*

¹⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁵² *Cohens*, 19 U.S. at 264.

¹⁵³ See *McCulloch*, 17 U.S. at 403 (characterizing the ratification of the Constitution in

challenges to state criminal convictions in federal courts,¹⁵⁴ and stressed the priority of the national character of the federal union.¹⁵⁵ He further narrowed the scope of the Eleventh Amendment in *Osborn v. Bank of the United States*, holding that the Eleventh Amendment barred only suits in which the state itself (not one of its officers or subdivisions) was a party.¹⁵⁶

Marshall and Story teamed up to construct an expansive view of the federal courts' admiralty jurisdiction, favoring uniformity over state sovereignty and setting the stage for Marshall's expansive understanding of Commerce Clause powers.¹⁵⁷ The Marshall Court construed the Commerce Clause and the Contracts Clause to negate state powers, the former with the aid of what became the dormant commerce doctrine,¹⁵⁸ the latter by analogy to takings law.¹⁵⁹ All of these rulings are still good law and many are taken as self-evident today, although they were by no means clear when the Marshall Court decided them.

Marshall's Jeffersonian adversaries could occasionally pounce on inconsistencies in his opinions¹⁶⁰ to accuse Marshall of manipulating the law to serve his own

assemblies of the several states as a matter of mere convenience); *Cohens*, 19 U.S. at 381 (observing that "the American people," not state legislatures, "adopted the present constitution").

¹⁵⁴ *Id.* at 411–12 (finding that the Eleventh Amendment applied only to suits commenced by a citizen against a state, a category into which an appeal from a criminal prosecution did not fit). In the alternative, Marshall noted that the Cohens were citizens of Virginia and thus did not come within the Eleventh Amendment's bar on suits brought against a state by citizens of another state. *Id.* at 412; see WHITE, *supra* note 93, at 517. This dictum somehow escaped the Court's notice when it decided *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (barring suit in federal court brought by a citizen raising a federal question against her own state).

¹⁵⁵ See *Cohens*, 19 U.S. at 414 ("These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.").

¹⁵⁶ See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857 (1824) ("[T]he 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record.").

¹⁵⁷ See WHITE, *supra* note 93, at 427–84 (discussing the development of the Court's jurisprudence of admiralty jurisdiction as a struggle involving Marshall, Story, and the Jeffersonian Justice William Johnson).

¹⁵⁸ See *id.* at 485–86 (describing Marshall's inclination in *Gibbons v. Ogden* and *Willson v. Black-bird Creek Marsh Co.* to bar states from regulating in areas in which Congress is empowered to act).

¹⁵⁹ See *id.* at 611 (noting that the Court, in its early Contract Clause cases, seemed to assume a "general principle that a legislature could not take property from A and then give it to B or back to itself").

¹⁶⁰ See, e.g., JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 175 (1997) (quoting Jefferson's estimate of Marshall as a man of "profound hypocrisy"); Thomas Jefferson, *Letter to Judge Spencer Roane*, in 10 WRITINGS OF THOMAS JEFFERSON 140, 141 (Paul Leicester Ford ed., 1899) (saying that Marshall's opinion in *McCulloch* reduced the Constitution

political ends.¹⁶¹ However, to a remarkable extent, Marshall shielded his and the Court's opinions from political challenge by presenting them as resolving legal rather than political conflicts. Jefferson restricted his negative commentary on *Marbury* to private correspondence,¹⁶² and the Republican press had to mute its criticisms of that decision because the ultimate judgment favored Jefferson.¹⁶³

C. *Conflicts of Interest and Manipulation of Procedure*

Marshall's distinction between law and politics must be understood in the context of his times. In the early nineteenth century, judges frequently sat in judgment of cases in which they had an interest. Members of the Marshall Court likely shared Blackstone's assessment that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."¹⁶⁴ Nineteenth-century judges also indulged in *ex parte* communications with attorneys. In one example that outraged Jefferson and his supporters, just after Marshall had set bail in Aaron Burr's treason trial at \$10,000, Marshall accepted a dinner invitation from Burr's attorney,

to a "mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please").

¹⁶¹ Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 174 (1803) (ruling that Congress could not give the Court appellate jurisdiction where the Constitution made it original, nor could it create original jurisdiction where the Constitution created appellate jurisdiction), with *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (allowing for the exercise of the Court's appellate jurisdiction where the Constitution provided expressly only for original jurisdiction). See also NEWMYER, *supra* note 103, at 188–89 (noting that Marshall had embraced the English doctrine of constructive treason in his *Bollman* opinion but renounced it in the trial of Aaron Burr, which doomed the government's case); *id.* at 253–66 (discussing Marshall's dogmatic embrace of Lockean natural law doctrine relating to freedom of contract in his *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), dissent and contrasting that opinion with the more flexible approach he had taken in previous opinions, such as *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), and in his correspondence with Justice Bushrod Washington relating to the latter's opinion in *Golden v. Prince*, 10 F. Cas. 542 (C.C.D. Pa. 1814) (No. 5,509)).

¹⁶² See Letter from Thomas Jefferson to James Madison (May 25, 1810), in 3 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1631–32 (James Morton Smith ed., 1995) (denouncing Marshall's "sophistry" and "twistifications"). Jefferson was still able to work himself into a lather over *Marbury* for years, denouncing the decision to Abigail Adams in 1804 as an act of judicial despotism, and calling it "very censurable" and a "perversion of the law" in an 1823 letter to Justice William Johnson. Melvin I. Urofsky, *Thomas Jefferson and John Marshall: What Kind of Constitution Shall We Have?*, 31 J. SUP. CT. HIST. 109, 115 (2006).

¹⁶³ See PAUL, *supra* note 71, at 260 (calling public reaction to *Marbury* "generally positive"); Urofsky, *supra* note 162, at 115 (observing that neither the President nor the press publicly commented on *Marbury* since Jefferson had "won").

¹⁶⁴ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

John Wickham. Burr also attended the dinner.¹⁶⁵ While Marshall's actions made some question his judgment, such conduct did not undermine the Court's legitimacy because judges were understood to decide cases based on "immutable principles and not by reference to their own subjective values . . ." ¹⁶⁶ The Marshall Court's contemporaries recognized "a respectable intellectual" distinction between law and politics and the difference between individual and legal discretion.¹⁶⁷

By modern standards, John Marshall did not exercise judicial restraint. He institutionalized judicial review, and he embraced opportunities to take cases that enabled him to settle policy questions and expand federal judicial reach. Marshall exploited the law/politics distinction while manipulating his Court's docket for political ends. His actions were consistent with the legal culture of the time, which accorded judges a deference that attached to their status as men of learning and probity. Although Marshall's political adversaries attacked him,¹⁶⁸ he did not cross clear ethical lines, and his conduct did not undermine the Court's authority.

1. *Marshall's Interests in Property Cases*

Marshall's commitment to federalism and to his personal fortune combined to inform rulings in favor of land speculators, including himself, his brother James, and his former client, Robert Morris,¹⁶⁹ who was also James Marshall's father-in-law.¹⁷⁰ Marshall drafted the writ of error in *Martin v. Hunter's Lessee*,¹⁷¹ a case involving disputed title to a parcel of land in which Marshall had an interest.¹⁷² He

¹⁶⁵ MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 866–67 (1970).

¹⁶⁶ WHITE, *supra* note 93, at 198.

¹⁶⁷ *Id.* at 778.

¹⁶⁸ See, e.g., Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1439 (2006) (noting that the Marshall Court was subject to periodic attacks from Jeffersonians); Letter from Thomas Jefferson to James Madison (May 25, 1810), in 3 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826*, at 1631 (James Morton Smith ed., 1995) (criticizing Marshall's opinion in *Cohens v. Virginia*); Spencer Roane, *Roane's "Hampden" Essays*, in *JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND* 109 (Gerald Gunther ed., Stanford Univ. Press 1969) (1819) [hereinafter *MARSHALL'S DEFENSE* Justice Roane] (criticizing Marshall's opinion in *McCulloch v. Maryland*).

¹⁶⁹ See NEWMYER, *supra* note 103, at 292 (describing Marshall as Morris's "chief legal representative in Virginia, arguing [Morris's] cases in both state and federal courts").

¹⁷⁰ *Id.* at 218.

¹⁷¹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); WHITE, *supra* note 93, at 167–68.

¹⁷² See WHITE, *supra* note 93, at 166 (explaining that the "principal question in the case originally concerned the validity of titles to a large tract of land" claimed by "a syndicate of which John Marshall and his brother James Marshall were members").

recused himself from the case, but his friend Bushrod Washington granted the writ.¹⁷³ In *Huidekoper's Lessee v. Douglass*,¹⁷⁴ Marshall ruled on behalf of land speculators, including the Holland Land Company, whose moving spirit was Robert Morris.¹⁷⁵ *Fletcher v. Peck* was a far more momentous case, involving Georgia's sale of 35 million acres to four land companies for 1.5 cents per acre.¹⁷⁶ Marshall's opinion was "an unqualified victory" for land speculators.¹⁷⁷ One biographer's conclusion regarding *Huidekoper's Lessee* sums up the problem with respect to Marshall's land decisions:

It is difficult to separate Marshall's aggressive opinion for the speculators from the fact that he was a speculator, and this is not to mention the even more direct connection between the Morris and Marshall families. It was not that *Huidekoper's Lessee* put money in his pocket, but rather that the speculative interests so prominent in that case were those with which he resonated.¹⁷⁸

From the perspective of those who would like to see Marshall as the disinterested defender of the rule of law, it is hard to explain Marshall's willingness to sit in judgment of such cases. He presented the facts so as to make the doctrinal result seem unavoidable, often ignoring facts that would have undermined the case Marshall made in his opinions for legal positions favoring property, the federal government, and judicial review.¹⁷⁹ But there was nothing unusual in Marshall's behavior by the standards of his own time. During the Early Republic, leading politicians often engaged in land speculation, and they frequently figured prominently among the litigants in leading cases.¹⁸⁰

Although Marshall and his allies did not stand to gain personally from them, Marshall's opinions on banks and corporations also seemed overdetermined by his policy preferences. Marshall no doubt thought himself capable of separating his own

¹⁷³ See *id.* at 165–70 (describing the highly unusual process whereby *Martin v. Hunter's Lessee* got onto the Court's docket).

¹⁷⁴ *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805).

¹⁷⁵ NEWMYER, *supra* note 103, at 218.

¹⁷⁶ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); see also Alex McBride, *Landmark Cases Fletcher v. Peck (1810)*, THIRTEEN, https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_fletcher.html (last visited Dec. 21, 2020).

¹⁷⁷ NEWMYER, *supra* note 103, at 232.

¹⁷⁸ *Id.* at 220–21. In connection with *Fletcher v. Peck*, Newmyer ponders whether Marshall played "free and easy with the Framers' intent in order to rationalize and privatize the land market" and if "he was moved to do so by his long-running war with Virginia over his investment in the Fairfax lands." *Id.* at 223.

¹⁷⁹ See *id.* at 312 (noting Marshall's suppression of troublesome facts in *Fletcher v. Peck*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*).

¹⁸⁰ See PAUL, *supra* note 71, at 300–01 (narrating the facts relevant to *Fletcher v. Peck*, which implicated the interests and investments of "financiers, judges, and politicians from Georgia, South Carolina, and Pennsylvania," including Georgia's U.S. Senator, James Gunn).

personal interest in the case from his legal treatment of it. However, Marshall's opinions in *McCulloch*, *Sturges*, and *Dartmouth College* "were attuned to the perceived needs of an emerging class of entrepreneurs—manufacturers, merchants, businessmen, and bankers—all of whom were interested in doing business across state lines."¹⁸¹ In such cases, Marshall's personal and familial speculative interests overlapped with his interest in the nationalist policy supporting land speculation.

2. *Judicial Overreach?*

Marshall sometimes decided issues that he could have dismissed on jurisdictional or procedural grounds. At least in some landmark cases (*Martin v. Hunter's Lessee* and *Dartmouth College*), procedural discretion bled into "manipulation of procedure."¹⁸² Such manipulation may not have been unusual; the pre-Marshall Court also created legal fictions in order to control its docket.¹⁸³

For example, in *Marbury v. Madison*, Marshall addressed the threshold issue of jurisdiction last, deciding the crucial issue of the Court's power to issue writs of mandamus to executive officers before determining that no such power existed in Marbury's case.¹⁸⁴ Similarly, in *Cohens v. Virginia*, Marshall's decision establishing federal appellate jurisdiction over state criminal convictions may have been unnecessary. The wording of section 25 of the Judiciary Act of 1789 only created jurisdiction over appeals from the states' highest courts, and the Cohens' case appealed from a lower court.¹⁸⁵ Moreover, the Court ultimately held that there was no conflict

¹⁸¹ NEWMYER, *supra* note 103, at 301.

¹⁸² See WHITE, *supra* note 93, at 180 (discussing such manipulation in the two named cases and noting that we lack documentation on the procedural histories of other Marshall Court cases). Joel Richard Paul considers it "most likely" that John and James Marshall conspired with Marbury's attorney, Charles Lee, to file Marbury's case in the wrong court. PAUL, *supra* note 71, at 258–59.

¹⁸³ See CASTO, *supra* note 54, at 102 (discussing the machinations of Alexander Hamilton, the Attorney General, and the Commissioner of Revenue that enabled Daniel Hylton to meet the amount-in-controversy requirement and thus get *United States v. Hylton* before a federal judge).

¹⁸⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 173 (1803) (finding that Marbury has stated "a plain case for mandamus"); *id.* at 176–80 (finding that the Constitution does not confer original jurisdiction on the Supreme Court to issue writs of mandamus and that Congress exceeded its power in providing such jurisdiction in the Judiciary Act of 1789). James O'Fallon questioned this "standard criticism" of *Marbury* on the ground that it "sound[s] from a doctrinal perspective" and ignores context. O'Fallon, *supra* note 87, at 17. The doctrinal perspective does not ignore context—Marshall knew as well as modern jurists do that a court may not rule on a case over which it lacks jurisdiction.

¹⁸⁵ Compare *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 375 (1821) (identifying the case as coming on writ of error from an intermediate appellate court), with Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73 (granting the Supreme Court jurisdiction to hear appeals of decisions from the high courts of the states when those decisions involved questions of the constitutionality of

between Virginia's law prohibiting the sale of lottery tickets, and the federal law permitting such sales, as the federal law only applied in the District of Columbia.¹⁸⁶ Because there was no federal question at issue, there was no basis for the exercise of federal jurisdiction over a conviction under state law.¹⁸⁷ In these cases, Marshall chose to read statutes broadly so as to enable him to decide issues of federal jurisdiction and judicial power. He rejected plausible narrow readings that would have removed the cases from the Supreme Court's docket.¹⁸⁸

Marshall's nationalism entailed deference to the legislature, or at least to the federal legislature, so long as it provided a plausible argument that its enactments were within its constitutional powers. As he put it in *McCulloch*, "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the [C]onstitution, are constitutional."¹⁸⁹ In the matter of the Bank of the United States, Marshall's deference was capacious because, as G. Edward White put it, "he might have been hard pressed to show how a private bank in which only 20 percent of the shares were owned by the federal government was 'necessary'" to the exercise of enumerated powers.¹⁹⁰ State banks might have done the job just as well.¹⁹¹ Here too, Marshall created a constitutional issue where the facts might not have necessitated a confrontation between federal commerce powers and state police powers.

This Part has endeavored to show that John Marshall elevated the federal judiciary to a place of equal dignity with the coordinate branches of government and established the courts' powers of judicial review. He did so by insisting that the courts decided only legal issues, not policy issues. Apart from swipes at Marshall in the Republican press, Marshall's contemporaries accepted this distinction, and so they did not question Marshall's motives when he manipulated procedure and decided cases in situations in which a modern judge would refuse jurisdiction or would recuse herself. This trust in the legal discretion of the Court also enabled Marshall and his Court to issue *ipse dixit* rulings without arousing suspicions that the opinions were not rendered in good faith.

state or federal laws or authorities).

¹⁸⁶ See *Cohens*, 19 U.S. at 445 (finding no congressional intent to establish a national lottery).

¹⁸⁷ See NEWMYER, *supra* note 103, at 365 ("[T]he congressional act of 1802, under which the Cohens claimed the right to sell lottery tickets in Virginia, was clearly limited to the governance of the newly created District of Columbia.").

¹⁸⁸ See *id.* at 353–75 (discussing Marshall's tendency to decide cases and expand the Court's jurisdictional reach when the facts would have permitted dismissal for want of jurisdiction).

¹⁸⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see *id.* at 423 (describing overturning a legislative enactment as a "painful duty" of the court).

¹⁹⁰ WHITE, *supra* note 93, at 549.

¹⁹¹ *Id.*

IV. INTERPRETIVE PLURALISM AND *IPSE DIXIT* IN THE MARSHALL COURT

Scholars who describe Marshall as engaged in some version of originalism usually present a narrative of decline, as if judges suddenly discovered judge-made constitutional law in the twentieth century.¹⁹² In his own time, however, Marshall's political antagonists attacked him in ways that anticipated the accusations of political activism and judicial legislation that were leveled at the Warren and Burger courts from the 1950s through the 1970s.¹⁹³ Those who claim Marshall as a textualist would have a hard time specifying the constitutional text on which his opinions turn. They can identify few instances in which he specifically relied on statements of the Framers' intentions beyond his self-serving proclamations of the Constitution's intentions.¹⁹⁴ His pronouncements of the Constitution's purposes adjudicated disputes that the Framers themselves had never resolved on fundamental issues such as state sovereignty, the limited powers of the federal government, and the federal judiciary's powers of review. In sum, the Marshall Court lent some fixity to the Constitution's textual meanings, intentions, and purposes that had not previously been settled. The presumption in favor of that fixity has proved difficult to overcome.

G. Edward White characterizes Marshall's approach in a way that makes it seem quite similar to Jack Balkin's "text and principle" approach, which straddles

¹⁹² See, e.g., JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 18–20 (2005) (characterizing Marshall's opinions as predominantly textualist); WOLFE, *supra* note 3, at 39–72 (describing Marshall's "traditional" approach to interpretation); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 194 (1997) (contending that Marshall and his contemporaries regarded as a truism "the idea that constitutionalism precluded an acceptance of an evolutionary conception of constitutional meaning").

¹⁹³ See, e.g., William Brockenbrough, *Amphictyon*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52, 74–76 (Gerald Gunther ed., Stanford Univ. Press 1969) (1819) (contending that Marshall's construction of the Necessary and Proper Clause was so broad as to make it impossible to imagine any scenario in which a federal court would strike down a congressional enactment as exceeding its powers); MARSHALL'S DEFENSE Justice Roane, *supra* note 168, at 109 (accusing the Court in *McCulloch* of having introduced "[a] new mode of amending the constitution").

¹⁹⁴ THOMAS C. SHEVORY, JOHN MARSHALL'S LAW: INTERPRETATION, IDEOLOGY, AND INTEREST 50 (1994) (explaining how Marshall utilized various interpretive techniques to match the Constitution he had in mind).

originalism and living constitutionalism.¹⁹⁵ White credits Marshall with using linguistic analysis to give universal meanings to words like “contract” or “commerce” and thus transform these words into principles.¹⁹⁶ He developed those principled interpretations of constitutional terms in contexts not contemplated by the Framers and thus established both the meaning and the earliest application of key constitutional provisions.¹⁹⁷

Rather than placing Marshall and his Court at the intersection of originalism and living constitutionalism, as Balkin would, White’s assessment suggests that our modern categories are ill suited for capturing nineteenth-century approaches to constitutional interpretation.¹⁹⁸ Lawrence Solum’s two principles of originalist interpretation, fixation and constraint,¹⁹⁹ do little to capture the nature of the legal disputes that arose in the Marshall Court. The cases always raised issues (often multiple issues) of first impression, where original meaning could not be fixed. In the absence of guiding precedent or tradition, few constraints existed on the Court’s ability to fashion its own substantive rules.²⁰⁰

Part IV.A shows that the Marshall Court’s legal judgments often turned, at critical junctures, on *ipse dixit* decisions and that its non-hierarchical interpretive pluralism made recourse to *ipse dixit* almost unavoidable. The Court’s constitutional cases all raised questions of first impression. When incommensurable and equally authoritative interpretive modalities point in different directions, judges must use their own intellectual resources and instincts to resolve the conflict. However, because judges are expected to rule based on legal reasoning, they do not write their opinions in a way that foregrounds conclusory leaps. This Part demonstrates the resort to *ipse dixit* reasoning by showing inconsistencies in the Court’s interpretive methodologies. First, the very availability of multiple interpretive modalities on which the Court drew in the exercise of its legal discretion suggests that its interpretive choices were not dictated by law. Second, I highlight roads not traveled. Because the case reporters at the time included arguments from counsel, we can see when the Court either summarily rejected or refused to address sound arguments.

Part IV.B is a detailed look at two iconic decisions that John Marshall authored on behalf of the Court. The cases show how Marshall moved seamlessly through multiple interpretive modalities to arrive at his legal conclusions. Marshall presented

¹⁹⁵ See BALKIN, *LIVING ORIGINALISM*, *supra* note 10, at 1–20 (introducing his method of constitutional interpretation and construction, which involves fidelity to text and principle).

¹⁹⁶ WHITE, *supra* note 93, at 8.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 741.

¹⁹⁹ See *supra* text accompanying notes 19–20.

²⁰⁰ See WHITE, *supra* note 93, at 785–86 (“No Court in American history was freer to make up its own rules of law. No Court had more first impression cases of constitutional interpretation.”).

the different interpretive approaches as working in combination, all supporting the same outcome. Where the modalities yielded divergent results, Marshall rejected available interpretive options without explanation, using strong rhetoric, suggesting that the alternatives were so obviously misguided that there was no reason to address them. He in fact made *ipse dixit* decisions to favor one legal outcome over another legally justifiable outcome.

Marshall's approach can be reconciled with constitutional fidelity, as his judicial opinions were always consistent with his understanding of what the law required. However, that understanding was informed by Marshall's fixed ideas about the Constitution and the Republic that it shaped. Those ideas steered Marshall towards certain interpretive choices, and those choices, while not unfounded, were not grounded in legal argument.

A. *Interpretive Modalities and Ipse Dixit*

1. *Intentionalism and Ipse Dixit Reasoning*

As Randy Barnett, a leading New Originalist scholar, has pointed out, the early Court at times relied on "counterfactual hypothetical intentions of the [F]ramers."²⁰¹ Gestures towards the Framers' intentions become the sleight of hand through which the Justices obscure other interpretive modalities, such as appeals to natural law or pragmatic considerations. Some early court decisions preface their *ipse dixit* judgments with invocations of original intent, thus masking subjective opinions with rhetorical appeals to authority.²⁰² Often, when the Marshall Court references original meaning or intention, the Justices actually pay no mind to evidence of either.²⁰³

Given his own credentials, Marshall felt no need to consult sources in order to discern the Framers' intentions. Many of his statements invoking intentionalism thus become difficult to distinguish from *ipse dixit*. For example, in *Fletcher v. Peck*, he cavalierly expanded the reach of the Contracts Clause²⁰⁴ to apply to contracts with the States, viewing his reading as in line with the implicit, if not the express,

²⁰¹ See Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1744 (2007) (naming *Dred Scott* and *Hans v. Louisiana* as examples of this rhetorical strategy).

²⁰² See Toler & Cecere, *supra* note 54, at 281 ("[T]hose who have studied anecdotal evidence have largely taken Justices' claims at face value, without discovering whether the Justices' claimed and practiced methodology align."); *id.* at 325–26 (reiterating this conclusion).

²⁰³ See Clinton, *supra* note 1, at 1213 (finding it unsurprising that originalism did not predominate in early constitutional jurisprudence "in light of the general unavailability at that time of primary historical materials necessary to undertake originalist research").

²⁰⁴ U.S. CONST. art. I, § 10.

intentions of the Constitution.²⁰⁵ In *Dartmouth College v. Woodward*,²⁰⁶ Marshall expanded on the doctrine first announced in *Fletcher*, further eroding the line between private and public law.²⁰⁷

H. Jefferson Powell has shown convincingly that eighteenth-century intentionalism did not involve any sort of inquiry into the Framers' expressed views of the meaning of the Constitution. Rather, when Marshall, like other Justices of the Early Republic, wrote of discerning the Framers' intentions, he engaged in a process of common law interpretation that drew on traditional canons of statutory construction.²⁰⁸ As Chris Eisgruber put it,

Marshall did refer to "intent"—but he almost always did so in a highly abstract way, referring not to any specific judgments made by actual Framers but rather to aspirations that the American people must have had when they adopted the Constitution, given the general nature of the constitutional project.²⁰⁹

Justice Marshall had sources available to him that would have enabled him to investigate original intentions,²¹⁰ but he preferred to rely on his own sense of order and justice. The Marshall Court's version of intentionalism overlapped extensively with a purposive or teleological approach. When the Court invoked the Framers' *intentions*, the Justices were often thinking of the Framers' *purposes*, as they understood them. Reliance on the Framers' undocumented intentions or purposes can signal *ipse dixit* decision making.

2. *Textualism, Skepticism, and Teleology*

The opinions of the Marshall Court include numerous statements endorsing a textual approach, at least as a point of departure.²¹¹ At times, Marshall indicated

²⁰⁵ See NEWMYER, *supra* note 103, at 235 (describing the decision as, in Marshall's view, comporting "closely to the general, if not the explicit, intent of the Framers").

²⁰⁶ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

²⁰⁷ See NEWMYER, *supra* note 103, at 253 (characterizing the *Dartmouth College* decision as a "fusion of public and private, of the common law with the Constitution").

²⁰⁸ See Powell, *Original Understanding*, *supra* note 4, at 887 (describing one strain in the views expressed during and immediately after the Constitution's adoption that indicated "willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes").

²⁰⁹ See Eisgruber, *supra* note 64, at 1221.

²¹⁰ See Toler & Cecere, *supra* note 54, at 306–08 (detailing the availability of source materials from the Framing period, including the Federalist Papers, some documents from the Convention, and some reports from the state ratification debates).

²¹¹ See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827) (observing that in interpreting a constitutional provision, "it is proper to take a view of the literal meaning of the words to be expounded, of their connection [sic] with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) ("[T]he enlightened patriots who framed our constitution, and the

that his readings of the Constitution were primarily based on the constitutional text:

[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words . . . [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.²¹²

Here, Marshall indicates that, absent absurdity, plain meaning must govern, even if inconsistent with the Framers' purpose. Similarly, in *Dartmouth College*, Marshall indicated that he would rule out textual readings that yield results that are "obviously absurd, or mischievous, or repugnant to the general spirit of the instrument."²¹³

Judges regularly give effect to the clear meaning of unambiguous texts. However, statements evidencing Marshall's commitment to doing so must be read against the backdrop of Lockean skepticism, which exerted a powerful influence on the United States' founding generation.²¹⁴ According to Gary Wills, Locke's epistemological ideas influenced the Framers more than his political theory did.²¹⁵ As Locke put it in his *Essay Concerning Human Understanding*:

Every man has so inviolable a Liberty, to make Words stand for what *Ideas* he pleases, that no one hath the Power to make others have the same *Ideas* in their Minds, that he has, when they used the same Words, that he does.²¹⁶

Locke was especially skeptical when it came to the communication of complex concepts such as justice.²¹⁷

people who adopted it, must be understood to have employed words in their natural sense, and to have intended, what they have said.").

²¹² *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

²¹³ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 645 (1819).

²¹⁴ See generally SHEVORY, *supra* note 194; Marc Mohan, Note, *Originalist Sin: The Failure of Originalism to Justify the Unitary Executive Theory*, LEWIS & CLARK L. REV. 1063, 1089–93 (2020).

²¹⁵ GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 169–70* (1989).

²¹⁶ *Id.* at 24–25 (citing JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Nicchitch, ed. 1976)).

²¹⁷ See *id.* at 26 (discussing Locke's views on abstract concepts such as "contract" and "justice").

James Madison voiced a Lockean perspective in *The Federalist No. 37*, observing that obscurity inevitably arises in human institutions “from the object itself as from the organ by which it is contemplated.”²¹⁸ More generally, Madison noted that “no language is . . . so correct as not to include many [words and phrases] equivocally denoting different ideas.”²¹⁹ For Madison, the solution to this problem was not pure textualism, because “[a]ll new laws . . . are considered as more or less obscure and equivocal,” but the common law process through which meaning can “be liquidated and ascertained by a series of particular discussions and adjudications.”²²⁰

Madison could be read to be saying that textual ambiguity could be overcome through interpretive processes. Vague and ambiguous provisions could obtain fixed meanings through legislative processes or adjudication.²²¹ But Madison acknowledged that not all legislation had the power to fix meaning, nor did he think that all judicial decisions established binding precedent as to the correct interpretation of constitutional provisions.²²² More problematically for originalists seeking to deny anything approaching living constitutionalism, there is evidence that the Framers believed that practice could fix constitutional meaning.²²³

James Wilson, in his *Chisholm* opinion, struck a Lockean chord, citing with approval Thomas Reid’s observation that, “[i]t is hardly possible to make any innovation in our philosophy concerning the mind and its operations, without using new words and phrases, or giving a different meaning to those that are received.”²²⁴ Wilson’s invocation of Reid merits close attention. As Bernard Bailyn showed, while the Framers freely borrowed ideas from seventeenth- and eighteenth-century political theorists, they transformed those ideas.²²⁵ Ideas about the good society and good constitution were extremely fluid in the last third of the eighteenth century.²²⁶ Wil-

²¹⁸ THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

²¹⁹ *Id.* at 229.

²²⁰ *Id.*

²²¹ See Nelson, *Interpretive Conventions*, *supra* note 32, at 527 (reading Madison to permit “liquidation” through adjudication or legislation). For the most recent, thorough treatment of the subject, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

²²² See Nelson, *Interpretive Conventions*, *supra* note 32, at 527–31 (citing Madison’s acknowledgement that some statutes are hastily adopted and that only “precedents of a certain description” can fix constitutional meaning).

²²³ See *id.* at 531–32; *id.* at 530 n.40 (citing examples of statements from the Early Republic endorsing the power of practice to fix constitutional meaning).

²²⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793).

²²⁵ BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION xiii (1967) (observing that American revolutionary pamphlets transformed their inherited tradition of political and social thought).

²²⁶ See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 xvi (1998) (noting that “terms and categories of political thought were undergoing rapid change” in

son's invocation of Reid comes in the context of a discussion of sovereignty, suggesting that terms basic to constitutional and political theory were in flux at the time of the Framing.

John Marshall sounds similarly Lockean in his approach to language in *McCulloch v. Maryland*. "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense."²²⁷ Aware of eighteenth-century skepticism regarding the ability of language to fix meaning, H. Jefferson Powell concluded that when the courts of the Early Republic referred to "intent," they left room for judicial discretion: "[T]he 'intent' of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document's text at the outset."²²⁸ The Framers' decision to use general terms, like "due process of law" and "cruel and unusual punishment," suggests an expectation that later generations would give more specific content to those phrases.

Because the Framers and the Justices of the Early Republic embraced a skeptical view of language, a textualist approach does not preclude second-order *ipse dixit*. Given that language is unavoidably imprecise, constitutional interpretation often involves a choice among possible renderings of a provision. A clear example of this sort of *ipse dixit* reasoning is Marshall's declaration in *Gibbons v. Ogden* that "commerce" means "intercourse."²²⁹ Contemporary originalists, using corpus linguistics methodology, have strong empirical grounds to argue that "commerce" was a cognate for "trade,"²³⁰ a narrow definition that Marshall expressly rejected: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."²³¹ Marshall's rendering of the meaning of "commerce" was not without textual foundation. "Intercourse" was a *possible* rendering of "commerce," but it could not claim to be the predominant rendering. Marshall's decision to give "commerce" a broad connotation was an *ipse dixit* linguistic choice with far-ranging consequences.

the period under consideration); *id.* (noting that between the Declaration of Independence and the Constitutional Convention "a fundamental transformation of political culture had taken place.").

²²⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819).

²²⁸ Powell, *Original Understanding*, *supra* note 4, at 910.

²²⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

²³⁰ See Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 310 (2019) (finding that the term "commerce" very rarely was taken to mean "all intercourse" and never in legal texts at the time the Constitution was adopted). *But see id.* at 283 (acknowledging the limitations of their methodology because looking at the term "commerce" in isolation may overlook the broader semantic and pragmatic context).

²³¹ *Gibbons*, 22 U.S. at 189.

Marshall's version of textualism also invoked Emer de Vattel and the teleological approach, according to which legal texts could be construed strictly or liberally in accordance with their objectives.²³² Marshall's approach to interpretation gave due weight to "[t]he nature of the instrument, the words that are employed, [and] the object to be effected."²³³

Teleological interpretation can be reconciled with intentionalism, but some contemporary originalists think it inconsistent with textualism. When Justice Scalia called upon judges to ignore legislative history,²³⁴ he opened a new front in the battle between the Rehnquist Court's conservative majority and the legacy of the Warren and Burger Courts.²³⁵ Justice Scalia characterized reliance on legislative history as a "brief and failed experiment,"²³⁶ as if it were a product of the excesses of mid-twentieth-century legal liberalism. But the tradition of inquiry into legislative intent has a much longer heritage. Courts' reliance on legislative history has been an important part of the judicial process at least since the advent of the administrative state.²³⁷ Nonetheless, the textualist/purposivist division continues today. Solum includes the search for "[p]urposive [m]eaning," defined as "the purpose for which a text was written," in his list of things that textualism is not.²³⁸

²³² See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827) (noting that one ought to construe constitutional clauses with a view to "the general objects to be accomplished"); *Gibbons*, 22 U.S. at 188–89 (observing that it is "well-settled" that textual ambiguity may be resolved in the light of "the objects for which [an instrument] was given"); MARSHALL'S DEFENSE Justice Roane, *supra* note 168, at 166 (citing Vattel for the proposition that legal texts "are to be understood according to the intention of the parties, and shall be construed liberally, or restrictively, as may best promote the objects for which they were made"). The modern version of this teleological approach to interpretation in international law can be found codified in the Vienna Convention on the Law of Treaties, art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 331, 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

²³³ See MARSHALL'S DEFENSE Justice Roane, *supra* note 168, at 169.

²³⁴ See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36–37 (1997) (arguing that research into legislative history is a waste of time and calling for its abandonment).

²³⁵ See *id.* at 18, 21 (tracing inquiries into legislative intent back to 1892 and calling it "nothing but an invitation to judicial lawmaking").

²³⁶ *Id.* at 36.

²³⁷ See, e.g., Kenneth W. Starr, *Observations about the Use of Legislative History*, 37 DUKE L.J. 371, 372 (1987) (explaining how the rise of administrative agencies beginning in the late nineteenth century required courts to broaden their approach to interpretive issues); see also Leigh Ann McDonald, *Role of Legislative History in Statutory Interpretation: A New Era after the Resignation of Justice Brennan?*, 56 MO. L. REV. 121, 125–26 (1991) (discussing recourse to legislative history in the early twentieth century).

²³⁸ Lawrence Solum, *Legal Theory Lexicon: Textualism*, LEGAL THEORY BLOG (Jan. 21, 2018), <http://solum.typepad.com/legaltheory/2018/01/legal-theory-lexicon-textualism.html>.

However, during the Early Republic, judges viewed both textualism and teleology as tools for discerning legislative intent, which they saw as their duty to enforce.²³⁹ John Marshall quite commonly found that the Constitution's text did not provide a plain meaning, leaving him free to consult his own sense of the instrument's purpose. Justice Story acknowledged that many constitutional provisions are ambiguous, having arisen as products "of compromise [and] of opposing interests and opinions."²⁴⁰ Consequently, Story suggested that "the safest rule of interpretation [is] . . . to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history" and then to harmonize text and purpose.²⁴¹

Unlike Justice Scalia and Solum, Justices during the Early Republic saw no opposition between textualism and teleology. Justices cited to the Constitution's Preamble as a basis for decisions, suggesting that they read substantive provisions in the light of the Constitution's general purposes.²⁴² As one self-described textualist noted, "For a not inconsiderable part of our history, the Supreme Court held that the 'letter' (text) of a statute must yield to its 'spirit' (purpose) when the two conflicted."²⁴³

²³⁹ See STORY, *supra* note 28, at 305 ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties. Mr. Justice Blackstone has remarked that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.").

²⁴⁰ *Id.* at 309.

²⁴¹ *Id.*

²⁴² See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324–25 (1816) (relying on the "We, the people" language in the Preamble to establish the source of the federal government's sovereign powers); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (listing the provisions of the Preamble as establishing the contours of Congress's power); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 463–64 (1793) (construing federal jurisdiction under Article III in light of the Preamble's call for the establishment of justice). In his treatise on the Constitution, Justice Story explains the importance of consideration of the Preamble:

It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute It is properly resorted to where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble.

STORY, *supra* note 28, at 350.

²⁴³ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006) (citing, for example, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

Barron v. Baltimore provides a useful illustration of the interplay between textual and teleological reasoning.²⁴⁴ In ruling that the Bill of Rights did not apply to the states, Marshall began with a teleological observation, noting that the Constitution concerned the government of the people of the United States, not “the government of the individual states.”²⁴⁵ He then proceeded to a textual analysis of Article I, Sections 9 and 10, and the Bill of Rights in support of his conclusion that the Bill of Rights placed limitations on the federal government, not on the states.²⁴⁶ For good measure, Marshall added historical and intentionalist arguments that supported both his teleological and his textual readings, noting that the push for amendments to the Constitution was “universally understood” to be a response to fears of “encroachments of the general government—not against those of the local governments.”²⁴⁷

Marshall similarly combined textual and teleological arguments in permitting the exercise of the Court’s appellate jurisdiction over a state criminal conviction in *Cohens v. Virginia*. Marshall pointed to the Constitution’s “general spirit,” citing to the principle of popular sovereignty and the Supremacy Clause.²⁴⁸ He bolstered this vaguely textual reference with a “political axiom”²⁴⁹ that he found implicit in the text that “the judicial power of every well constituted government must be co-extensive with the legislat[ure].”²⁵⁰ This axiom is nowhere to be found in the constitutional text, but it was a fundamental element of Marshall’s understanding of the role of the federal judiciary.

Marshall believed that a teleological interpretation, supported by a broad reading of the text, should trump a narrow textualism interpretation inconsistent with the instrument’s objects and purposes. In *Gibbons v. Ogden*, he rejected “narrow construction[s] which, in support of some theory not to be found in the [C]onstitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument.”²⁵¹ This passage from *Gibbons*, as is clear from Justice Story’s gloss on the subject, was clearly directed at Thomas Jefferson, St. George Tucker, and others who viewed the Constitution as a compact among sovereign states and thus favored narrow readings of the scope of federal power where the

²⁴⁴ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

²⁴⁵ *Id.* at 247.

²⁴⁶ *Id.* at 248–49. *But see* WHITE, *supra* note 93, at 590 (discussing the difficulties with Marshall’s textual argument in *Barron*).

²⁴⁷ *Barron*, 32 U.S. at 250.

²⁴⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380–81, 384 (1821).

²⁴⁹ *Id.* at 384–85.

²⁵⁰ *Id.* at 384.

²⁵¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

exercise of such powers would burden state sovereignty.²⁵² Marshall's nationalism informed his understanding of the text. The constitutional text itself of course provides no direction to judges as to whether it should be broadly or narrowly construed. The interpretive choice is an *ipse dixit* decision determined by extra-legal concerns.

3. Structural, Historical, Precedent-Based, and Moral Reasoning

Finally, we turn to other interpretive modalities that played a role in the Marshall Court's legal reasoning. The variety of interpretive options available to the Justices gives rise to a legal discretion that allows judges to make choices among valid approaches. When a judge cannot resolve textual ambiguity, non-hierarchical interpretive pluralism necessitates the importation of what we might now call value judgments into the interpretive process.²⁵³ Marshall acknowledged the inevitability of the exercise of what he called "legal discretion,"²⁵⁴ but non-legal commitments inform that legal discretion.

Structural interpretation is distinct from both textualism and intentionalism. Structural interpretation turns on neither the meaning of the particular constitutional provisions nor the intentions of its authors. Philip Bobbitt defines structural arguments as "claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments."²⁵⁵ In addition, I regard as structural, interpretations that turn on the relationship among textual provisions or the location of certain provisions within a document. For example, the principle of separation of powers is articulated nowhere in the constitutional text. Rather, it is implied from the separate vesting clauses of Articles I, II, and III.²⁵⁶ The concept of limited powers is implicit in the enumeration of Congress's powers in Article I, Section 8.²⁵⁷

²⁵² See STORY, *supra* note 28, at 313, 321 (rejecting Tucker's explication of Blackstone).

²⁵³ See SHEVORY, *supra* note 194, at 45 (stressing the variety of interpretive approaches available to eighteenth- and nineteenth-century adjudicators and the amount of discretion thereby created).

²⁵⁴ *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

²⁵⁵ Bobbitt, *supra* note 47, at 7.

²⁵⁶ See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

²⁵⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419–20 (1819). *But see* Richard A. Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 615 (2014) (noting that, for most Framers, the most important mechanisms for constraining Congress were neither external limits, such as a Bill of Rights, nor internal limits, such as an enumeration, but process limits, such as separation

McCulloch v. Maryland provides perhaps the clearest example of structural reasoning by the Marshall Court. Justice Marshall explains that the most conclusive argument against Maryland's narrow construction of the Necessary and Proper Clause is the intention of the Convention in adopting it.²⁵⁸ The first evidence Marshall presents of that intention is the *location* of the Clause among Congress's enumerated powers rather than among the limitations on those powers.²⁵⁹ The location of the Necessary and Proper Clause in Article I, Section 8 makes it an expansion of Congress's powers.²⁶⁰ If the Framers had intended otherwise, they would have put it in Article I, Section 9, which sets forth limits on Congress's powers.²⁶¹

In the absence of binding positive law, Justice Marshall looked to comparative historical precedent for rules that he treated as dispositive. When confronted with weighty jurisprudential issues in property cases, he would typically begin by reviewing sources of law dating from the advent of European colonies in America to the founding of the Republic.²⁶² In Marshall's view, such historical materials were not merely background, they established the legal principles on which the case could be decided.²⁶³ Marshall appealed to historical precedent in determining that Georgia could not regulate conduct within Native American territories in *Worcester v. Georgia*.²⁶⁴ Marshall's review of the history of the relevant legal doctrines took up nearly two-thirds of his opinion in *Worcester*.²⁶⁵ Once he had addressed preliminary jurisdictional issues in three pages, he needed only three pages to determine that Native American territories were subject to regulation only by the tribes themselves or through agreements between the tribes and the United States.²⁶⁶ G. Edward White describes Marshall's reasoning here as "bold" but "cryptic."²⁶⁷ Marshall saw no need to be expansive about legal doctrine because the basis for it was so clear from history.

of powers and democratic accountability); Richard A. Primus, "The Essential Characteristic": *Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 420 (2018) (observing that "[a]t the [Constitutional] Convention, during the ratification process, and into the 1790s, any number of well-informed Americans denied the enumeration principle, the internal-limits canon, or both").

²⁵⁸ *McCulloch*, 17 U.S. at 419.

²⁵⁹ *Id.* at 419–20.

²⁶⁰ *Id.* at 420.

²⁶¹ *Id.*

²⁶² See WHITE, *supra* note 93, at 733.

²⁶³ *Id.* (articulating Marshall's perspective that "attention to history and to the principles embodied in that history . . . went a long way to disposing of the issues").

²⁶⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 573 (1832).

²⁶⁵ WHITE, *supra* note 93, at 733.

²⁶⁶ See *Worcester*, 31 U.S. at 560–61 (1832) (reasoning, based on "the actual state of things" and history, that the federal government had exclusive power to regulate Native American affairs).

²⁶⁷ WHITE, *supra* note 93, at 734.

The British had treated their agreements with the Native American tribes as international agreements; there was no reason why the United States should do otherwise.²⁶⁸

As discussed below, Marshall relied on the historical precedent of the First Bank of the United States in upholding Congress's power to create the second Bank of the United States.²⁶⁹ *Stuart v. Laird*, decided five days after *Marbury*, provides another example of the Court's reliance on historical precedent.²⁷⁰ When they learned that the Judiciary Act of 1789 would require that Supreme Court Justices also serve as judges on the circuit courts, Chief Justice John Jay and others wrote to President Washington, claiming that the Act was unconstitutional.²⁷¹ The Judiciary Act of 1801 was to end the practice, and *Stuart v. Laird* challenged the Judiciary Act of 1802, which reintroduced it.²⁷² Chief Justice Marshall and his colleagues adhered to the original constitutional determination of their predecessors: the Justices continued to think it unconstitutional that they be required to sit as circuit court judges.²⁷³ However, in the opinion of the Court, responding to that objection to the Judiciary Act of 1802, Justice Paterson wrote as follows:²⁷⁴

To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.²⁷⁵

The Court uses unusually forceful language (“indeed,” “[o]f course,” and “too strong and obstinate to be shaken or controlled”) in upholding the 1802 Act based on precedent from the 1789 Act. Historical usage had much less force in *Marbury*, decided five days previously, when the Court struck down a different provision of

²⁶⁸ See NEWMYER, *supra* note 102, at 453 (summarizing Marshall's views on the status of agreements with Native American tribes as, “[w]hat applied to England also applied to the United States.”).

²⁶⁹ See *infra* Part IV.B (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

²⁷⁰ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 299 (1803).

²⁷¹ THAYER, *supra* note 71, at 67.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ For unknown reasons, Chief Justice Marshall recused himself. He had decided the case as a Circuit Court judge, but the Justices did not regularly recuse themselves in such circumstances. Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 260 (2003).

²⁷⁵ *Stuart*, 5 U.S. at 309.

the Judiciary Act of 1789, the legality of which had never been questioned.²⁷⁶ Such bluster, devoid of legal argument, is a hallmark of *ipse dixit*. Non-hierarchical methodological pluralism permits the Court to treat history as determinative in *Stuart* and inconsequential in *Marbury*. Where the Justices can choose the interpretive modality best suited to an outcome, *ipse dixit* commitments decide cases.

In a related version of historical reasoning, in *Cohens v. Virginia*, Marshall cited to the legislation that the first Congress had promulgated as evidence of the Framers' intentions. In *Cohens*, Marshall treated Section 25 of the Judiciary Act of 1789, which gave rise to the Court's appellate jurisdiction over state court decisions, as following from the Constitution itself.²⁷⁷ The Congress that passed it, Marshall noted, included "many eminent members of the Convention which formed the [C]onstitution."²⁷⁸ And yet, in *Marbury*, he held that the same Act unconstitutionally extended original mandamus jurisdiction to the Supreme Court.²⁷⁹ This inconsistency strongly suggests that the Marshall Court's decisions to treat the first Congress's constitutional determinations as authoritative *vel non* turned on *ipse dixit* commitments.

Perhaps more important than the Marshall Court's use of historical materials was the tradition of common law adjudication that underpinned its methodology in general and its approach to constitutional interpretation in particular.²⁸⁰ There is no dispute that the Marshall Court relied on precedent.²⁸¹ As Caleb Nelson has

²⁷⁶ See Hobson, *supra* note 84, at 297 ("The Court in *Stuart* thus refused to exercise judicial review against an act of Congress that many believed to be unconstitutional, while in *Marbury* it struck down a section of the Judiciary Act of 1789 whose constitutionality had not previously been in doubt.").

²⁷⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

²⁷⁸ See *id.* at 420 (calling the Judiciary Act "a contemporaneous exposition of the constitution" and contending that "[n]ot a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the cases therein specified, to be unauthorized by the constitution"); *McCulloch v. Maryland*, 17 U.S. 316, 402 (1819) ("It would require no ordinary share of intrepidity to assert that a measure adopted [by the first Congress] was a bold and plain usurpation, to which the constitution gave no countenance.").

²⁷⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 176 (1803) (concluding that the authority that the Judiciary Act gave to the Supreme Court to issue writs of mandamus was not constitutionally warranted).

²⁸⁰ See HOBSON, *supra* note 48, at 26 ("As chief justice [Marshall] assimilated the familiar methods of interpreting and adjudicating the common law to the novel and extraordinary task of creating a constitutional law for the new nation."); NEWMYER, *supra* note 103, at 380 ("Marshall's constitutional world . . . rested on a common-law foundation.").

²⁸¹ See MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, *supra* note 7, at 166 (observing that the early Supreme Court followed precedent); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV.

shown, the predominant view in the Early Republic was that a court should abide by precedent unless it is demonstrably erroneous.²⁸²

While some originalists stress the importance of the Framers' decision to reduce the Constitution to writing,²⁸³ other originalists, including Justice Clarence Thomas, argue that the written Constitution must be understood against a background of natural law.²⁸⁴ The text itself hints at such residual rights in the Ninth Amendment,²⁸⁵ the Tenth Amendment,²⁸⁶ and in the two Privileges and Immunities

647, 666–81 (1999) (concluding that the Marshall Court moved from the declaratory treatment of case law to a culture of binding precedent and only overruled prior decisions based on changed practices or factual errors that rendered prior opinions mistaken).

²⁸² See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–14 (2001) (discussing Madison's view of precedent and arguing that Marshall, like Madison, thought courts should adopt a deferential attitude towards both statutes and precedents).

²⁸³ See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 50–61 (1999) (arguing that the Framers wanted a written constitution that could be presented to and ratified by the people and that the fact that it was written was a remedy for the ills of the English unwritten constitution, which lacked fixity); BORK, *supra* note 1, at 24 (contending that Marshall's view of judicial power was built upon the foundation of a *written* constitution); Barnett, *Originalism for Nonoriginalists*, *supra* note 5, at 629–36 (providing arguments from contracts law about the binding nature of written agreements absent authorized modifications). For an extended counterargument, see Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PENN. L. REV. 1025 (2010) (arguing that virtually nothing follows from the fact that we have a written constitution).

²⁸⁴ See, e.g., Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 5 (2014) (“To secure natural rights is, therefore, why the Constitution was enacted, and to secure natural rights is how the Constitution should be interpreted.”); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 63–64 (1989) (defending consultation of higher law as a check on both legislative excess and judicial activism).

²⁸⁵ U.S. CONST. amend. IX (reserving rights not delegated to the federal government to the people). Early originalists, who were committed to a narrow textualism, insisted that the Ninth Amendment was not a reservoir of rights not enumerated in the constitutional text. See Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 6 (1980) (maintaining that the Ninth Amendment was merely declaratory and added no unspecified rights to the Bill of Rights); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228 (1983) (arguing that “the amendment neither creates new rights nor alters the status of pre-existing rights”). More recently, originalists have come to view the Ninth Amendment as a repository of unenumerated rights. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006) (arguing that the Ninth Amendment protects individual rights that arise under natural law from federal encroachment).

²⁸⁶ U.S. CONST. amend. X (reserving rights not delegated to the federal government to the

Clauses.²⁸⁷ Justice Chase famously gave voice to natural law limits on legislative power in *Calder v. Bull*: “An act of the Legislature (for I cannot call it a *law*), contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise of legislative authority*.”²⁸⁸

In *Marbury*, Marshall stressed the importance of the written Constitution.²⁸⁹ However, Marshall also recognized natural law as an unwritten background to the Constitution.²⁹⁰ Marshall’s reliance on natural law helps explain his capacious approach to his own interpretive powers. Assuming that we could identify them, natural law principles do not change over time; only their application changes. Flexibility is one of the principles of natural law interpretation.²⁹¹ A judge can present as a common-sense conclusion a legal proposition about which reasonable minds could differ. For example, although the Court largely treated *Fletcher v. Peck* as raising questions of natural justice,²⁹² Marshall also found in the Contracts Clause grounds for vacating state restrictions on land grants.²⁹³ However, the Contracts Clause was only relevant based on an analogy between private contracts and public grants.²⁹⁴ Marshall treated that analogy as natural when it was problematic on a number of levels.²⁹⁵ Similarly, in *Dartmouth College*, in the words of G. Edward White, Marshall decided that “Dartmouth’s charter was a contract by assertion” and tinkered with the facts in order to prestidigitate consideration.²⁹⁶

states or to the people).

²⁸⁷ U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”).

²⁸⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

²⁸⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (maintaining that requiring that courts uphold unconstitutional laws would subvert the purposes of a written constitution).

²⁹⁰ Clinton, *supra* note 1, at 1225.

²⁹¹ *Id.* at 1227.

²⁹² See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (subjecting Georgia’s legislative powers to limitations based on “certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded”).

²⁹³ See *id.* at 139 (holding that Georgia was “restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from” rendering plaintiff’s land claim null and void).

²⁹⁴ See *id.* at 145.

²⁹⁵ See WHITE, *supra* note 93, at 604–05 (providing numerous reasons for treating the land grants from state governments differently from private contracts for the purposes of Contracts Clause analysis).

²⁹⁶ *Id.* at 623–24. White notes that the point mattered little, because Marshall had already decided in previous cases “that unilateral grants were contracts,” and *Dartmouth’s* royal charter “was unmistakably a grant.” *Id.* at 624.

While Marshall relied on natural law arguments in defense of property, he favored positivism over natural law in his decisions on international law and in cases relating to the property rights of Native Americans.²⁹⁷ As he put it in *Johnson v. McIntosh*:

[A]s the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case and given us as the rule for our decision.²⁹⁸

Positive law superseded natural rights. But Marshall's decision here was overdetermined: his prejudices colored his rulings on Native American matters. Because he regarded Native Americans as "fierce savages," he believed that ceding land to them would be "to leave the country a wilderness."²⁹⁹ He thus sought legal arguments that would facilitate the alternative.

Finally, prudential considerations obviously played a role in Marshall's decisions in *Marbury v. Madison* and *Stuart v. Laird*, as noted above,³⁰⁰ and in *McCulloch v. Maryland*. Moreover, in rejecting strict constructionism in *Gibbons v. Ogden*, Marshall also endorsed prudential arguments as a general strategy of constitutional interpretation. Where a narrow construction "would cripple the government, and render it unequal to the objects for which it is declared to be instituted," Marshall observed, "then we cannot perceive the propriety of this strict construction."³⁰¹

Interpretive modalities provide a rich palette from which a judge, exercising legal discretion, can choose. As each modality is legitimate, and the law recognizes

²⁹⁷ See *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) (rejecting an appeal to morality in favor of "those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part and to whose law the appeal is made"). But see *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 834 (D. Mass. 1822) (treating the slave trade as a violation of natural law). See also NEWMYER, *supra* note 103, at 284 (discussing Marshall's reliance on legal positivism in *The Antelope* to reject Justice Story's reasoning in *United States v. La Jeune Eugenie* that the slave trade was outlawed under principles of natural law); WHITE *supra* note 93, at 693–703 (noting Marshall's insistence in *The Antelope* on the possibility of separating law and morality).

²⁹⁸ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

²⁹⁹ *Id.* at 590.

³⁰⁰ See *supra* text accompanying notes 147–53.

³⁰¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

no hierarchy among interpretive methods, a judge has no legal basis for choosing one interpretive approach over another when the modalities lead to different outcomes. While judges strive to avoid conclusory arguments, they often have no choice when addressing complex constitutional issues of first impression. The Marshall Court's constitutional jurisprudence attempted to give effect to the constitutional text as the Justices understood it. In so doing, they resorted to their training in common-law adjudication, and made *ipse dixit* choices when forced to choose among two or more equally valid interpretive options.

B. *Marshall's Interpretive Approaches in Case Law*

In this Section, I outline the interpretive modalities that John Marshall deployed in two seminal cases: *Marbury v. Madison* and *McCulloch v. Maryland*. I chose these two because they are landmark cases, and they nicely illustrate the methodological pluralism that I have described in Part IV.A. These cases are special because of their importance, but they are also representative. I could have chosen other cases as examples of interpretive pluralism at work, and I have come across no Marshall opinion that rejects such pluralism, even if Marshall's rhetoric sometimes suggests otherwise.³⁰²

1. *Marbury v. Madison: Institutionalizing Judicial Review*

William Marbury was named as one of 42 new justices of the peace appointed by outgoing President John Adams on March 3, 1801, pursuant to a congressional act from February 27th.³⁰³ Marbury's judicial commission was one of at least four that were not delivered in the less than twenty-four hours remaining in John Adams' Presidency. John Marshall, who was serving as Secretary of State, wrote these commissions.³⁰⁴ The newly-elected President, Thomas Jefferson, instructed his Secretary of State, James Madison, not to deliver the commissions, and Marbury sought an order of mandamus in the Supreme Court, directing Madison to do so notwithstanding the President's wishes.³⁰⁵ In the ensuing litigation, Charles Lee, who had served as John Adams' Attorney General, represented Marbury.³⁰⁶ Madison, not

³⁰² Michael Rappaport has argued that Marshall was a textualist. Michael Rappaport, *Chief Justice Marshall's Textualist Originalism*, L. & LIBERTY BLOG (Mar. 21, 2019), <https://lawliberty.org/chief-justice-marshalls-textualist-originalism/> (quoting from Marshall's opinion in *Sturges v. Crowninshield*, 17 U.S. 122, 202–03 (1819)). The quotation, and others like it, stands only for the uncontroversial proposition that a court should give effect to the unambiguous language of a statute or the Constitution. Marshall takes no risks in so stating, because his Supreme Court never confronted an unambiguous constitutional provision.

³⁰³ Van Alstyne, *supra* note 75, at 4.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

recognizing the Court's jurisdiction over him, refused to appear through counsel.³⁰⁷

Marshall begins his constitutional analysis with the second issue in *Marbury*, which is whether the laws provide a remedy for violation of Marbury's right to his commission.³⁰⁸ Marshall first discusses general principles of common law. Those principles establish for Marshall both that legal wrongs require legal remedies³⁰⁹ and that there can be no general exception for legal wrongs perpetrated by executive officers.³¹⁰ Rather, Marshall illustrates, through a series of rhetorical questions, that some executive acts are examinable and others are not.³¹¹ There must then be "some rule of law to guide the court in the exercise of its jurisdiction" over executive acts.³¹² In five short paragraphs, Marshall arrives at his conclusion: acts within the executive's discretion "are only politically examinable" but "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty," the injured party has a right to a remedy.³¹³ From there, Marshall states a series of propositions: the President has discretion to make an appointment; once that appointment has been made, it is protected by law, and the President cannot undo it;³¹⁴ the judiciary has the power to determine whether a right has vested; Marbury's right to his commission has vested, and therefore he is entitled to a remedy.³¹⁵ Marshall cites to no constitutional authority. He cites to none of the Constitution's drafting or ratification history. He relies only on his own sense of what logic and political propriety require.

Marshall next addresses the question of what remedy is available to Marbury. Marshall lays out the common-law nature of the writ in reliance on Blackstone and Mansfield.³¹⁶ He then applies the rules about the nature of the writ to Marbury's

³⁰⁷ *Id.* at 5.

³⁰⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

³⁰⁹ *See id.* at 163 (citing Blackstone for the proposition that where there is a right, there must be remedy).

³¹⁰ *See id.* at 164–65 (refusing to accept that all executive actions are to be viewed as exceptions to the general rule and again citing Blackstone for the principle that even the King's agents are accountable to law).

³¹¹ *Id.* at 164–65.

³¹² *Id.* at 165.

³¹³ *Id.* at 166.

³¹⁴ William Van Alstyne raises an interesting point that Marshall elides. Even if Marbury's commission had vested, President Jefferson might have power of removal. If the removal was wrongful, Marbury might be entitled only to damages (judgement for salary) and not to be returned to his position. Van Alstyne, *supra* note 75, at 9–10.

³¹⁵ *Marbury*, 5 U.S. at 167–68.

³¹⁶ *Id.* at 168–69.

case, carefully noting that the courts should not intrude upon political questions.³¹⁷ He maintains that mandamus actions will lie with or without express congressional authorization, but the question is whether the writ can issue from the Supreme Court as a matter of original jurisdiction.³¹⁸

On that issue, Marshall begins by ascertaining the meaning of the statute. He treats the statute as clearly empowering the Supreme Court with original jurisdiction to hear mandamus actions.³¹⁹ In addressing whether, in the 1789 Judiciary Act, Congress could empower the Supreme Court with original jurisdiction to issue a writ of mandamus, Justice Marshall's methodology is best described as textualist. He determines that the Constitution enumerated the Court's original jurisdiction. If the Framers had intended for Congress to be empowered to expand upon that jurisdiction, much of Article III would be "mere surplusage."³²⁰ The affirmative grants of jurisdiction in Article III must be given a negative or exclusive sense or they would have "no operation at all."³²¹

As Corwin pointed out, Marshall's textual argument is not entirely convincing: the purpose of the remaining language may simply have been to prevent Congress from stripping the Court of its jurisdiction in particular categories of cases.³²² Marshall himself abandoned *Marbury's* logic in later opinions. In deciding *Marbury*, Marshall held that the listing of original jurisdiction was exclusive; in *Cohens v. Virginia*, he upheld Section 25 of the Judiciary Act, which granted the Supreme Court appellate jurisdiction in a realm in which the Constitution granted it original jurisdiction. He reconciled the two positions as follows:

The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different Court.³²³

Corwin describes Marshall's *Cohens* opinion as a reversal of his textualist reading in *Marbury*³²⁴ and notes that Marshall was, in part, motivated to change his position

³¹⁷ *Id.* at 170–73.

³¹⁸ *Id.* at 173.

³¹⁹ *Id.*

³²⁰ *Id.* at 174.

³²¹ *Id.*

³²² See CORWIN, *supra* note 102, at 5 (noting that the enumeration places whole categories of cases "beyond the reach of Congress,—surely no negligible matter").

³²³ *Cohens v. State of Virginia*, 19 U.S. (6 Wheat.) 264, 397–98 (1821).

³²⁴ See CORWIN, *supra* note 102 at 6–7 (pointing out that Marshall's position in *Cohens* could only be harmonized with *Marbury*, as a textual matter, by editing the Constitution's text).

because he realized that his original ruling would undermine the Constitution's purposes.³²⁵

There are additional textualist responses to Marshall's position in *Marbury*. For example, the Court's appellate jurisdiction is enumerated,³²⁶ subject to "such Exceptions" as Congress may choose to make.³²⁷ Congress, relying on the Exceptions Clause, could empower the Court to exercise original jurisdiction over a category of claims within its appellate jurisdiction. Congress may have believed that the Constitution's enumeration of the Court's original jurisdiction was not exclusive,³²⁸ or they may have thought that writs of mandamus related to remedies and not to jurisdictional questions.³²⁹ Moreover, *Marbury*'s counsel argued that "[t]he writ of mandamus is in the nature of an appeal as to fact as well as to law."³³⁰ Marshall rejects such arguments rather weakly, saying that "a writ to an officer for the delivery of a paper is, in effect the same as to sustain an original action for that paper, and therefore *seems not to belong* to the appellate, but to original jurisdiction."³³¹

In addition to textual arguments, there was also historical evidence supporting the Court's exercise of mandamus. Marshall clearly struggled with the question of whether the Court could provide a remedy for *Marbury*. Marshall acknowledges the Court's prior practice of hearing mandamus actions, discussing a congressional act from February 1793 creating a mandamus action in the Supreme Court to settle questions pertaining to pension status for disabled officers and soldiers.³³² Strikingly, Marshall refuses to distinguish *Marbury*'s case from the prior mandamus cases that were created by statute.³³³ Marshall's textual argument is based on the notion that a constitutional enumeration of the Court's original jurisdiction negatives the

³²⁵ See *id.* at 7 (noting Marshall warranted insistence "upon the necessity of the rule in question to major purposes of the Constitution").

³²⁶ U.S. CONST. art. III, § 2, cl. 1.

³²⁷ *Id.* art. III, § 2, cl. 2.

³²⁸ See CORWIN, *supra* note 102, at 4 (noting that the first Congress's passage of the Judiciary Act is evidence against Marshall's understanding of Article III).

³²⁹ See *id.* at 7–9 (distinguishing mandamus as a remedy from jurisdictional questions and citing cases where the Marshall Court recognized such distinctions).

³³⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148 (1803) (argument of Charles Lee).

³³¹ *Id.* at 175–76 (emphasis added).

³³² *Id.* at 171–72 (discussing the creation of mandamus actions in the Supreme Court for pensioners); see also *id.* at 148–49 (argument of Charles Lee) (setting out the arguments of counsel, reviewing the precedents for the Court's having entertained mandamus suits); Bloch, *supra* note 143, at 306 (arguing that Marshall and his colleagues knew that the Court had issued writs of mandamus in connection with pension cases in the 1790s and precedents in order to achieve a political solution in *Marbury*).

³³³ See *Marbury*, 5 U.S. at 172 (stating that the difference between statutory authorization and congressional silence "is not considered as affecting the case").

possibility of additional categories of actions over which the Court could exercise original jurisdiction. However, other constitutional enumerations had not been treated as prohibiting the exercise of unenumerated powers. As Corwin points out,³³⁴ Congress has express constitutional power to enact criminal penalties relating only to counterfeiting,³³⁵ treason,³³⁶ and piracy.³³⁷ Already by 1790, Congress enacted further criminal penalties pursuant to the Necessary and Proper Clause.³³⁸

Justice Marshall's famous reasoning that "[i]t is emphatically the province and the duty of the judicial department to say what the law is,"³³⁹ finds no support in the constitutional text.³⁴⁰ Marshall identifies the issue to be resolved as "whether an act, repugnant to the Constitution, can become the law of the land."³⁴¹ He answers this question based on "certain principles, supposed to have been long and well established."³⁴² These principles include: popular sovereignty,³⁴³ limited government embodied in a written constitution,³⁴⁴ and constitutional supremacy.³⁴⁵ Although Marshall's position on judicial review in *Marbury* was not without antecedent,³⁴⁶ he

³³⁴ CORWIN, *supra* note 102, at 5.

³³⁵ U.S. CONST. art. I, § 8, cl. 6.

³³⁶ *Id.* art. I, § 8, cl. 10.

³³⁷ *Id.*

³³⁸ *Id.* art. I, § 8, cl. 18.

³³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁴⁰ See CORWIN, *supra* note 102, at 10 (finding no basis for judicial review in the constitutional text but asserting that such review is justified based on "general principles thought by its framers to have been embodied in the Constitution"); NELSON, MARBURY, *supra* note 84, at 1 (finding the case especially important in light of "the absence of any clear plan on the part of the Constitution's framers to provide the Court" with the power of judicial review).

³⁴¹ *Marbury*, 5 U.S. at 176.

³⁴² *Id.*

³⁴³ *Id.* (observing that the people have an original right to establish principles of government that will "most conduce to their own happiness").

³⁴⁴ See *id.* (maintaining that the distinction between limited and unlimited government is abolished if the legislature can set aside written limitations on its powers).

³⁴⁵ See *id.* at 177 (calling the alternative "an absurdity too gross to be insisted on").

³⁴⁶ See, e.g., CASTO, *supra* note 54, at 215 (recounting an incident in 1795 when Justice Wilson, in the Circuit Court for Virginia, directed counsel, John Wickham, not to address the issue of judicial review, as the matter was settled in favor of judicial review); CORWIN, *supra* note 102, at 10–65 (explaining the historical background to judicial review); NELSON, MARBURY, *supra* note 84, at 65–66 (citing Hamilton, Luther Martin, and Eldridge Gerry all supporting judicial review); Scott Douglas Gerber, *The Myth of Marbury v. Madison and the Origins of Judicial Review*, in MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 1, 7–13 (Mark A. Gerber & Michael Perhac eds., 2002) (discussing cases endorsing judicial review before *Marbury*).

cites no authority.³⁴⁷ Marshall provides numerous outrageous examples of the absurdities that would arise if courts lacked the power of constitutional review,³⁴⁸ but unlike Marshall's scandalous hypotheticals, the 1789 Judiciary Act involved no clear and intentional repudiation of the constitutional text.³⁴⁹ Marshall cites to no precedent and to no authority, despite the availability of Hamilton's arguments in *The Federalist*,³⁵⁰ for the power of courts to have the ultimate power to say what the law is. In the very same opinion in which Marshall struck down the portion of the Judiciary Act that purportedly created original jurisdiction over mandamus actions, he created the power of judicial review, a category of claims over which the Constitution expressly grants the courts neither original nor appellate jurisdiction.³⁵¹

Once he has asserted judicial review and maintained that any alternative would reduce the written Constitution to nothing,³⁵² Marshall does provide some textual references. First, Marshall notes that Article III gives federal courts power of "cases arising under the Constitution."³⁵³ Second, Marshall cites to the judicial oath of office, in which judges pledge to discharge their duties "agreeably to the [C]onstitution, and laws of the United States."³⁵⁴ Finally, he notes that the Supremacy Clause puts the Constitution first, thus implying that only laws "made in *pursuance* of the [C]onstitution" are supreme.³⁵⁵ Marshall probably leaves these textual references for

³⁴⁷ See NELSON, *MARBURY*, *supra* note 84, at 63 (noting that Marshall relied on neither precedent nor any "other prior judicial authority" and cited only one case in the entire opinion).

³⁴⁸ See *Marbury*, 5 U.S. at 179 (providing, as examples of congressional acts that ought to be reviewed, export duties, *ex post facto* laws, and legislative changes to the evidentiary requirements for a charge of treason).

³⁴⁹ See Van Alstyne, *supra* note 75, at 18 (distinguishing between laws clearly in violation of the Constitution and laws that some might construe as unconstitutional).

³⁵⁰ See THE FEDERALIST NO. 78, at 467, 502, 505–06 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that "[n]o legislative act . . . contrary to the Constitution can be valid" and that "[t]he interpretation of the laws is the proper and peculiar province of the courts").

³⁵¹ See SHEVORY, *supra* note 104, at 49–50 (contrasting Justice Marshall's interpretive strategy in the second part of *Marbury* of construing silence as restricting the Court's original jurisdiction with his interpretive strategy in the third part of *Marbury* in which "the grant of power is teased from various phrases and inferences").

³⁵² *Marbury*, 5 U.S. at 178. William Van Alstyne points out, quite correctly, that the fact that the Constitution is written tells us nothing about whether courts or legislatures (or the people themselves) are to have the final say on what the Constitution means. Van Alstyne, *supra* note 75, at 17–18.

³⁵³ *Marbury*, 5 U.S. at 178.

³⁵⁴ *Id.* at 180.

³⁵⁵ *Id.*

the end because none of them actually speak to the judiciary's power to sit in judgment of the actions of the political branches.³⁵⁶ Marshall's famous dictum seems to assume, rather than reason, that the judicial department is empowered to determine whether a legislative act is repugnant to the Constitution.³⁵⁷ It was by no means clear to the founding generation that judges could review statutes without themselves becoming policymakers.³⁵⁸

Marbury v. Madison well illustrates the power of *ipse dixit* reasoning. The Marshall Court faced an existential crisis in 1803. It had good legal grounds to order the Secretary of State to issue Marbury his commission, but it was clear that James Madison would have ignored any such order, and the Court was powerless to enforce its decisions. Meanwhile, the threat of impeachment loomed.³⁵⁹ The Court also had good legal grounds to refuse to exercise jurisdiction and to allow the problem to go away. Marshall chose to write an opinion in which he passed judgment on the Jefferson administration, asserted the power of review, and yet declined to order Madison to do anything. In so doing, he made use of many of the tools in his kit of interpretive modalities: common law adjudication, appeals to the English tradition, rhetorical questions designed to appeal to logic and common sense, textualism, and intentionalism.³⁶⁰ Every step of the decision is idiosyncratic, but the opinion is structured so as to make each step seem not only appropriate but fore-ordained.

2. *McCulloch v. Maryland: Buttressing the National Economy*

In *McCulloch v. Maryland*,³⁶¹ the Court decided two issues. First, it upheld the legality of the Second Bank of the United States, a ruling that should not have been

³⁵⁶ See Van Alstyne, *supra* note 75, at 20–22 (disputing Marshall's reading of the significance of the Supremacy Clause); *id.* at 25–26 (observing that the oath to uphold the Constitution is not unique to judges); *id.* at 26–29 (providing readings of Article III's grant of federal question jurisdiction to the courts that do not entail constitutional review of congressional acts).

³⁵⁷ Marshall's failure to cite precedents for judicial review is curious. Scott Gerber provides numerous examples of the pre-Marshall court engaging in judicial review. Marshall could simply have cited to those precedents. See Scott Douglas Gerber, *The Supreme Court Before John Marshall*, 14 U. ST. THOMAS L.J. 27, 38–39 (2018) (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), as well as cases decided in the circuit courts overturning state laws as unconstitutional, and *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), and other cases in which the Court reviewed the constitutionality of federal statutes).

³⁵⁸ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (maintaining that the predominant view during the Founding era was that the people themselves held final interpretive authority over the meaning of the Constitution); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 622–23 (2012) (arguing that the Jeffersonian view of judicial review predated the Constitution and did not regard governmental interpretation of the Constitution to be authoritative).

³⁵⁹ See *supra* text accompanying notes 141–46.

³⁶⁰ See *supra* note 45.

³⁶¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

surprising, given the precedent for a national bank and the well-developed Hamiltonian justification for the constitutionality of such an entity.³⁶² Unlike *Marbury*, the first issue in *McCulloch* was not clearly partisan, as Madison's Republican administration established the Second Bank, Madison having reversed his position on the bank's legality.³⁶³ The second issue, Maryland's power to tax the Bank, raised the highly partisan issue of the limits on state sovereignty.

After a paragraph of throat-clearing about the weighty issues at hand, Marshall immediately acknowledges that prior precedents prevent him from considering Congress's ability to incorporate a bank an open question.³⁶⁴ Although those precedents include acts "by the judicial department," the main force of Marshall's argument is that, absent "a bold and daring usurpation," well-established policies enacted by the people's representatives "ought not to be lightly disregarded."³⁶⁵

Marshall notes that the issue was hotly debated in Congress and in Washington's cabinet when Hamilton proposed the first bank.³⁶⁶ He also notes that, when the authorization for the original First Bank lapsed, it led to "embarrassments," and now those opposed to the First Bank created the Second.³⁶⁷ Such considerations, historical and pragmatic, do not decide the question entirely, but they certainly color what follows.

Marshall next moves on to the question of sovereignty under the Constitution. Sovereignty, for Marshall, resided with the people and not with the states.³⁶⁸ Marshall references Maryland's contrary arguments but only in order to refute them categorically.³⁶⁹

Marshall next insists, rather than argues, that "the government is acknowledged

³⁶² *Id.* at 401.

³⁶³ See NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* 611 (2017) (setting out Madison's position that the bank had been so universally recognized as constitutional that it had become constitutional).

³⁶⁴ *McCulloch*, 17 U.S. at 402. David Schwartz points out that Marshall nonetheless went on to provide constitutional arguments in support of the bank's legality. His arguments were largely adopted from Hamilton without attribution, "as if to emphasize the Court's independent right to decide the question afresh." David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 STAN. L. REV. ONLINE 17, 22–23 (2019).

³⁶⁵ *McCulloch*, 17 U.S. at 402.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ See *id.* at 402–05 (reviewing the history of the Constitution's ratification and citing to the Preamble as evidence that the document emanates from the people).

³⁶⁹ See *id.* at 401 (referencing counsel's argument that the Constitution was "the act of sovereign and independent States"); *id.* at 404 (summarizing counsel's argument that the people had surrendered their powers to state sovereignty before the advent of the Constitution).

by all to be one of enumerated powers” and that the federal government “is supreme within its sphere of action.”³⁷⁰ He backs up the latter assertion with a reference to the Supremacy Clause.³⁷¹ Marshall concedes, as he must, that the enumeration does not include the power to establish a bank, but the enumeration does not limit Congress to those powers *expressly* given.³⁷² Here, Marshall does some intertextual analysis, comparing the Constitution to the Articles of Confederation.³⁷³ Marshall explains that the Framers omitted the word “expressly” from the Constitution to avoid the “embarrassments” that plagued the Articles of Confederation, thus combining intentionalism, textualism, and purposivism.³⁷⁴

Marshall next provides one of the most controversial statements in the corpus of Supreme Court opinions, maintaining that a constitution could not “partake of the prolixity of a legal code” and providing the general admonishment “we must never forget that it is a *constitution* we are expounding.”³⁷⁵ What follows from Marshall’s reasoning is that Congress has implied powers sufficient to establish a bank even without the Necessary and Proper Clause.³⁷⁶ Marshall cites to no authority for his reasoning, but that reasoning is pragmatic, informed by canons of interpretation to which both the common law and international law can lay claim. The operative interpretive canon is that one prefers a reading that promotes an instrument’s effectiveness over one that hinders its achievement of its ends.³⁷⁷ He further demon-

³⁷⁰ *Id.* at 402, 404; see WHITE, *supra* note 93, at 546 (noting that Marshall asserts rather than argues his point).

³⁷¹ *McCulloch*, 17 U.S. at 405–06.

³⁷² *Id.* at 406.

³⁷³ See *id.* (noting that nothing in the Constitution, including the Tenth Amendment, excludes incidental or implied powers).

³⁷⁴ *Id.* at 406–07.

³⁷⁵ *Id.* at 407.

³⁷⁶ See *id.* at 409–10 (“The government which has a right to do an act . . . must, according to the dictates of reason, be allowed to select the means”); see also *id.* at 419 (repeating the argument and calling it “too apparent for controversy”). Justice Story’s treatise is explicit on this point. See STORY, *supra* note 28, at 137 (asserting the Necessary and Proper Clause “is only declaratory, of a truth, which would have resulted by necessary and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers”).

³⁷⁷ See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 180 (Apr. 11) (finding that the United Nations must possess international standing in order to function as designed); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63–65 (2012) (elaborating on the canon that one should favor an interpretation that furthers rather than obstructs the document’s purpose); Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT’L L. 571, 581 (2011) (“The basis for all interpretation in international law is said to lie with the treaty text and an overarching principle of effectiveness.”).

strates that implied powers necessarily follow from the enumeration through an exercise in logic and common sense.³⁷⁸ The approach suggests a Socratic exercise, with rhetorical questions to which Marshall provided suitable answers while incredulously waiving off alternatives.³⁷⁹

Marshall's opinion does not acknowledge the arguments of Maryland's Attorney General, Luther Martin, who was at the Constitutional Convention, where he championed the causes of the small states.³⁸⁰ Martin began his oral argument with quotations from *The Federalist* and from state ratification conventions in Virginia and New York, all showing that Federalists in 1787–1789 considered the views expounded in favor of the Bank “wholly repugnant” to their understanding of the Constitution.³⁸¹ Martin was willing to concede to Congress powers of necessary implication, but the incorporation of a Bank was no such power and thus was, by the express language of the Tenth Amendment, reserved to the states.³⁸² Marshall, perhaps wisely, chose not to get down into the weeds of the ratification debates. To do so would have been to acknowledge that an issue that he insisted was “too apparent for controversy”³⁸³ was, in fact, highly controversial.

Having established that Congress has incidental powers, Marshall must then explain the need for the Necessary and Proper Clause. Maryland provides the logical reading that the words “necessary” and “proper” either establish limits on Congress's implied powers,³⁸⁴ or merely are there to establish Congress's powers to pass laws.³⁸⁵ Marshall, referring to textual evidence,³⁸⁶ quickly rejects the latter proposition, concluding, “[t]hat a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.”³⁸⁷

Marshall reads the word “necessary” in the Necessary and Proper Clause broadly to permit Congress to do whatever was convenient in furtherance of its enumerated powers.³⁸⁸ Marshall acknowledges that “no one word conveys to the mind, in all situations, one single definite idea,” a notion consistent with Lockean

³⁷⁸ *McCulloch*, 17 U.S. at 406.

³⁷⁹ *See id.* at 410–11 (arguing that the power of incorporation is always incidental to some substantive power and thus would not be enumerated).

³⁸⁰ WHITE, *supra* note 93, at 230–41.

³⁸¹ *McCulloch*, 17 U.S. at 372 (arguments of Luther Martin).

³⁸² *Id.*

³⁸³ *Id.* at 419.

³⁸⁴ *Id.* at 412 (summarizing Maryland's argument that the Necessary and Proper Clause “is really restrictive of the general rights, which might otherwise be implied”).

³⁸⁵ *Id.*

³⁸⁶ *See id.* (citing U.S. CONST. article I, §§ 7, 8).

³⁸⁷ *McCulloch*, 17 U.S. at 413.

³⁸⁸ *Id.* at 413–14.

skepticism.³⁸⁹ “Necessary,” he maintains, must be understood “in a mitigated sense” because the Framers did not modify “necessary” with “absolutely” in the Necessary and Proper Clause as they did elsewhere.³⁹⁰ In one of his few statements touching on interpretation, Marshall concludes that “necessary” must be construed according to “the subject, the context, [and] the intention” of the drafter.³⁹¹

Applying that approach to the Necessary and Proper Clause, Marshall’s analysis repeats his prior arguments about implied powers. Limiting Congress’s powers to the Constitution’s express enumeration could not have been the intention of the drafters. To do so “would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”³⁹² Moreover, Marshall contends, if the principle of requiring express enumeration of all congressional powers were extended, it would negate many implied powers that Congress exercises without question.³⁹³

The decision had broad ramifications for Marshall’s nationalist politics. As early as 1791, Jefferson had expressed horror at constructions of “necessary” to mean “convenient.”³⁹⁴ He argued that such an interpretation “would swallow up all the delegated powers, and reduce the whole to one power;”³⁹⁵ that is, the power to do whatever Congress thought was convenient.

Marshall concludes this section with his structural analysis, noting that the Necessary and Proper Clause could not be a limit on Congress’s powers because it is placed among the Constitution’s affirmative grants of power to Congress rather than among the limitations on Congress’s powers.³⁹⁶ If the Framers had intended the Clause as a limitation, they would have placed the Clause elsewhere and worded it as a limitation—e.g., “no laws shall be passed but such as are necessary and proper.”³⁹⁷ Marshall also analogizes the Clause to Article IV, Section 3, which empowers Congress to make “rules and regulations respecting the territory or other property belonging to the United States.”³⁹⁸ Pursuant to that provision, Congress

³⁸⁹ *Id.* at 414; see *supra* notes 213–27 and accompanying text for a discussion of Lockean skepticism.

³⁹⁰ *McCulloch*, 17 U.S. at 416; see U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws . . .”).

³⁹¹ *McCulloch*, 17 U.S. at 415.

³⁹² *Id.*

³⁹³ *Id.* at 416 (discussing Congress’s power to punish violations of its laws and to carry the mail, which are not provided for in the Article I enumeration).

³⁹⁴ Thomas Jefferson, *Opinion Against the Constitutionality of a National Bank*, in 3 WRITINGS OF THOMAS JEFFERSON 145, 149 (A. Lipscomb & A.E. Bergh eds., 1903).

³⁹⁵ *Id.*

³⁹⁶ *McCulloch*, 17 U.S. at 419.

³⁹⁷ *Id.* at 420.

³⁹⁸ *Id.* at 382; U.S. CONST. art. 4, § 3.

had established territorial governments, which are corporate bodies, just like a bank. Marshall argues that the Rules and Regulation Clause “is not more comprehensive” than the Necessary and Proper Clause,³⁹⁹ but the argument is far from self-evident.

Joseph Hopkinson, arguing on behalf of Maryland, conceded the legality of the First Bank, but argued that the constitutional necessity of a national bank in 1791 could not serve to establish its necessity in 1816.⁴⁰⁰ Citing Alexander Hamilton’s defense of the establishment of the First Bank, Maryland acknowledged that a national bank may have been needed in 1791, when only three state banks were in operation, but could not be deemed “necessary” when “we have a banking capital to a vast amount, vested in banks of good credit, and so spread over the country, as to be convenient and competent for all the purposes enumerated in [Hamilton’s] argument.”⁴⁰¹ Maryland was inviting Marshall to a middle ground. The question was not whether Congress had power to establish a bank but whether the establishment of *this Bank* could be deemed necessary to the effectuation of a congressional power. However, Marshall preferred to defer to Congress. “[T]he existence of State banks can have no possible influence on the question,” he proclaimed, because the Constitution gives Congress the choice of means to effectuate its enumerated powers.⁴⁰² Marshall here combines question begging with a *non sequitur*. The extent to which Congress can choose its means goes to the heart of the controversy. Given a common-sense construction of the word “necessary,” the existence of state banks sufficient to the task most certainly would be relevant to whether Congress’s powers extended to the incorporation of *this Bank*.

The second issue in *McCulloch* was whether Maryland could tax the Bank. Marshall had to concede up front that no constitutional provision prohibited Maryland from doing so.⁴⁰³ Rather, the argument that the Bank was exempt sounded in the principle of federal supremacy.⁴⁰⁴ The federal government’s power to create implies a power to preserve, and the states’ power to destroy through taxation, as the lesser power, must yield if repugnant to supreme federal power.⁴⁰⁵

Just as Maryland did not take a categorical stand against Congress’s power to incorporate a bank, it also did not contend that the states enjoyed an unlimited taxing power. Rather, Maryland conceded that the power to tax could be a power

³⁹⁹ *McCulloch*, 17 U.S. at 422.

⁴⁰⁰ *Id.* at 331 (argument of Joseph Hopkinson).

⁴⁰¹ *Id.* at 332–33 (argument of Joseph Hopkinson).

⁴⁰² *Id.* at 424.

⁴⁰³ *Id.* at 427–28.

⁴⁰⁴ *Id.* at 427.

⁴⁰⁵ *Id.* at 426.

to destroy but so could many other powers.⁴⁰⁶ The Constitution is built on mutual trust between the federal government and the states that one will not exercise its power in order to ruin the other.⁴⁰⁷ But Marshall rejected this notion as preposterous. The people of one state would not entrust to those of another the “power to control the operations of a government to which they have confided their most important and most valuable interests.”⁴⁰⁸ Marshall declared the judicial department to be unfit to determine “what degree of taxation is . . . legitimate.”⁴⁰⁹ He regarded the slippery slope as unavoidable in this instance—if states can tax one instrument of the federal government, they can tax them all.⁴¹⁰ Marshall ignored Maryland’s further argument that the Bank was a federal bank in name only. It was in fact, and by design, a private institution in which the United States held shares.⁴¹¹

Marshall’s mode of constitutional construction (for it is hard to call it “interpretation” when no text is referenced or discussed) involves reasoning from first principles. States have sovereign power to tax.⁴¹² That cannot be denied. However, they can only tax things over which they have authority, and the states have no authority over “the means employed by the government of the Union, for the execution of its powers.”⁴¹³ Maryland counters with a textual argument. Article I, Section 10 of the Constitution provides the sole limitation on the states’ powers for raising revenue: “no [S]tate shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”⁴¹⁴ Maryland also relies on passages from *The Federalist Papers*, which clearly state that the federal government and the states have “co-equal authority . . . in the article of revenue.”⁴¹⁵ Marshall returns to the general principles of *The Federalist Papers* as a whole and states with great confidence that the authors of that work would never countenance state taxation of instruments of the federal government.⁴¹⁶

Finally, Marshall closes with an argument from democratic theory. Congress

⁴⁰⁶ *Id.* at 327–28.

⁴⁰⁷ *Id.* at 349–50.

⁴⁰⁸ *Id.* at 431.

⁴⁰⁹ *Id.* at 430.

⁴¹⁰ *Id.* at 432.

⁴¹¹ *See id.* at 340–41 (argument of Joseph Hopkinson) (pointing out that the United States was merely a shareholder in the Bank and that Alexander Hamilton considered it vital that the Bank be a private institution); *id.* at 375 (argument of Luther Martin) (arguing that Maryland was not necessarily arguing that states could tax the federal government but only that they could tax a corporation in which the federal government held shares).

⁴¹² *Id.* at 428.

⁴¹³ *Id.* at 430.

⁴¹⁴ *Id.* at 343 (argument of Joseph Hopkinson) (citing U.S. CONST. art. I, § 10, cl. 2).

⁴¹⁵ *Id.* at 345 (argument of Joseph Hopkinson) (citing THE FEDERALIST NO. 34).

⁴¹⁶ *Id.* at 434.

can impose taxation on state banks because the people of all of the states, and the states themselves, are represented in Congress.⁴¹⁷ Its representatives can be held to account should the taxes imposed be unreasonable.⁴¹⁸ But the state of Maryland seeks to impose tax burdens on an entity endorsed by the people as a whole.⁴¹⁹ The beneficiaries of that tax reside in Maryland, and Maryland's legislature is not accountable to the people from other states who will be paying the tax.⁴²⁰

McCulloch turned on two *ipse dixit* determinations. Maryland challenged Congress's power to establish *this particular* Bank. Marshall answered that Congress could do whatever was convenient in furtherance of its enumerated powers, refusing to ask whether the Second Bank was really necessary. Maryland claimed the power to impose a particular tax on a particular United States entity. It sought no general ruling that the powers of states to tax federal entities was unlimited. Marshall ruled that no state could tax any United States entity. In both cases, Marshall's reasoning steered him towards categorical rulings in favor of the national interest.

C. Conclusion: Pluralism, Discretion, and *Ipse Dixit*

The point here is not to criticize Marshall's conclusions nor to fault him for the inconsistency of his approach. Rather, my aim is to demonstrate that the Marshall Court was not wed to any hierarchy among interpretive strategies. In deciding when to construe the text narrowly, as in his reading of Article III in *Marbury*, and in deciding to construe the text broadly, as in his reading of the enumeration of congressional powers in *McCulloch*, Marshall made *ipse dixit* decisions.

Exposing Marshall's *ipse dixit* reasoning does not entail a cynical form of legal realism in which judges treat their own policy preferences as constitutional commands. Rather, *ipse dixit* reasoning is unavoidable when a judge has to choose among possible renderings of the constitutional text. The fact that judges exercise choice does not mean that those choices are unconstrained.⁴²¹ Rather, as Jack Balkin has pointed out, judges are always constrained by conventions of legal interpretation, including precedent, their own duty of fidelity to the Constitution, and by the

⁴¹⁷ *Id.* at 435.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 435–36.

⁴²¹ Phillip Bobbitt considers judges constrained by conscience. Phillip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1873–74 (1994) (noting that judges have recourse to conscience when different interpretive modalities conflict). For a general discussion of the role of conscience in Bobbitt's system, see Bobbitt, *supra* note 47, at 169–75. Conscience, however, is only one of many constraints.

opinions of their peers.⁴²² Marshall and his contemporaries faced stark choices, but they had an array of interpretive tools that they could use to choose among compelling options. They rendered opinions consistent with their understandings of the Constitution's text and its purposes. They referenced the intentions of the Framers, but they knew that the Framers were divided on the very issues that they had to decide in these early, seminal cases. Still, they wrote opinions that, while contested, sounded in accepted interpretive modalities. The Marshall Court thus resolved fraught issues while establishing the enduring legacy of the federal judiciary as a non-partisan forum in which a well-reasoned opinion not without basis in the Constitution's text, structure, history, and general purposes could resolve legal controversies.

V. MARSHALL'S GIFT: AUTHORITY WITHOUT FIXITY

Some contemporary originalists claim that the Supreme Court's constitutional jurisprudence in the Early Republic was originalist. I have argued in Part IV that originalism as we conceive of it today does not provide a useful means for understanding the Marshall Court's interpretive method. But even if it were, there would be very few occasions on which a judge during the Early Republic could put that tool to use. As originalist theorist Mike Rappaport has noted on the Originalism Blog, "If one has a sophisticated and open minded view of interpretation . . . many clauses of the [Constitution] are simply not clear, unless one has done the extensive historical research."⁴²³ He then concedes that even those who have done the research may come to opposite conclusions.⁴²⁴ While judges have never been unconcerned with original meaning, judges in the early nineteenth century could not have undertaken such research whether or not they were inclined to be bound by original meaning.

Contemporaries attacked Justice Marshall in the same manner that early originalists attacked the Warren Court. Thus, Spencer Roane discovered evidence in Justice Marshall's opinion in *McCulloch* that "a new mode of amending the Constitution" had been found, one in which "the Constitution may be expounded without ever looking into it!"⁴²⁵ To Marshall's detractors, his interpretive strategies were primarily motivated by political expediency. Some contemporary commentators echo this charge, calling Marshall's interpretive strategies "as political as any opinions of the Warren Court."⁴²⁶

⁴²² See Balkin, *Arguing About the Constitution*, *supra* note 49, at 204–06 (describing objective, subjective, and inter-subjective constraints on constitutional construction).

⁴²³ Mike Rappaport, *Clear Originalist Cases*, ORIGINALISM BLOG (Dec. 12, 2016), <http://originalismblog.typepad.com/the-originalism-blog/2016/12/clear-originalist-casesmike-rappaport.html>.

⁴²⁴ *Id.*

⁴²⁵ MARSHALL'S DEFENSE Justice Roane, *supra* note 168, at 109.

⁴²⁶ SHEVORY, *supra* note 194, at 55.

While some of his contemporaries viewed Justice Marshall as partisan, his successors within the judiciary considered him an unimpeachable authority and adhered to both his holdings and his methodology.⁴²⁷ John Marshall's continued influence is undeniable. *Marbury v. Madison* alone renders Marshall a towering figure because it gave rise to and remains unquestioned in its establishment of judicial review.⁴²⁸ *Marbury* has been invoked (and arguably expanded)⁴²⁹ at crucial junctures in our legal history. The Court invoked *Marbury* in *Cooper v. Aaron*,⁴³⁰ in thwarting Arkansas state officials engaged in massive resistance to *Brown v. Board of Education*.⁴³¹ It did so again in *United States v. Nixon*, in compelling the President to comply with a Special Prosecutor's subpoena.⁴³²

John Marshall's Constitution is our Constitution; John Marshall's Supreme Court is our Supreme Court. He initiated a discursive practice. He shaped our legal system with his authoritative constitutional interpretations, but his interpretations were authoritative because he founded a legal culture in which his Court's pronouncements were treated as decisive and Supreme—to be overcome only through constitutional amendment. Today, originalists and non-originalists alike proclaim themselves to be the true guardians of Marshall's approach to constitutional adjudication. Both can make such claims with some legitimacy, which itself signals the extensive reach of Marshall's pluralistic approach. But that approach is best understood in its own terms and not in the light of debates that have arisen in the aftermath of the perceived judicial activism of the Warren and Burger Courts.

⁴²⁷ See Toler & Cecere, *supra* note 54, at 314 (noting later Justices during the Court's first century "relied heavily on the early Court, especially the Marshall Court, as a guide to conducting constitutional inquiry"); *id.* at 316 (finding that four of the eight most cited Supreme Court cases are from the Marshall Court).

⁴²⁸ See Eisgruber, *supra* note 64, at 1204 (noting that *Marbury* has come to stand for the proper role of courts in a constitutional system); NELSON, *MARBURY*, *supra* note 84, at 75 (noting that state courts overwhelmingly adopted judicial review).

⁴²⁹ Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 *GEO. L.J.* 1135, 1171 (2019) (arguing that the doctrine of judicial supremacy, announced for the first time in *Cooper*, vastly expanded the scope of judicial review as articulated in *Marbury*).

⁴³⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁴³¹ *Id.* (articulating the doctrine of judicial supremacy).

⁴³² *United States v. Nixon*, 418 U.S. 683, 703–04 (1974) (asserting the Court's power "to say what the law is" with respect to Executive powers).