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OUR RHIZOMATIC CONSTITUTION

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ABSTRACT

The text of Section 5 of the Fourteenth Amendment says that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Yet, since its inception, the word "enforce" has been the subject of great constitutional controversy: does the word give Congress the ability to define the scope of rights under the Fourteenth Amendment independently of the Supreme Court? Though that question remained unresolved for most of American history, the Rehnquist and Roberts Courts have formally answered the question with a resounding "no."

This Article pushes back against that misreading of the Fourteenth Amendment and its history, as well as the Supreme Court's recent mischaracterization of judicial review that underpins its misunderstanding of the congressional role under the Fourteenth Amendment. In doing so, this Article argues that a better understanding of our constitutional structure is that Congress and the Court must engage in a kind of dialogic and rhizomatic tug-of-war over the Fourteenth Amendment's—and more broadly, the Constitution's—meaning. This dialogue is necessary to ensure that neither branch can deprive a person of life, liberty, and property, or deny the equal protection of our laws without being checked by the other. More than that, however, this Article fills a gap in legal scholarship by providing specific examples of how the dialogic model of constitutional interpretation has been carried out before in American history, and how it should be carried out going forward.

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I. INTRODUCTION

"[I]f they were to be anything but 'parasites' on their society . . . [t]hey had to know the Constitution better than the Supreme Court had allowed it to be known and trust its precepts more than the framers had themselves."

— Charles Hamilton Houston[1]

[1] JAMES RAWN, JR., ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION 53 (1st ed. 2010).

It was March 12, 1990, and Congress had a problem waiting on its front steps.[2] Almost one year earlier, Senator Tom Harkin and Representative Tony Coelho jointly introduced a revised version of the Americans with Disabilities Act (ADA) to the 101st Congress.[3] This time, however, the ADA's sponsors had something they did not before: unusually strong bipartisan support and the endorsement of then-President George H.W. Bush.[4] With such a broad coalition of support, the passing of the ADA seemed to be a given—the rules of bicameralism and presentment nothing more than a mere formality.

As expected, the bill passed the full Senate by an overwhelming majority.[5] Getting the bill through the House, however, proved to be a more tortuous matter.[6] Referred to an unprecedented four House committees, the bill became bogged down in subcommittee hearing after subcommittee hearing, and ultimately stalled in the House Committee on Public Works and Transportation[7]—a delay that occurred despite, as Representative Major R. Owens said of the bill at the time, "All the i's hav[ing] been dotted and all the t's hav[ing] been crossed."[8] By the spring of 1990, alarmed, the disability rights movement had had enough.[9]

That March, 475 disability rights activists and 1,000 more supporters peacefully congregated outside of the United States Capitol with one rather simple demand: the passage of the ADA.[10] Towards the end of the rally, sixty of those protesters cast aside their wheelchairs and other mobility aids, and began to crawl up the seventy-eight marble stairs of the Capitol West Front, one-by-one.[11] Their struggle to make their way up the steps of their own government—plastered on television screens across America—"show[ed]

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[2] *See* Julia Carmel, *'Nothing About Us Without Us': 16 Moments in the Fight for Disability Rights*, N.Y. Times (Jul. 29, 2020), https://www.nytimes.com/2020/07/22/us/ada-disabilities-act-history.html [https://perma.cc/U48D-N782].

[3] Jonathan M. Young, Equality of Opportunity: The Making of the Americans with Disabilities Act, National Council on Disability 85 (1997), https://files.eric.ed.gov/fulltext/ED512697.pdf [https://perma.cc/6SSY-JGJT]. The first version of the ADA was introduced in the 100th Congress by Senator Lowell Weicker and Representative Coelho, though the bill never came to a vote before the end of the congressional session. *See id.* at 54, 75.

[4] *See* Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 Idaho L. Rev. 205, 209 (1999).

[5] *Id.* at 210 ("[The bill] was considered early by the full Senate, passing by a 76-8 vote on September 7, 1989").

[6] *See* Young, *supra* note 3, at 104.

[7] *Id.*

[8] Carmel, *supra* note 2 (despite having bipartisan support in Congress, the ADA stalled in the House because of the lobbying efforts of public transportation companies that "fought against the strict regulations for accessibility"); *see also* Perri Meldon, *Disability History: The Disability Rights Movement*, National Park Service (Mar. 22, 2024), https://www.nps.gov/articles/disabilityhistoryrightsmovement.html [https://perma.cc/T92S-C9YS].

[9] *See Carmel, supra* note 2.

[10] Minnesota Governor's Council on Developmental Disabilities, *Moments in Disability History 27: A Magna Carta and the Ides of March to the ADA*, The ADA Legacy Project (Mar. 1, 2015), https://mn.gov/mnddc/ada-legacy/ada-legacy-moment27.html [https://perma.cc/SG4C-C9U6].

[11] *Id.*

the country what kinds of things people with disabilities have to face on a day-to-day basis."[12] The "Capitol Crawl" forced Congress to respond.[13]

Just three months later, in a ceremony on the South Lawn of the White House, President Bush signed into law[14] what has since been called "the most significant piece of civil rights legislation since the Civil Rights Act of 1964"[15] and the "Emancipation Proclamation" for the disability community: the Americans with Disabilities Act of 1990.[16] In rather "prosaic" language, the ADA codified a national "commitment to remove barriers and protect opportunities for all Americans to strive, achieve, and contribute up to their potential."[17] More than just "rewriting building codes and personnel manuals across America" to reflect the negative right of individuals with disabilities to be free from discrimination,[18] the ADA went a step further. The statute also imposes affirmative obligations on both public and private entities to ensure equality.[19]

While there is much to say about the historic passing of the ADA, the incredible disability rights activism it required, as well as the ground-breaking vision of federal civil rights protections eventually embodied in its substantive provisions,[20] few have focused on how, in enacting the ADA, Congress joined the constitutional conversation on the status of disabled people that, at that point, had been dominated solely by the Supreme Court. As explained by Professors Katie Eyer and Karen M. Tani, the ADA's drafters displayed remarkable awareness of, and responsiveness to, the Court's recent constitutional jurisprudence[21]—at times acquiescing to the Court's demands, while at others, completely repudiating them. For instance, in response to Justice William Rehnquist's requirement in *Pennhurst State School & Hospital v. Halderman (Pennhurst I)*[22] that Congress clearly specify the constitutional provision that authorizes a piece of legislation, the ADA's drafters explicitly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth

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[12] *Id.*; *see also* Faye Ginsburg & Rayna Rapp, *Making Accessible Futures: From the Capitol Crawl to #cripthevote*, 39 CARDOZO L. REV. 699, 703 (2017).

[13] *See* Gabe Sanders, *How the "Capitol Crawl" Galvanized Congress into Passing a Landmark Civil Rights Bill*, THE NONVIOLENCE PROJECT (Sept. 8, 2022), https://thenonviolenceproject.wisc.edu/2022/09/08/capitol-crawl/ [https://perma.cc/MEA6-5MUQ].

[14] *See* Young, *supra* note 3, at 146–47.

[15] Craig, *supra* note 4, at 206.

[16] *See* 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Sen. Harkin) ("The ADA is, indeed, the 20th century emancipation proclamation for all persons with disabilities").

[17] Craig, *supra* note 4, at 206.

[18] *Id.*

[19] *See generally* Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933 (2021).

[20] *See generally* Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

[21] Katie Eyer and Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 899 (2024).

[22] 451 U.S. 1 (1978).

amendment" in Section 2 of the ADA.[23] In response to the Court's many rulings that any abrogation of Eleventh Amendment immunity in statutes authorized by the Fourteenth Amendment requires a clear statement,[24] the ADA's drafters also included a section titled "State Immunity."[25]

More controversial, however, was the ADA's original "Findings and Purposes" section, which seemingly refuted one of the Court's decisions from six years earlier.[26] In 1984, the Supreme Court in *City of Cleburne v. Cleburne Living Center*[27] held that individuals with disabilities are not a "quasi-suspect class," warranting heightened scrutiny in the Equal Protection Clause analysis.[28] Unlike other suspect classes, such as race or sex, the disability community, the Court said, was too "large and diversified" and clearly not subject to "continuing antipathy or prejudice" given the existence of disability rights legislation like the Rehabilitation Act of 1973.[29] Regardless of the question of what form of scrutiny the Court actually applied to disability in *Cleburne*, the Court had at least facially rejected heightened scrutiny for people with disabilities.[30]

Despite the Court's precedent in *Cleburne*, Congress in the ADA went on to memorialize an alternative stance on the classification of individuals with disabilities under the Fourteenth Amendment.[31] In the statute's original

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[23] 42 U.S.C. § 12101(b)(4); *see* Eyer and Tani, *supra* note 21, at 899.

[24] *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); Dellmuth v. Muth, 491 U.S. 223, 228 (1989); Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 284–85 (1973).

[25] *See* Eyer and Tani, *supra* note 21, at 899–900. That section declared that "[a] State shall not be immune under the eleventh amendment . . . from an action in Federal or State court . . . for a violation of this act." 42 U.S.C. § 12202.

[26] *See* Eyer and Tani, *supra* note 21, at 900.

[27] 473 U.S. 432 (1985).

[28] *Id.* at 442.

[29] *Id.* at 443–46.

[30] Interestingly, in evaluating the challenged law under rational basis review, the Court found in favor of the *Cleburne* plaintiffs because of the "irrational prejudice" displayed by the defendants. *Id.* at 450. In other words, the Court ultimately applied some sort of heightened scrutiny to disability rights by shifting the burden of proof to the defendant to justify its regulation. *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Nam*e, 62 IND. L.J. 779, 794–96 (1987). That test—never formally recognized by the Supreme Court—informally came to be known as rational basis with bite. *Id.*

[31] The issue of rational basis not being protective enough of individuals with disabilities was indeed raised during the legislative process for the ADA. For instance, then-President of the American Association on Mental Retardation, Jared W. Ellis, testified to the House Judiciary Committee, specifically the Subcommittee on Civil and Constitutional Rights, about the "lack of judicial enforcement of the protections of the United States Constitution" since the *Cleburne* decision. *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 422 (1989). Specifically, Ellis testified to the following:

> The Fourteenth Amendment guarantees to all persons the equal protection of the laws. There can be no doubt that this applies to citizens with disabilities just as it does to all others. But the Supreme Court of the United States has declined to provide the same level of protection that it does in the areas of race and gender. Instead, it consigned cases involving disability discrimination to the level or 'tier' of

"Findings and Purposes" section, the ADA's drafters went line-by-line and addressed the Court's reasoning in *Cleburne*.[32] They wrote that "individuals with disabilities are a discrete and insular minority" that has been "subjected to a history of purposeful unequal treatment" and "relegated to a position of political powerlessness in our society" because of immutable "characteristics . . . beyond [their] control."[33] In passing this language, the disability rights advocates and scholars argued, "Congress clearly intended to create a new protected class" and had subsequently ratcheted up the standard of review for disability-rights equal protection claims.[34] More significantly, through the ADA, the drafters had potentially resurrected the view that Congress has independent authority to interpret the Fourteenth Amendment.[35]

The passing of the ADA settled that people with disabilities have a right to be free from discrimination under the law, while simultaneously unearthing a different, less easily resolvable constitutional question: to what extent does Congress have the authority to define for itself equal protection and due process violations under Section 5 of the Fourteenth Amendment? Although Section 5 explicitly vests Congress with "the power to enforce, by appropriate legislation" the guarantees of the Fourteenth Amendment,[36] the scope of its enforcement power has been a source of significant constitutional controversy since its ratification.

> judicial scrutiny least favorable to the individual who suffers the discrimination—the so-called 'rational basis' test. What this means in practical terms is that any halfway plausible rationalization for governmental discrimination against people with mental or physical disabilities will be enough to satisfy the Federal courts.

Id. at 422–23. Given the Court's misstep in *Cleburne*, Ellis "urge[d] the House of Representatives to join the Senate and President Bush in approving the Americans with Disabilities Act" and increase the scope of protection for individuals with disabilities. *Id.* at 423.

[32] Congress also seemingly addressed the indicia of suspectness famously mentioned by Justice Harlan Stone in Footnote 4 of *United States v. Carolene Products*. 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . Nor need we enquire whether similar considerations enter into the review of . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

[33] 42 U.S.C. § 12101(a)(7) (1990). This language remained in the ADA until it was removed in the ADA Amendments Act of 2008.

[34] Amy Scott Lowndes, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 FLA. L. REV. 417, 446 (1992).

[35] *See* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 202 (1992) ("Whether or not the Supreme Court ultimately decides that Congress has now mandated heightened judicial scrutiny in cases of discrimination on the basis of disability brought under the fourteenth amendment, there can be no question that the A.D.A. will provide, when fully effective, powerful avenues of redress for Americans with disabilities who are subjected to discrimination").

[36] U.S. CONST. amend. XIV, § 5.

The idea that the word "enforce" permits Congress to not only enact remedial congressional legislation but to also define rights themselves excites controversy for two reasons. First, as prominent legal scholar and former Solicitor General of the United States, Archibald Cox, once explained, our legal tradition has long committed constitutional interpretation to the federal judiciary[37]—an understanding commonly traced back to Chief Justice John Marshall's famous pronouncement in *Marbury v. Madison*[38] that it is "the province and duty of the judicial department to say what the law is."[39] By extension, congressional interpretation of the Fourteenth Amendment would appear to be incongruent with the contours of judicial review established in *Marbury*.[40] Second, most participants in the heated debate on the question of which branch is the proper constitutional interpreter believe that there can only be one authoritative interpreter of the Constitution.[41] The idea that multiple branches of government can concurrently interpret the Constitution in a collaborative dialogue seems to violate the minor premises of both judicial supremacists[42] and many modern legislative constitutionalists who argue that Congress has the authority to define the nation's highest law.[43]

Despite the amount of ink spilled defending one-branch supremacy—often judicial supremacy, though not always—this Article makes exactly the inverse argument: the structure of our constitutional system and principles of good institutional design demand a kind of dialogic and interpretive tug-of-war between both the Supreme Court *and* Congress—something that the ADA's drafters clearly understood in 1990. With regard to the Fourteenth Amendment specifically, the interaction of competing viewpoints advanced by these two separate, but coordinate, interpreters is necessary to ensure that neither branch can deprive a person of life, liberty, and property, or deny the equal protection of our laws without being checked by the other.[44]

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[37] Archibald Cox, *The Supreme Court, 1966 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) [hereinafter Cox, *Foreword*].

[38] 5 U.S. (1 Cranch) 137 (1803).

[39] *Id.* at 177.

[40] *See id.*

[41] *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

[42] *See id.* at 1377–78 ("The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative").

[43] *See* Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/YDS5-JKA7].

[44] Much has been written about the executive branch's ability to interpret the Constitution as well. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993); Christopher N. May, *Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994). However, this Article does not cover the argument of executive review in-depth.

The dialogic model of interpretation is nothing new—both in terms of American constitutional law as well as from a larger, bird's-eye view of nature and philosophy. In the 1980s, the postmodern French philosophers Gilles Deleuze and Félix Guattari differentiated between the "arborescent" classic Western philosophy—in which knowledge and thinking are seen as growing hierarchically and linearly from a single origin point like a tree—and what they called "rhizomatic" philosophy, or the perspective that knowledge develops horizontally, shooting off its roots in every which way until a complex, infinite network of information forms.[45] Deleuze and Guattari explained that "[a] rhizome has no beginning or end; it is always in the middle, between things, interbeing, *intermezzo*. The tree is filiation, but the rhizome is alliance, uniquely alliance."[46] Over the years, constitutional law has been characterized by arborescent thinking. Lawyers, scholars, and judges have fallen into the trap of believing that the Constitution can mean one thing and that that singular truth must be dictated to us by the first among equals branch of government: the judiciary.[47] But much like the rhizome Deleuze and Guattari described, the Constitution is fluid, ever evolving, and non-hierarchical. Its true meaning exists in the interstices of the different branches of government rather than being rooted in a single source of power indefinitely.

In exploring the rhizomatic nature of our Constitution, this Article proceeds as follows. Part I tracks judicial and congressional perception of the term "enforce" in Section 5 over time, starting with the understanding of the Fourteenth Amendment's drafters during the Reconstruction Era and ending with the modern Court's narrow construction of the term. Part II rejects the philosophy of judicial supremacy that has leached into arguments against Congress' ability to define the scope of the Fourteenth Amendment's protections. Finally, Part III explores how Congress interpreting the Fourteenth Amendment in tandem with the Supreme Court would functionally play out.

II. Defining "Enforce" in Section 5 of the Fourteenth Amendment

As Professors Eyer and Tani explain, litigators immediately took notice of the ADA's "Findings and Purposes" section.[48] Specifically, they began arguing that the ADA changed the standard of review for disability-based equal protection claims.[49] Less than six months after the ADA's passage,

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[45] *See generally* Gilles Deleuze and Félix Guattari, A Thousand Plateaus: Capitalism and Schizophrenia (1987).

[46] *Id.* at 25.

[47] *See, e.g.*, Kenneth W. Starr, First Among Equals: The Supreme Court in American Life (2002).

[48] *See* Eyer and Tani, *supra* note 21, at 902.

[49] *Id.* (citing More v. Farrier, 984 F.2d 269, 271 n.4 (8th Cir. 1993); Tomsha v. City of Colorado Springs, 856 P.2d 13, 14 (Colo. App. 1992)).

the California Association of the Physically Handicapped, for instance, petitioned the Supreme Court arguing just that.[50] The advocates claimed that "Congress has determined that disabled Americans should have their equal protection claims subjected to strict scrutiny" and that "[t]he Court should defer to this finding since Congress is particularly well suited to evaluate the extent to which disabled Americans have been relegated to a position of political powerlessness in our society."[51] Though the Court ultimately denied the petition,[52] the argument had been made: Congress had openly disagreed with the Court on the demands of the Fourteenth Amendment through the ADA.

More than just denying cert petitions, though, the Court eventually foreclosed these types of legislative constitutionalist arguments altogether. In 1993, the Court in *Heller v. Doe*[53] considered a challenge to Kentucky's involuntary civil commitment statutory scheme, which differentiated between adults with mental illnesses and those with intellectual disabilities. In their brief, the plaintiffs borrowed from litigators before them and argued that the Court should be "[m]indful of the prerogatives of a co-equal branch of government" by "tak[ing] into account the intention of Congress, implicit in the findings which preface the Americans With Disabilities Act of 1990, that classifications burdening persons with disabilities be given the higher scrutiny reserved for discrete and insular minorities."[54] Ultimately, however, the Court ignored this argument and upheld the Kentucky scheme under rational basis review.[55]

The Court's implicit rejection of the argument that Congress could, for example, change the level of review accorded to a law under the Equal Protection Clause by the Supreme Court, fits well within the Court's current narrow construction of Section 5 and congressional power more generally.[56] Whether it comports with historical understandings of the Section 5 enforcement power, however, is a different matter.[57] This Part describes the ambiguity inherent in the original understanding of Section 5 and how the Court has struggled at

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[50] Petition for Writ of Certiorari at 20, Cal. Ass'n of Physically Handicapped v. FCC, 499 U.S. 975 (1991) (No. 90-1086); *see also* Eyer and Tani, *supra* note 21, at 902.

[51] *Id.*

[52] Cal. Ass'n of Physically Handicapped v. FCC, cert. denied, 499 U.S. 975 (1991).

[53] 509 U.S. 312 (1993).

[54] Brief for Respondents at 9, Heller v. Doe, 509 U.S. 312 (1993) (No. 92-351).

[55] *See Heller*, 509 U.S. at 334. In doing so, the Court even denied the existence of rational basis with bite, positing that it had never "appl[ied] a different standard of rational-basis review" to begin with. *Id.* at 321. Though, Professors Eyer and Tani have noted that:

> [i]nternal Court documents and the oral argument transcript show that the Justices recognized and understood the ADA-based argument. Justice Blackmun's law clerk, for example, noted her own agreement with the notion that people with intellectual disabilities 'are a discrete and insular minority who have experienced a history of discrimination' and who therefore deserved heightened protection.

Eyer and Tani, *supra* note 21, at 903 (quoting Memorandum from Radhika Rao, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 27 n.6, Heller v. Doe, No. 92-351 (Mar. 19, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 2)).

[56] *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

[57] *See* discussion *infra* Sections II.A–C.

various times to reconcile that ambiguity. In doing so, this Part establishes that, at best, contemporaries and even some later Courts and Congresses believed the term "enforce" in Section 5 conferred broad congressional enforcement power, and at worst, the term has been so open to interpretation that Congress claiming such a broad power is not heretical.

A. The Reconstruction Period

More than 80 years after the Fourteenth Amendment was ratified, the Court handed down its famous decision in *Brown v. Board of Education*[58] "that in the field of public education, 'separate but equal' has no place."[59] But before reaching that landmark conclusion, Chief Justice Earl Warren took a slight detour.[60] On re-argument of the case, the Court had asked both parties to focus largely on the ratification history of the Fourteenth Amendment.[61] Yet, despite the "exhaustive[] consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment," Chief Justice Warren ultimately found the ratification history to be "[a]t best . . . inconclusive."[62] As Chief Justice Warren helpfully explained:

> The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[63]

Though Chief Justice Warren warned that "we cannot turn the clock back to 1868 when the Amendment was adopted,"[64] the Court has attempted to do just that in numerous cases since then. In the 1960s, the Court relied on the 39th Congress' debates to argue that "[a] construction of Section 5 that would require a judicial determination that the enforcement of the state law . . . violated the Amendment" would contravene the framers' intent to assign the responsibility of implementing the Amendment to Congress.[65] Towards the end of the century, the Court flipped and began arguing the exact opposite—that the Amendment's framers intended, as indicated by their revisions of the

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[58] 347 U.S. 483 (1954).
[59] *Id.* at 495.
[60] *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1 (1955).
[61] *Brown*, 347 U.S. at 489.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 492.
[65] Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

Fourteenth Amendment, to confer upon Congress not "plenary but remedial" power to "make the substantive constitutional prohibitions [determined by the Court] against the States effective."[66] Put differently, both sides over the years have cherry-picked various snippets of the imprecise "mass of evidence" that is the ratification history of the Fourteenth Amendment[67] to argue with absolute certainty that the role of Congress in interpreting the Fourteenth Amendment has been long-settled—a line of reasoning the Court explicitly rejected in *Brown*.[68]

In analyzing the original understanding of the Fourteenth Amendment, this Section does not take an originalist view. Rather, I aim to neutralize a narrow understanding of the Fourteenth Amendment that has emerged in recent years. Recognizing the different possible interpretations of Section 5 of the Fourteenth Amendment that have existed since its inception much like the Warren Court did in *Brown* helps us craft an interpretation in a way that "endure[s] for ages."[69] After all, as Chief Justice Marshall admonished us, "it is a *constitution* we are expounding."[70]

1. The Bingham Proposal

While the Senate was busy considering the Freedmen's Bureau and Civil Rights Bills, Representative John A. Bingham of Ohio proposed a new amendment to the Constitution on January 12, 1866.[71] His proposal stated that "[t]he Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property."[72] After some back-and-forth in the Joint Committee on Reconstruction, the final language of the proposal sent to the full House Floor changed only slightly:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).[73]

The implications of Bingham's language "with regard to congressional power and federalism were shocking."[74] That was because Bingham,

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[66] City of Boerne v. Flores, 521 U.S. 507, 508 (1997).
[67] Bickel, *supra* note 60, at 6.
[68] 347 U.S. at 489–90.
[69] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).
[70] *Id.* at 407 (emphasis added).
[71] *See* Bickel, *supra* note 60, at 29–30.
[72] *Id.* at 30.
[73] *Id.* at 33.
[74] Robert J. Harris, The Quest for Equality: The Constitution, Congress, and the Supreme Court 33 (1960).

"[a] shrewd . . . and successful railroad lawyer,"[75] had copied the breadth of the language in the Necessary and Proper Clause in his proposal.[76] Some Radicals, like William D. "Pig-Iron" Kelley of Pennsylvania, argued "the amendment would add no new powers whatever to those Congress already possessed" and instead was simply "declarative."[77] That argument comports with the text of the Necessary and Proper Clause itself,[78] and Bingham himself seemed to believe that when he explained to the House that "[e]very word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States."[79] However, many of their fellow congressmen saw in the proposed amendment an unprecedented expansion of congressional power.[80]

Yet, in the context of the past four years with the Civil War, and even the abolitionist struggle prior to the war, the sheer breadth of Bingham's initial proposal is actually not that surprising. For years, abolitionists had worked to "revitalize[] doctrines of equality and natural rights under a literal interpretation of the Declaration of Independence which applied to all men, black or white, and made slavery a nullity as a violation of the laws of nature"—work that congressmen like Bingham took notice of when they argued that a new amendment was necessary to ensure that "all men, before the law, are equal in respect of those rights which God gives and no man or state may rightfully

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[75] Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 YALE L.J. 371, 373 (1938) (quoting CHARLES A. BEARD, THE RISE OF AMERICAN CIVILIZATION 111–13 (1927)).

[76] *See* U.S. CONST. art. I, § 8, cl. 18.

[77] Bickel, *supra* note 60, at 33–34.

[78] *See* U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof") (emphasis added). As explained by John Manning, the text of the Necessary and Proper Clause:

> delegates to Congress broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power . . . [T]he Necessary and Proper Clause is a master provision that allocates decisionmaking responsibility to make laws that implement other constitutional powers. Indeed, the clause empowers Congress to carry into execution not only its own powers, but also 'all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' This breadth indicates that the people not only delegated the implementation power to Congress, but also gave it precedence over the other branches in the exercise of such power.

John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6–7 (2014) (citations omitted). Although members of the 39th Congress debated what it would mean to include the phrase "necessary and proper" in the text of the Fourteenth Amendment, arguably, the various versions of the Fourteenth Amendment being circulated were already encompassed by the broad language of the Necessary and Proper Clause. In that way, the inclusion of the "necessary and proper" language only embellished the "parts of the Constitution which 'probably were intended from the beginning to have life and vitality'"—namely the Necessary and Proper Clause. Bickel, *supra* note 60, at 33–34 n.65 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1865) (statement of Rep. William Higby)).

[79] CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1865).

[80] HARRIS, *supra* note 74, at 33–35.

take away except."[81] These abolitionists saw plenary congressional power as a necessity to enforce the guarantees of equality in the Constitution once and for all.[82]

Moreover, many members of the 39th Congress displayed a "deep-seated mistrust of the judiciary."[83] As Professor Robert Harris explained, the "Former Abolitionists" who predominated in the 39th Congress "had not forgiven the Court for its decision in the *Dred Scott* case or for Chief Justice Roger B. Taney's circuit court opinion in *Ex parte Merryman*."[84] Or, as Professor Joseph James noted, the "decisions of courts had not normally favored abolitionists before the war. There was consequently little inclination to bestow new powers on the judiciary, but rather to lean on an augmented power of Congress, if it could be controlled."[85] The "necessary and proper" language appeared to remedy these concerns by instead expressly conferring upon Congress—not the courts—the broadest constitutional discretion possible.

However, Bingham's proposal was certainly not without criticism. Some congressmen, including many of those eventually cited by the Supreme Court in the 1990s,[86] seemed to worry that such broad congressional power would lead to the federal compulsion of states in ensuring full political equality between the different races.[87] Representative Jackson Rogers of New Jersey worried that:

> Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States.[88]

Representative Robert S. Hale of New York argued that because the Amendment "gives to all persons equal protection," its effect would be to supplant "all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen . . . [with] the law of Congress established instead."[89] And Representative Thomas T. Davis, also of New York, "feared that the power would be used 'in the establishment of perfect political

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[81] *Id.* at 17–18.
[82] *See id.*
[83] Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rev. 81, 94 (1969).
[84] Harris, *supra* note 74, at 54. Professor Harris also suggested that "[t]he hostility of Radicals to the Court was intensified by Chief Justice Salmon P. Chase's refusal to hold circuit court in states under martial law, thereby preventing the trial of Jefferson Davis, and the fears that their reconstruction policies would be invalidated." *Id.*
[85] Joseph B. James, The Framing of the Fourteenth Amendment 184 (1956).
[86] *See* City of Boerne v. Flores, 521 U.S. 507, 520–24 (1997).
[87] *See, e.g.*, Bickel, *supra* note 60, at 38.
[88] *Id.* at 34.
[89] *Id.* at 35.

equality between the colored and the white race of the South.'"[90] On the other side, one Radical, Representative Giles W. Hotchkiss, also of New York, even appeared to worry that Bingham had not been "sufficiently radical."[91] According to Representative Hotchkiss, Bingham's decision to place the proposal's guarantees of equality in the hands of a majoritarian institution like Congress hurt the civil rights cause instead.[92] Together, these objections were enough to lead the House to table Bingham's proposal until the following April.[93]

2. The Fourteenth Amendment

On April 30, 1866, the Joint Committee reconvened and reported a new proposal to Congress.[94] In the new draft of the Amendment, one section stated that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[95]

Another section prescribed that "Congress shall have power to enforce by appropriate legislation, the provisions of this article."[96] This language, of course, is the one that now appears in the Fourteenth Amendment.[97]

Missing from the final version of the Fourteenth Amendment, though, is the "necessary and proper" language from Bingham's original proposal. What, then, is "[t]he significance of the defeat of the Bingham proposal"?[98] While some commentators, including some Justices, have since argued that the revision preserved judicial responsibility for enforcing legal equality, the congressional debates on the Amendment suggest instead that at least some members of Congress believed the Fourteenth Amendment codified broad congressional power.[99] For instance, Bingham himself, who remained heavily involved in the drafting of the revised Fourteenth Amendment, "contended that Congress had no less power to legislate under the fourteenth amendment than it would have had under his own earlier, rejected proposal. In other words, he attached

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[90] *Id.* at 38.
[91] *Id.* at 39–40.
[92] *Id.*
[93] *Id.* at 40.
[94] *Id.* at 45.
[95] *Id.* at 42–43.
[96] *Id.* at 41.
[97] *Id.* at 43; U.S. CONST. amend XIV, § 5.
[98] City of Boerne v. Flores, 521 U.S. 507, 523 (1997).
[99] HARRIS, *supra* note 74, at 37 ("Dr. tenBroek and others have demonstrated rather plausibly that the debates reveal a determination to vest Congress with a broader power to enforce the amendment by legislation extending protection to persons in the event of failure of the states to afford it positively and adequately by their own laws").

no significance whatever to the defeat of that proposal."[100] Other congressmen suggested the same. Representative Thaddeus Stevens remarked that:

> [t]his Amendment allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.[101]

Senator Jacob Howard of Michigan, who was cited by the Court at the peak of its optimism regarding congressional power in the 1960s,[102] similarly argued that Section 1 of the Amendment "restrain[ed] the power of the States and compel[ed] them at all times to respect these great fundamental guarantees"—a directive that would be accomplished by Congress under Section 5, which constituted "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[103] Therefore, regardless of the omission of the "necessary and proper" language in the final amendment, certainly some framers at the time of ratification believed that "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States"[104]—that too, by all means necessary.[105]

B. The Redemption Period

While the meaning of the Fourteenth Amendment still remained relatively ambiguous after ratification, the enacting Congress seemingly embraced the broad interpretation of the Amendment as it quickly passed a series of enforcement legislation, including the Enforcement Act of 1870, the Ku Klux Klan Act of 1871, and the Civil Rights Act of 1875.[106] Even the contemporaneous Supreme Court seemed to embrace the abolitionist interpretation of broad congressional power, as it initially treated congressional enforcement legislation similar to how the modern Supreme Court treats the political questions doctrine—a doctrine that suggests that some constitutional issues are better entrusted solely to another branch of government instead of the

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[100] Bickel, *supra* note 60, at 60 n.115.

[101] *Id.* at 46 (quoting Cong. Globe, 39th Cong., 1st Sess. 2459 (1865)).

[102] *See* Katzenbach v. Morgan, 384 U.S. 641, 648 n.8 (1966) (citing Cong. Globe, 39th Cong., 1st Sess. 2768 (1866)).

[103] Harris, *supra* note 74, at 38.

[104] Horace Edgar Flack, The Adoption of the Fourteenth Amendment 64 (1908).

[105] *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1807 (2010) ("The framers of the Reconstruction Amendments sought to ensure that the test of *McCulloch* would apply to the new powers created by the Reconstruction Amendments").

[106] *See* Laurence H. Tribe, American Constitutional Law 921 n.5 (3d ed. 2000).

judiciary.[107] In upholding the Civil Rights Act of 1875, for instance, the Court in *Ex Parte Virginia*[108] explained that through the Fourteenth Amendment, "[i]t is the power of Congress"—not "the *judicial power*"—"which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation."[109] And in doing so, Congress' Section 5 enforcement power extends to:

> [w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[110]

In other words, according to the Court, what was needed to carry out the dictates of the Fourteenth Amendment through Section 5 was more a question to be answered by Congress in the first instance.

In retrospect, however, both Congress' initial broad understanding of its new powers and the Court's original deference to those congressional interpretations of the Fourteenth Amendment now seem more like temporary aberrations that vanished as soon as support for Reconstruction crumbled.[111] "On the whole, the judicial history of the Reconstruction civil rights legislation is one of the progressive dismantling by the courts of most of what Congress had attempted."[112] In 1872, the Court in the *Slaughterhouse Cases*[113] read the Privileges or Immunities Clause of the Fourteenth Amendment to protect only the rights guaranteed by the federal government, not the individual states. In 1875, the Court in *United States v. Cruikshank*[114] hinted that the purpose of the Fourteenth Amendment was to give the federal government the means to ensure that *states* do not deny its citizens due process or equal protection. And in 1883, the Court reaffirmed this state action doctrine more clearly in

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[107] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[108] 100 U.S. 339 (1879).

[109] *Id.* at 345 (emphasis in original).

[110] *Id.* at 345–46.

[111] *See* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1361 (1964) ("In 1876 the structure of Reconstruction was already crumbling and its impending defeat was evident").

[112] *Id.* at 1373.

[113] 83 U.S. (16 Wall.) 36, 78–79 (1873).

[114] 92 U.S. 542, 554 (1875).

the *Civil Rights Cases*[115] and *United States v. Harris*.[116] Altogether, the Court in the Redemption Period wound up "adopting an extremely narrow view of the legitimate objects of the amendments" despite initially recognizing the broad scope of the Civil War Amendments.[117] In the aftermath of this judicial dismantling, Congress began to backtrack on its use of its new powers under the Reconstruction Amendments as well.[118]

C. The Warren and Burger Courts

Though the Court had already begun to show signs of restricting congressional power under the Fourteenth Amendment more generally, the exact scope of the Section 5 enforcement power still remained relatively unaddressed by the 1960s.[119] That silence, however, did not remain for very long.[120] Perhaps influenced by the Civil Rights Movement, the 1960s marked a time when both Congress and the Supreme Court sought to reinvigorate the Reconstruction Amendments' full potential.[121]

In a prelude to its forthcoming Fourteenth Amendment jurisprudence, the Warren Court in *South Carolina v. Katzenbach*[122] upheld provisions of the Voting Rights Act of 1965 passed pursuant to Congress' authority under the Fifteenth Amendment to ensure that the right to vote is not denied on the basis of race. The Voting Rights Act was, in part, enacted under Section 2 of the Fifteenth Amendment, which contains an enforcement provision that mirrors the language in Section 5 of the Fourteenth Amendment almost word-for-word: "The Congress shall have power to enforce this article by appropriate legislation."[123] In interpreting Section 2, the Court rejected the idea that there are "any such artificial rules under § 2 of the Fifteenth Amendment" that suggest that "Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts."[124] Instead, the Court found that the Section 2 enforcement power was, in essence, as broad as Congress' power under the Necessary and Proper Clause as ex-

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[115] 109 U.S. 3, 11 (1883).
[116] 106 U.S. 629, 639 (1883).
[117] TRIBE, *supra* note 106, at 921. For an example of why the state action doctrine has been criticized as a misreading of the Fourteenth Amendment, *see* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).
[118] *Id.* at 922 n.12 ("Indeed, in 1894 Congress repealed the most important of the Reconstruction civil rights statutes which the Supreme Court had not struck down, the suffrage protections of the Enforcement Act and the Force Act").
[119] *See* TRIBE, *supra* note 106, at 921–22.
[120] *See id.*
[121] *See id.*
[122] 383 U.S. 301 (1966).
[123] U.S. CONST. amend. XV, § 2.
[124] *South Carolina*, 383 U.S. at 327.

plained by Chief Justice Marshall in *McCulloch v. Maryland*:[125] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[126] The question that remained following the Court's decision in *South Carolina* was whether Section 5 of the Fourteenth Amendment could also be read so broadly—a subject that Professor Laurence Tribe noted was "of even greater controversy than Congress' power under the Fifteenth Amendment."[127]

The Warren Court wasted little time in answering that question. The same year it decided *South Carolina*, the Court addressed the scope of congressional power under the analogous Section 5 of the Fourteenth Amendment in *Katzenbach v. Morgan*.[128] The case involved a challenge to Section 4(e) of the Voting Rights Act, which effectively provided that no person who successfully completed the sixth grade in an accredited Spanish-language school in Puerto Rico could be denied the right to vote because of their inability to read or write English.[129] Registered voters in New York argued that Section 4(e)'s nullification of the state's literacy test was unconstitutional under the Court's decision in *Lassiter v. Northampton County Board of Elections*,[130] which held that literacy requirements did not violate the Equal Protection Clause.[131] The Supreme Court disagreed.[132] The majority of the Court, in an opinion written by Justice William Brennan, held that like Section 2 of the Fifteenth Amendment, Section 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[133] In other words, much like the abolitionists who supported Bingham's original proposal for the Fourteenth Amendment, and those who continued to emphasize the broad sweep of congressional power after the proposal's defeat, the Court argued that any legislation passed by Congress pursuant to its Section 5 power is constitutional as long as it meets *McCulloch*'s traditional rationality test—the same approach the Court had applied in *South Carolina*.[134]

Justice Brennan offered two different rationales for why Congress could outlaw literacy tests despite the Court's earlier decision in *Lassiter*.[135] First,

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[125] 17 U.S. 316 (1819).
[126] *South Carolina*, 383 U.S. at 326 (quoting *McCulloch*, 17 U.S. at 421).
[127] TRIBE, *supra* note 106, at 936.
[128] 384 U.S. 641 (1966).
[129] *Id.*; *see* 52 U.S.C.A. § 10303(e).
[130] 360 U.S. 45 (1959).
[131] *Morgan*, 384 U.S. at 648.
[132] *Id.*
[133] *Id.* at 651.
[134] *See id.* at 650.
[135] *Id.* at 652–56.

Congress could provide a prophylactic remedy to the discriminatory treatment the Puerto Rican community residing in New York was experiencing by arming the "community [with] the right that is 'preservative of all rights'": the right to vote.[136] As explained by Professor Tribe, this theory rested upon Congress' superior institutional ability "to find facts and frame remedies" and "marked no doctrinal advance beyond *South Carolina v. Katzenbach*."[137]

The second theory, however, recognized Congress' role as a legitimate interpreter of the Constitution—in addition to the Court itself. Justice Brennan suggested it was Congress' "prerogative" to determine for itself that an "application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause."[138] This theory proved to be much more radical,[139] despite being one of the original possible interpretations of the Fourteenth Amendment.[140]

For the next thirty-one years, the Court did little to clarify the meaning of the "*Morgan* power," as the first theory came to be known.[141] In 1970, the Court considered in *Oregon v. Mitchell*[142] the Voting Rights Amendments of 1970, in which Congress, among other things, reduced the minimum age to vote in both federal and state elections to 18 years. Congress justified this amendment on the grounds that 18-year-olds are mature enough to vote, therefore depriving them of the franchise amounts to an equal protection violation that Congress could fix under Section 5 of the Fourteenth Amendment.[143] Despite the Court's earlier decision in *Morgan*, the *Mitchell* Court was sharply divided about the scope of the Section 5 enforcement power.[144] Five Justices wrote separate opinions, with no single opinion joined by more than three Justices.[145] Justice Black concluded that Congress, under Section 5, could change the voting age in federal, but not state or local elections, given that the latter are "preserved to the States by the Constitution" and Congress was not trying to "eliminat[e] discrimination on account of race"[146]—a conclusion that all the other Justices rejected but wound up becoming the decisive holding of the case.[147]

Though the significance of *Mitchell* is uncertain, some of the other Justices' opinions shed light on the fact that at least some of the Warren Court Justices continued to stand by the earlier recognition of congressional power

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[136] *Id.* at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
[137] TRIBE, *supra* note 106, at 937.
[138] *Morgan*, 384 U.S. at 656.
[139] TRIBE, *supra* note 106, at 937.
[140] *See* discussion *supra* Section II.A.
[141] *See* TRIBE, *supra* note 106, at 937.
[142] 400 U.S. 112 (1970).
[143] *See* TRIBE, *supra* note 106, at 937–38.
[144] *Id.* at 937.
[145] *Id.* at 938.
[146] *Mitchell*, 400 U.S. at 130.
[147] TRIBE, *supra* note 106, at 938.

under Section 5 from *Morgan*. Justice Brennan, joined by Justices Byron White and Thurgood Marshall, wrote separately in *Mitchell* that "Section 5 empowers Congress to make its own determination on the matter," especially given its superior fact-finding abilities.[148] In contrast to Congress, the judiciary, they explained, is an "inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication."[149] Justice William Douglas also wrote separately to emphasize that because "[t]he powers granted Congress by Section 5 of the Fourteenth Amendment to 'enforce' the Equal Protection Clause are 'the same broad powers expressed in the Necessary and Proper Clause,'" Congress could have "well conclude[d] that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection."[150]

The Burger Court in the 1980s fared no better than the Warren Court in explaining *Morgan*. In *Fullilove v. Klutznick*,[151] Chief Justice Burger wrote that with regard to its "authority to enforce equal protection guarantees," "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[152] However, just three years later, Chief Justice Burger dissented in *EEOC v. Wyoming*,[153] writing for himself and three other Justices that he did not agree with the proposition "that Congress can define rights wholly independently of our case law."[154] The persistent flip-flopping by Justices on the Court, like Chief Justice Burger, meant that the Court had left a vacuum of authority on how to understand the meaning of the *Morgan* power.[155]

As they waited for guidance from the Court, legal scholars vigorously debated the *Morgan* power on their own.[156] What makes Congress a legitimate interpreter of the Constitution, if at all? Does the *Morgan* power align with our constitutional structure? If Congress could theoretically expand constitutional rights using the *Morgan* power, then could it also restrict them? Out of these debates, two main concerns emerged about the *Morgan* power. First, allowing a simple majority of Congress to define the meaning of entire constitutional provisions not only conflicts with Chief Justice Marshall's emphatic assertion that it is "the province and duty of the judicial department to say what the law is," but also undermines our whole constitutional structure by giving Congress

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[148] *Mitchell*, 400 U.S. at 248 (Brennan, J., concurring in part and dissenting in part).
[149] *Id.* at 247–48.
[150] *Id.* at 141 (Douglas, J., concurring in part and dissenting in part).
[151] 448 U.S. 448 (1980).
[152] *Id.* at 483–84.
[153] 460 U.S. 226 (1983).
[154] *Id.* at 262 (Burger, C.J., dissenting).
[155] *See* TRIBE, *supra* note 106, at 941.
[156] *See id.*

the ability to circumvent the amendment process laid out in Article V.[157] Second, as Justice John Marshall Harlan II noted in his dissent in *Morgan*, the *Morgan* power also appears to give Congress the ability to contract constitutional guarantees.[158] After all, "[i]n all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment."[159] In the rush to allay these concerns, however, legal scholars—even those who defended *Morgan*—placed various limits on what the *Morgan* power could mean. Under the view of these scholars, the *Morgan* power became less a radical vision of Congress as an independent constitutional arbiter and more a principle of a kind of super-deference to Congress that began to resemble Professor James Bradley Thayer's clear mistake rule: the Court "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question."[160]

The criticisms and defenses of *Morgan* can largely be grouped into five separate categories. One defense of *Morgan*, proposed by Professor Cox, is that because Congress is simply a better fact-finder than the Supreme Court can ever be, the Court should defer to Congress' findings.[161] According to Professor Cox:

> [c]ongressional supremacy, over the judiciary in the areas of legislative factfinding and evaluation and over the state legislatures

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[157] *See* Oregon v. Mitchell, 400 U.S. 112, 204–05 (1970) (Harlan, J., concurring in part and dissenting in part) ("Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government, this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that: 'It is emphatically the province and duty of the judicial department to say what the law is.' It inheres in the structure of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure"); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) ("[T]he majority [in *Morgan*] stood *Marbury v. Madison* on its head by judicial deference to congressional interpretation of the Constitution").

[158] *See* Katzenbach v. Morgan, 384 U.S. 641, 668 (Harlan, J., dissenting) ("In effect the Court reads Section 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of Section 5, then I do not see why Congress should not be able as well to exercise its Section 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court").

[159] *Id.*

[160] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[161] *See* Cox, *Foreword*, *supra* note 37, at 107; *see also* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 205–11 (1971) [hereinafter Cox, *The Role of Congress*].

> under the supremacy clause in any area within federal power, would seem to be a wiser touchstone, more consonant with the predominant themes of our constitutional history, than judicially-defined areas of primary and secondary state and federal competence.[162]

Put differently, armed with the power of subpoena and composed of members from a wide variety of backgrounds, Congress is better equipped to find the background facts in constitutional cases than an appellate court.[163] And, as other legal scholars like Professor Irving Gordon have explained, "where the judicial function depends on an assessment of underlying legislative facts, Congress, as a superior factfinding body, is permitted to exercise its power under section 5 of the fourteenth amendment."[164] Under this understanding of *Morgan*, there is no conflict with *Marbury* because Congress is simply deciding questions of fact and not law.[165]

Another theory of *Morgan*, however, is that Congress only has the power to define rights within the conceptual limits fixed by the Supreme Court—a view of congressional power that many abide by today. For instance, Professor Lawrence Sager argued that Congress can use its Section 5 power to "legislate against a broader swath of state practices than the Court has found or would find to violate the norm of equal protection."[166] In doing so, Congress would be merely "enforcing a judicially unenforced margin of the equal protection clause and thereby moving our legal system closer to a full enforcement of an important but elusive constitutional norm."[167] Congress could not, however, undo any determination the Court makes as to what does or does not violate the substantive norm of the Fourteenth Amendment.[168] This theory seems to be closer to what Justice Harlan II argued in his dissent in *Morgan*:

> When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs . . . But it is a judicial question whether the condition with which Congress has thus sought to deal is, in truth, an infringement on the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.[169]

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[162] Cox, *Foreword*, *supra* note 37, at 107.

[163] *See* Cox, *The Role of Congress*, *supra* note 161, at 209.

[164] Irving A. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 Nw. U. L. Rev. 656, 680 (1977).

[165] *See* Tribe, *supra* note 106, at 943.

[166] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1239 (1978).

[167] *Id.*

[168] *Id.* at 1240.

[169] Katzenbach v. Morgan, 384 U.S. 641, 666 (Harlan, J., dissenting).

In this approach, the question of what the Fourteenth Amendment demands would always be determined in the first instance with an eye to what the Court has said or might say on the issue.

A third approach to *Morgan* focused on Congress' ability to resolve conflicting principles better than the Supreme Court. Though arguing that the Court should not merely defer to Congress, Professor Robert Burt, for instance, noted that Congress' greater flexibility in accommodating multiple conflicting interests makes Congress well suited to "serve as an adjunct" to the Court, helping it "refine [its] interpretations of the Constitution."[170] Under Professor Burt's view, *Morgan* can best be understood as helping facilitate an "ordered dialogue between Court and Congress on the detailed application of constitutional doctrine"—though the Court ultimately gets to set "the basic terms" for the resulting conversation.[171]

Another flavor of the third approach came from Professor William Cohen, who distinguished between decisions based on substantive rights and decisions concerned with questions of federalism.[172] Because "Congress presumably reflects a balance between both national and state interests and hence is better able to adjust such conflicts," "a congressional judgment resolving at the national level an issue that could—without constitutional objection—be decided the same way at the state level, ought normally to be binding on the courts."[173] On the other hand, according to Professor Cohen, a "congressional judgment rejecting a judicial interpretation of the due process or equal protection clauses . . . is entitled to no more deference than the identical decision of a state legislature."[174]

The final hedge on the meaning of the *Morgan* power came from the majority opinion in *Morgan* itself. In response to the potential concern of the two-way ratchet, Justice Brennan added a footnote restricting Congress' power under Section 5 to a one-way ratchet: "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[175] Though fixing a limit on the *Morgan* power, Justice Brennan's footnote does not address the difficult question of how to tell which way the "due process or equal protection handle" "is turning."[176] Inevitably, an expansion of rights for some can mean a contraction in rights for others.[177]

All five of these approaches to *Morgan* are certainly permissible readings of the Court's decision. In many ways, the original example of the ADA's "Findings and Purposes" section posed at the start of this Essay, for instance, can easily be slotted away under many of these understandings of *Morgan*.

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[170] Burt, *supra* note 83, at 114, 134.
[171] *Id.* at 118, 134.
[172] *See* Cohen, *supra* note 157, at 614.
[173] *Id.*
[174] *Id.*
[175] Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).
[176] Cohen, *supra* note 157, at 606–07.
[177] *See id.* at 607.

Many disability rights advocates, in their briefs, for example, attempted to justify their argument that Congress had changed the standard of review in the "Findings and Purposes" section of the ADA by noting that Congress was merely exercising its fact-finding power, and the Court should take notice of that.[178] Putting aside Congress' fact-finding abilities, even the argument that Congress sought to increase the standard of review for disability laws to heightened scrutiny is no longer radical because Congress is still operating within the tiers of scrutiny crafted by the Supreme Court—though these tiers are found nowhere in the text of the Constitution.[179]

But there is one problem with all these theories: almost all of them appear to fall into the trap of one-branch supremacy, arguing a version of the *Morgan* power that fits with our current model of judicial supremacy. They are all still operating within a framework in which the other branches are subservient to the Court, admittedly, though with small grants of interpretive power to be used to urge the Justices to decide differently the next time. Even scholars that invoked the idea of *Morgan* standing for the principle of "cooperation"[180] or characterize the decision as an "invitation"[181] for the two branches to engage in "contemporary constitutional dialogue"[182] still subject Congress to a high level of judicial control, and inevitably always give the Court the final word in every resulting conversation.[183] But if carried to its fullest extent, the *Morgan* power has the potential to stand for much more than that. It can amount to a repudiation of judicial supremacy by, arguably rightfully, recognizing that Section 5 gives Congress the power to act as independent arbiter of the Fourteenth Amendment's guarantees in addition to the Court itself. To do that, one must understand why judicial supremacy is a gross misunderstanding of our constitutional structure—a topic addressed in Part II of this Article.[184]

D. The Rehnquist Revolution and Modern Constitutional Law

In the background of all this turmoil and confusion over the true meaning of *Morgan*—and, by extension, Section 5 of the Fourteenth Amendment—the composition of the Court changed.[185] In 1986, the same year Justice Antonin

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[178] Petition for Writ of Certiorari at 20, Cal. Ass'n of the Physically Handicapped v. FCC, 499 U.S. 975 (1991) (No. 90-1086).

[179] *See* Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1274 (2007).

[180] Sager, *supra* note 166, at 1240.

[181] Burt, *supra* note 83, at 133.

[182] Stephen L. Carter, *The* Morgan *Power and the Forced Reconsideration of Constitutional Decisions*, 53 U. Chi. L. Rev. 819, 859 (1986).

[183] *See id.*

[184] *See* discussion *infra* Part III.

[185] *See generally* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L.J. 569 (2003) (discussing composition and changes in character of the Rehnquist Court over time).

Scalia joined the Court,[186] then-Justice Rehnquist became Chief Justice.[187] In 1988, Justice Anthony Kennedy was appointed to the bench.[188] And in the early 1990s, Justices David Souter[189] and Clarence Thomas followed.[190] Before long, the Court was again composed of a conservative majority. The subsequent period on the Court—dubbed the "Rehnquist Revolution"—revived the power of the states at the expense of congressional power.[191]

The Rehnquist Court began by dramatically shrinking the scope of Congress' powers under the Commerce Clause.[192] From there on, it was only a matter of time before the Rehnquist Court set its sights on Congress' Section 5 power.[193] That decision ultimately came in 1997 in *City of Boerne v. Flores*.[194]

The story leading up to the Court's infamous restriction of congressional power in *City of Boerne* actually starts seven years earlier with its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[195] In that case, Alfred Smith, a drug counselor who had once struggled with alcoholism, had decided to return to his roots and join the Native American Church.[196] As a member of the church, Smith ingested peyote, a hallucinogenic, for sacramental purposes during a ceremony.[197] He was subsequently fired from his job and denied unemployment benefits by Oregon.[198] Though Smith recognized that the state's controlled substance law appears to prohibit the use and possession of peyote, he argued that barring the use of peyote during church services violated the Free Exercise Clause.[199] The Court thought

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[186] Maria Garcia and Amisha Padnani, *Justice Antonin Scalia: His Life and Career*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/interactive/2016/02/14/us/scalia-timeline-listy.html [https://perma.cc/AQP2-EYB6].

[187] Andrew Glass, *William Rehnquist Sworn in as Chief Justice, Sept. 26, 1986*, POLITICO (Sept. 26, 2018), https://www.politico.com/story/2018/09/26/william-rehnquist-sworn-in-as-chief-justice-sept-26-1986-834960 [https://perma.cc/QJR9-FRD3].

[188] Melissa Quinn, *Justice Anthony Kennedy to Retire from Supreme Court*, WASHINGTON EXAMINER (June 27, 2018), https://www.washingtonexaminer.com/news/1025864/justice-anthony-kennedy-to-retire-from-supreme-court/ [https://perma.cc/V6XX-LE3Z].

[189] Nina Totenberg, *Supreme Court Justice Souter to Retire*, NPR (Apr. 30, 2009), https://www.npr.org/2009/04/30/103694193/supreme-court-justice-souter-to-retire [https://perma.cc/QUF8-TXR4].

[190] John E. Yang and Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, THE WASHINGTON POST (July 1, 1991), https://www.washingtonpost.com/archive/politics/1991/07/02/bush-picks-thomas-for-supreme-court/943b9fda-e079-405e-974e-14c2d0cd999b/ [https://perma.cc/UC4L-22NT].

[191] *See generally* Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004).

[192] *See* United States v. Lopez, 514 U.S. 549 (1995).

[193] This occurred even though a plurality of the Rehnquist Court in 1989 had seemingly affirmed an expansive interpretation of *Morgan*. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) ("The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").

[194] 521 U.S. 507 (1997).

[195] 494 U.S. 872 (1990).

[196] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 3 (2000).

[197] *Employment Division*, 494 U.S. at 874; TUSHNET, *supra* note 196, at 3.

[198] TUSHNET, *supra* note 196, at 3.

[199] *Id.* at 3–4.

otherwise.[200] Writing for the majority, Justice Scalia held that generally applicable laws, like the state statute at issue, are constitutional even when their enforcement burdens someone's exercise of religion.[201] In rejecting Smith's Free Exercise Clause claim, the Court, however, broke with the test it set forth in *Sherbert v. Verner*,[202] under which any governmental action that substantially burdens a religious practice must be justified by a "compelling state interest."[203]

Almost immediately, a coalition "spann[ing] the religious right and the secular left" criticized the Court's decision.[204] In fact, the decision was so heavily condemned that Congress attempted to undo it by passing the Religious Freedom Restoration Act of 1993 (RFRA).[205] According to Congress, "the Supreme Court [in *Employment Division*] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" by abandoning the compelling interest test[206]—"a workable test for striking sensible balances between religious liberty and competing prior governmental interest."[207] Because of the Court's misstep, Congress sought "to restore the compelling interest test as set forth in *Sherbert v. Verner*."[208]

Only a few years later, RFRA—and consequently, Congress' mettle in rebuking the Court—was put to the test.[209] In order to accommodate its growing parish, the Archbishop of San Antonio, Texas, applied for a building permit to enlarge its St. Peter Catholic Church in the City of Boerne.[210] Upon seeing the Archbishop's plans for the church, city officials "became concerned that the new construction would destroy the old church's appearance and would interfere with the city's economic development plan, which was to promote tourism by preserving the area's historic character."[211] The Boerne City Council proceeded to designate the church as a historic preservation area under its recently passed historic landmark zoning ordinance and subsequently denied the church's permit.[212] The church sued on the grounds that the city's refusal to issue the permit violated RFRA.[213] The city, on the other hand, countered that

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[200] *Employment Division*, 494 U.S. at 890.
[201] *Id.* at 881–82.
[202] 374 U.S. 398 (1963).
[203] *Id.* at 403.
[204] TUSHNET, *supra* note 196, at 4.
[205] 42 U.S.C. § 2000bb.
[206] *Id.* § 2000bb(a)(4).
[207] *Id.* § 2000bb(a)(5).
[208] *Id.* § 2000bb(b)(1).
[209] *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).
[210] *Id.* at 512.
[211] TUSHNET, *supra* note 196, at 4.
[212] *See City of Boerne*, 521 U.S. at 512.
[213] *Id.*

in "enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment."[214]

In *City of Boerne*, the Supreme Court ultimately held RFRA unconstitutional.[215] But the decision's implications affected much more than just RFRA. Though recognizing that "[t]here is language in [the Court's] opinion in [*Morgan*] which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment," Justice Kennedy wrote for the majority that "[t]his is not a necessary interpretation . . . or even the best one."[216] Instead, he argued, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[217] Furthermore, to ensure that Congress stays within its designated constitutional role, the Court explained that in congressional measures enacted pursuant to Section 5, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[218] In one fell swoop, the Court seemingly killed the *Morgan* power.

Subsequent cases only confirmed that "the most enduring part of *Morgan* is not its alternative holding that Congress may take a view different from that of the Court,"[219] but rather its first holding that Congress can enact remedial laws targeting violations of "court-articulated principles of equal protection."[220] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[221] for instance, the Court affirmed its holding in *City of Boerne*.[222] In that case, the Court struck down the Patent and Plant Variety Protection Remedy Clarification Act, saying that Congress cannot use its Section 5 power to "protect property interests that it has created in the first place under Article I."[223] In *Dickerson v. United States*,[224] the Court, once again citing *City of Boerne* for the proposition that "Congress may not legislatively supersede [the Court's] decisions interpreting and applying the Constitution,"[225] struck down an act of Congress that conflicted with the rights detailed in *Miranda v. Arizona*[226] for criminal suspects. That is, the Court held that Congress may not undermine the Court's constitutional decisions, even though the Court in *Miranda* specifically "invited legislative action to protect the constitutional

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[214] *Id.*
[215] *Id.* at 536.
[216] *Id.* at 527–28.
[217] *Id.* at 524.
[218] *Id.* at 520. In the case of RFRA, the sparse legislative record lacked examples of modern religious persecution through general laws, indicating that "Congress' response was out of proportion." *See* TUSHNET, *supra* note 196, at 5.
[219] TRIBE, *supra* note 106, at 955.
[220] Lowndes, *supra* note 34, at 424.
[221] 527 U.S. 627 (1999).
[222] *See id.* at 639–40.
[223] *Id.* at 642.
[224] 530 U.S. 428 (2000).
[225] *Id.* at 437.
[226] 384 U.S. 436 (1966).

right against coerced self-incrimination" as long as that legislative alternative is "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[227]

In other words, the Rehnquist Court, for the first time, took the power of determining what constitutes an equal protection violation under the Fourteenth Amendment for itself. And in doing so, the Rehnquist Court swiftly rejected over a century's worth of precedent and thought recognizing Congress' role in constitutional interpretation of the scope of the Fourteenth Amendment.[228]

III. Reconciling a Broad Section 5 Power with Judicial Review

In taking an aggressive stance on the Court's role in determining the scope of the Fourteenth Amendment, the Rehnquist Court threatened to undo numerous civil rights statutes—including the ADA. These statutes were created without legislative records equipped to appease the post-*Boerne* Court.[229] And "[e]ven were it possible to squeeze out of these examples [in the legislative record] a pattern of unconstitutional discrimination,"[230] statutes like the ADA would probably still fail the *Boerne* test of congruence and proportionality.[231] Why? Because the statutory remedies and duties created by these statutes "far exceed" what the Court is likely to find constitutionally required under the Fourteenth Amendment.[232]

And therein lies the problem. Implicit in the Rehnquist Court's decisions like *Boerne* is not just a narrow reading of the Section 5 enforcement power that was never fully accepted by previous Congresses or Courts, but also a particular conception of judicial review—that of judicial supremacy. In claiming that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary,"[233] the Rehnquist Court "monopolize[s] control over the Constitution."[234] And the Court did so by rewriting constitutional history to argue that our system of separation of powers demands that the judiciary have exclusive control over constitutional law. After all, as the Court notes, Chief Justice Marshall once stated in *Marbury* that "[i]t is emphatically the province

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[227] *Dickerson*, 530 U.S. at 429 (citing *Miranda*, 384 U.S. at 467).

[228] *See* discussion *supra* II.A–C.

[229] *See* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 Ala. L. Rev. 91, 127–48 (2000).

[230] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

[231] *See id.*

[232] *See id.*

[233] City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

[234] Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 5, 144 (2001) [hereinafter Kramer, *Foreword*]. Professor Kramer's *Foreword* formed the basis of his later book on popular constitutionalism. *See generally* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

and duty of the judicial department to say what the law is"[235]—a line "that every lawyer and law student knows by heart, almost by instinct."[236]

But what exactly did Chief Justice Marshall mean in *Marbury*? Everyone shares the baseline understanding that the Constitution is "the Supreme Law of the Land."[237] But who gets to decide when the Constitution has been violated? Chief Justice Marshall attempted to clarify just that in *Marbury*. In dicta, Marshall recognized that the plain language of the Supremacy Clause authorizes courts to invalidate legislation inconsistent with the Constitution[238]—a power that, as Justice Kennedy later explained, exists because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one [form] of Government has tipped the scales too far."[239]

Yet, nothing in the text of *Marbury* itself suggests that the framers intended the Court to be the sole expositor of the Constitution's meaning. Instead, the people, acting in union or through the various branches of government, have always been the ultimate expositors of the Constitution in our system.[240] Because the Constitution is supreme to all other forms of law, *Marbury* stands for the modest proposition that courts, too, can evaluate the constitutionality of legislative acts.[241] *Marbury* affirms the "fundamental principle[] of our society"[242] that when the Constitution has been violated, the Court should not play the role of a helpless bystander, but rather can, and should, speak up as a coordinated branch of government accountable to the people. Put simply, courts share in the responsibility of ensuring that the Constitution—"the most direct expression of the people's voice"—is enforced.[243]

And the idea that some constitutional decisions should be made in a dialogic "tug-of-war" with the other branches is certainly not a modern one either.[244] That principle has been recognized throughout American history when the likes of Thomas Jefferson, Abraham Lincoln, and the Reconstruction Congress openly disagreed with the Court's various pronouncements.[245] Even the Supreme Court itself has appreciated that some constitutional decisions, like those related to political questions, are better answered by Congress or the

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[235] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[236] Kramer, *Foreword*, *supra* note 234, at 5.

[237] U.S. Const. art. VI, cl. 2.

[238] *See Marbury*, 5 U.S. at 177; *see, e.g.*, Michael J. Klarman, *How Great were the Great Marshall Court Decisions*, 87 Va. L. Rev. 1111, 1118 (2001).

[239] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

[240] *See* Kramer, *Foreword*, *supra* note 234, at 162 ("And no matter how often the Court repeats that it has been the ultimate expositor of the Constitution since *Marbury*, it still will not have been so. Popular constitutionalism—understood as a domain in which the people are free to settle questions of constitutional law by and for themselves in politics—has been a prominent feature of American constitutional practice from the beginning").

[241] *See id.* at 5–6.

[242] *Marbury*, 5 U.S. at 177.

[243] Kramer, *Foreword*, *supra* note 234, at 11.

[244] *Id.* at 57.

[245] *See id.* at 6.

President.[246] Repeatedly, constitutional law over the years has been shaped by the understanding of the judicial role Marshall first posited in *Marbury*: the power of judicial review exists, but it is not so extensive as to decide constitutional questions definitively for all other political actors, including the people.

Yet, somehow, *Marbury* has come to stand for a much different proposition today. Though "[b]etween 1803 and 1887, the Court *never once* cited *Marbury* for the proposition of judicial review, even when the Court issued highly controversial decisions such as *Dred Scott v. Sandford* or the *Civil Rights Cases* striking down important congressional legislation,"[247] today, *Marbury* is consistently cited by the courts for just that reason.[248] Citing the magic words of *Marbury* has become a tactic to remind various actors of their supposed duty to submit to decisions of the Court, even when they disagree. For instance, the Court in *Cooper v. Aaron*[249] in 1958 stated that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"—an idea that "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[250] Or in *City of Boerne*, the Court cited *Marbury* for the proposition that "Congress could [not] define its own powers" under the Fourteenth Amendment, as it did exactly that in enlarging its own power.[251] Though "[w]e have never had [a] purely legal Constitution," cases like these have turned over "stewardship of our Constitution . . . exclusively to lawyers and judges."[252]

This Part pushes back against this rewriting of constitutional history and the rise of judicial supremacy that has been used to limit Congress' power under Section 5 of the Fourteenth Amendment. Instead, I argue that though judicial review may have well become established in the system by the time of *Marbury*, the historical practice of judicial review looked much different from the way it is used today—and these early examples of judicial review give us a glimpse of what an open conversation between Congress and the Court on the scope of the Fourteenth Amendment could actually look like in practice.[253]

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[246] *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[247] Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: the Emergence of a "Great Case,"* 39 WAKE FOREST L. REV. 375, 376–77 (2003) (emphasis in original).

[248] *See id.* at 378.

[249] 358 U.S. 1 (1958).

[250] *Id.* at 18.

[251] City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

[252] Kramer, *Foreword*, *supra* note 234, at 162.

[253] As numerous scholars have noted, the many calls for congressional interpretation or interpretation by the demos of the Constitution have "done so at a high level of abstraction." David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053 (2010); *see also* Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676 (2004) ("A major frustration in discussing the body of scholarship arguing for popular constitutionalism is its failure to define the concept with any precision"); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009) ("It is hard to know how popular constitutionalism would work, since few (if any) of its advocates make any concrete suggestions about how to implement

A. Judicial Review as a Political-Legal Act

Today, the Court is often painted as a counter-majoritarian institution.[254] In fact, much of modern constitutional legal scholarship has focused on the tension between judicial review and the democratic process—a tension that Professor Alexander Bickel called the "counter-majoritarian difficulty."[255] As Professor Bickel explained, the "reality [is] that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[256] On this view of the judicial role, it is no wonder why Professor Bickel and some other legal scholars have gone so far as to completely reject judicial review as part of the original understanding.[257]

But what if judges were not separate from, or antithetical to, the democratic process but rather a part of it? To understand why judges need not always play a counter-majoritarian role in our system, we need to go back to the beginning of early American history when the judicial role was largely accepted to have a political dimension to it. During the Revolution, the American opposition was initially "not only defended and justified in terms of the traditional constitution, but . . . was also waged on those terms."[258] In protesting the Stamp Act, for instance, Whig mobs not only made sure no stamped paper was available for use in legal proceedings, but they also

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popular constitutional interpretation"). In his famous Foreword for the Harvard Law Review, for instance, Professor Larry Kramer briefly noted in a footnote:

> that much of the literature rejecting judicial supremacy is written at too abstract a level to know just what the authors think; they concede that judgments should be enforced but insist that the other branches are participants with the Court in some sort of open conversation or dialogue without ever explaining what this means in practice.

Kramer, *Foreword*, *supra* note 234, at 8 n.12. This essay aims to fill that gap in by explaining what an open conversation between Congress and the Court could look like and has looked like in the past. In demonstrating that proposition, however, I rely on many of the examples Professor Kramer used to argue that judicial review did not exist prior to *Marbury*. This decision is because, on my review of this early history, I agree with other professors who have argued that judicial review existed before *Marbury*. *See* Klarman, *supra* note 238, at 1113–18; *see generally* William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455 (2005). My addition to this conversation is that those very examples of judicial review before *Marbury* show that, first, judicial review is very different from judicial supremacy, and second, judicial review, as it was practiced back then, made room for, and often explicitly invited, legislative interpretation of constitutional provisions.

[254] *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998).

[255] *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system").

[256] *Id.* at 16–17.

[257] *See, e.g.*, *id.*

[258] Kramer, *Foreword*, *supra* note 234, at 35.

actively called on judges to defy the unconstitutional Act.[259] According to the protestors, because the Stamp Act was "utterly void, and of no binding Force," "[they knew] Nothing of it"[260] and argued that judges "should pay no Regard to it."[261] While only a few courts in Massachusetts ended up joining the protest, the revolutionaries' instinct to call on the courts heralded the first version of judicial review in American history: the idea that "judges, *no less* than anyone else, should resist unconstitutional laws."[262]

Because they lacked the ability to challenge unconstitutional governmental action through peaceful, systemic means, the protestors ultimately had to resort to revolution. The effect of the American Revolution, however, was to make popular sovereignty the core and defining principle of American constitutionalism.[263] As the colonies—and later the Constitutional Convention at the federal level—worked to create new legislatures, executives, and judiciaries after declaring independence, popular sovereignty became the background principle of every new constitution.[264] As James Madison explained, even at the height of his anti-populism stance, constitutional meaning in the new democratic system could not be decided "without an appeal to the people themselves; who, as grantors of the commissions, can alone declare its true meaning and enforce its observance"[265]—a power that had been denied to them under the English constitution.[266]

In a framework that then makes the people the ultimate expositors of constitutional meaning, judicial review should be rooted in popular sovereignty too. In early American history, courts exercised judicial review, not because of some sort of special institutional competence, but rather because courts, as agents of the people, were also responsible for ensuring that the Constitution was enforced.[267] In that sense, much like the few Massachusetts courts who joined the Whigs in their protest of the Stamp Act, the early courts that invalidated unconstitutional laws were simply "exercising the people's authority to resist" *ultra vires* legislative acts by acting within the power delegated to them by the people.[268] Unlike the popular resistance used during the Revolution, however, judicial review in this manner offered the people a

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[259] *Id.* at 36.

[260] *Id.* (quoting John Adams, Address to the Council Chamber of Massachusetts (Dec. 1765), *in* Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay 200–01 (Josiah Quincy, Jr. ed., Boston: Little, Brown & Co. 1865)).

[261] *Id.* at 36–37 (quoting Francis Bernard, Address to the Council Chamber of Massachusetts (Dec. 1765), *in* Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, *supra* note 260, at 206).

[262] Kramer, *Foreword*, *supra* note 234, at 37 (emphasis in original).

[263] *See id.* at 47.

[264] *See id.* at 35.

[265] The Federalist No. 49 (James Madison).

[266] *See* Kramer, *Foreword*, *supra* note 234, at 35.

[267] *See id.* at 53–56.

[268] *Id.* at 54.

peaceful avenue to be heard. That was certainly the understanding of the court in *Trevett v. Weeden*.[269] In that case, the court struck down a Rhode Island statute that failed to provide the right to a jury trial, saying that "the people themselves will judge, as the only resort in the last stages of oppression" when "the Legislative [as] the supreme power in government, [has] violated the constitutional rights of the people;" but in the meantime they "refer those [laws] to the Judiciary courts for determination."[270] It was the case in 1786 when future-Justice James Iredell wrote that "judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution"—a power that "inevitably resulting from the constitution of their office, they being judges for the benefit of the whole people."[271] And it was the case in *Commonwealth v. Caton*,[272] when the lawyer arguing the case, Edmund Randolph, justified the use of judicial review, saying the "bench too is reared on the revolution and will arrogate no undue power. I hold, then, that every law against the constitution may be declared void."[273] In this context, and countless other instances of judicial review before *Marbury*, judicial review was seen as "a political duty and responsibility rather than a strictly legal one."[274]

This function of judicial review as a political-legal act lingers even today. Some legal scholars have suggested that the "Supreme Court often acts on behalf of a national political majority that has not yet worked its will through legislation."[275] Because some laws "are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters,"[276] judicial review is just another way for members of the general population—whether one wants to call them "discrete and insular minorities,"[277] or a majority that has simply not built up its political power yet—to create constitutional change and define constitutional meaning. From that perspective, the judiciary is another type of majoritarian institution that

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[269] J. M. Varnum, The Case, Trevett v. Weeden (1787), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 422 (1971).

[270] *Id.* at 422.

[271] An Elector, To the Public, *in* 2 Life and Correspondence of James Iredell 148 (Griffith J. McReed., Peter Smith 1949) (1857).

[272] 8 Va. (4 Call) 5 (1782).

[273] William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491, 512 (1994) (quoting Edmund Randolph, Rough Draft of Argument *in Respondent v. Lamb* (the *Case of the Prisoners*)).

[274] Kramer, *Foreword*, *supra* note 234, at 37.

[275] Tushnet, *supra* note 196, at 144; *see also* Robert A. Dahl, Democracy and its Critics 190 (1989) ("[T]he views of a majority of justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country"); Robert G. McCloskey, The American Supreme Court 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand").

[276] Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

[277] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

is supposed to enhance our democratic process, as the people work through judges just as they do through officials in the other political branches.[278]

In that way, popular constitutionalism in early American history looked a lot more like what is today called the theory of departmentalism,[279] because all three branches, including the judiciary, are subordinate to the people, each department is duty bound to ensure that the Constitution—"the voice of the people themselves" and "the first law of the land"[280]—is enforced.[281] It does not follow from this delegation of power, however, that the judiciary "draws from the constitution greater powers than another" and could therefore decisively invoke the Constitution's authority against another independent department of government.[282] As representatives of the people, each branch is responsible for upholding the Constitution.

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[278] This view of courts as majoritarian institutions then raises the question of what precisely would rooting judicial power in the sovereignty of the people mean for the relationship between popular sentiment and minority rights and views? To clarify, the underlying criticism that majoritarian institutions are less protective of minority rights—a criticism often levied against Congress, the original and classic example majoritarian institution—has not exactly borne out. *See generally* Louis Fisher, *Protecting Individual Rights: A Broad Public Dialogue*, 45 J. SUP. CT. HIST. 66 (2020). Similarly, reimagining courts as majoritarian institutions, and encouraging judges to do so as well, does not necessarily entail the erosion of minority rights. Instead, the unique attributes of the judicial system and the ability of various groups to use the courts to address narrow and insular questions that would otherwise go unaddressed by Congress suggest that regardless of the lens one views them through—majoritarian or not—courts can and should play a role in protecting everyone's rights. Furthermore, a constitutional structure that enables multiple system actors, not just the courts, to interpret the Constitution means that any judicial contraction of rights would be prevented by the other branches of government. *See* discussion *infra* Section IV.B. For a discussion of how judicial review can be used to ensure the fair representation of minority interests and make effective representative government, *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[279] Professor David Pozen explains that three models of popular constitutionalism have emerged over the years. *See* Pozen, *supra* note 253, at 2060–64. The first model, what he terms "modest popular constitutionalism," "generally reject[s] the notion that the people or their representatives can ignore a judicial ruling because they disagree with it. They accept that courts may occasionally strike down statutes or contravene majority preferences as part of their constitutionally assigned role." *Id.* at 2060. The second model, called "robust popular constitutionalism," suggests that "the interpretive authority of the people trumps that of the judiciary any time the people are sufficiently ready and willing to use it." *Id.* at 2061. Finally, the third model, known as "departmentalism," builds on the second model by adding that "the coordinate branches of government possess independent authority to interpret the Constitution." *Id.* at 2063. This Article adopts the third model of popular constitutionalism.

[280] Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 71, 78 (1793).

[281] *See* Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816–26, at 140, 142 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899) ("[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question").

[282] James Madison, Removal Power of the President (June 17, 1789), *in* 12 THE PAPERS OF MADISON 238 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973) ("But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that

B. Judicial Review Before Marbury

This understanding of the judicial role as another way for the people to decide the Constitution's meaning is important in understanding why the courts can—and should—play a role in interpreting the Constitution, but why the judiciary's interpretation cannot always be the most conclusive one. With this context of judicial review as originally seen as a political-legal act in mind, it becomes easier to see why an open conversation between Congress and the Court was possible in early American history—and why early jurists were so hesitant to exercise the power of judicial review.[283]

While judges are agents of the people and offer the people a means to exercise their will without resorting to outright resistance, they are expected to exercise judicial review only when a law is "unconstitutional beyond dispute" in the people's eyes.[284] Determining whether a law has come close to that threshold often requires a back-and-forth between courts, legislatures, and other system actors as seen in the examples below.

1. Rutgers v. Waddington

Some of the first state court experiments with judicial review "had their genesis in the anti-loyalist legislation enacted by many states in the waning days of the Revolutionary War."[285] Therefore, it is only fitting that one of the first examples of a dialogic tug-of-war between a court and legislature occurred in New York—the "loyalist 'mecca' during [the] seven years of British occupation."[286]

With anti-British sentiments particularly high there, the New York state legislature enacted a list of acts directly targeting loyalists.[287] One statute, the Trespass Act, provided that any New York resident who "by reason of the Invasion of the Enemy[] left his [or] her . . . Place[] of Abode" would have an action sounding in trespass "against any Person . . . who may have occupied, injured, or destroyed his [or] her . . . Estate . . . within the Power of the Enemy."[288] Rather pointedly, no defendant was allowed to plead "in justification, any military Order or Command whatever, of the Enemy, for such Occupancy, Injury, Destruction or Receipt."[289]

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any one of these independent departments has more right than another to declare their sentiments on that point").

[283] *See* Kramer, *Foreword*, *supra* note 234, at 55–56.

[284] *Id.* at 56 (quoting Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 LIFE AND CORRESPONDENCE OF IREDELL, *supra* note 271, at 172, 175).

[285] David A. Weinstein, *Alexander Hamilton and the Birth Pangs of Judicial Review*, JUDICIAL NOTICE 9, Summer 2013, at 27.

[286] *Id.*

[287] *Id.*

[288] *Id.* (quoting Session Laws, 1783, Chapter 31).

[289] *Id.*

Not every patriot supported the Act. Patriots like John Jay and Alexander Hamilton worried that penalizing loyalists would hurt the new country's relationships with Europe by revealing that Americans were people "on whose engagement of course no dependence can be placed."[290] *Rutgers v. Waddington*[291] gave these men the perfect vehicle to challenge the Trespass Act—and for our purposes, a closer look at the relationship between the judicial branch and the legislature that later informed Alexander Hamilton's defense of judicial review during the ratification debates over the new Constitution.[292]

Rutgers involved an elderly patriot widow, Elizabeth Rutgers, who sought to recover rent from two British merchants, Benjamin Waddington and Evelyn Pierrepont.[293] Rutgers and her husband had owned a brewery in Manhattan, but were forced to leave the property behind when they fled from the British troops occupying New York in 1776.[294] Not long afterwards, the British Army seized the property and the civilian Commissary General licensed the brewery to the merchants in 1778.[295] In 1780, the British Commander-in-Chief of North America took over and gave the merchants another license to occupy the property and began charging them rent.[296] Once the Revolution ended, however, Rutgers eventually regained control of her property and commenced a lawsuit on the basis of the Trespass Act to recover the rent she had lost.[297]

Representing Waddington, Alexander Hamilton used the case to bring forward two constitutional challenges against the Trespass Act.[298] First, he argued that the statute violated "the common law of . . . the law of nations" which had been adopted by the New York Constitution.[299] Second, he argued that the statute violated the Treaty of Paris, which had concluded the Revolution and constituted binding national law upon the states.[300] In essence, Hamilton made one of the first arguments that state court judges could disregard a state statute like the Trespass Act when it conflicted with national law: "When two laws clash that which relates to the most important concerns ought to prevail."[301]

Ultimately, the Mayor's Court narrowly avoided Hamilton's second argument and instead decided the case on the basis of the law of nations.[302] Only

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[290] *Id.* at 28 (quoting Letter from Phocion to the Considerate Citizens of New York on the Politics of the Day (1784), http://archive.org/details/cihm_57335 [https://perma.cc/KGR8-5E77]).

[291] There is no official report of the case. Documents from the case are collected in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 282–543 (Julius Goebel ed., 1964).

[292] *See generally* THE FEDERALIST NOS. 22, 78 (Alexander Hamilton).

[293] *See* Weinstein, *supra* note 285, at 28.

[294] *See id.*

[295] *See id.*

[296] *See id.*

[297] *See id.*

[298] *See* Treanor, *supra* note 253, at 480.

[299] *Id.* at 480–81 (quoting Alexander Hamilton, Brief of Defendant, Rutgers v. Waddington, *reprinted in* 1 The LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 291, at 368).

[300] *See id.* at 481–82.

[301] *Id.* at 482 (quoting Hamilton, *supra* note 299, at 381).

[302] *See* Kramer, *Foreword*, *supra* note 234, at 56.

at the very end of the opinion did Chief Judge (and Mayor) James Duane address the question of judicial review first posed by Hamilton.[303] He wrote:

> [t]he supremacy of the Legislature need not be called into question; if they think fit positively to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them to be unreasonable, to reject it: for this were to set the judicial above the legislative, which would be subversive of all government.[304]

Even then, the legislature decided to step in. Following the case, the state legislature released a resolution condemning the opinion as "in its tendency subversive of all law and good order, and lead[ing] directly to anarchy and confusion."[305] Soon after, the New York Packet & the American Advertiser printed an open letter from nine citizens denouncing the court for exercising its "power to set aside an act of the state," and warned that "[s]uch power in courts would be destructive of liberty, and remove all security of property. The design of courts of justice . . . is to declare laws, not to alter them. Whenever they depart from this design of their institution, they confound legislative and judicial powers."[306] The backlash from the public at the mere idea of the court exercising its power of judicial review against the Trespass Act suggested that court might have overstepped its delegation of power.

2. Trevett v. Weeden

New York was not unique though. Something like *Rutgers* happened in Rhode Island, too. In 1786, after rural politicians ascended to the General Assembly, the legislature passed a statute authorizing the issuance of a hundred thousand pounds sterling of paper money in an attempt to resolve Rhode Island's debt left over from the Revolution.[307] And because the law was much opposed by creditors and merchants, the legislators, for good measure, passed

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[303] *See* Treanor, *supra* note 253, at 486.

[304] *Id.* (quoting Rutgers v. Waddington, *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 291, at 415) (emphasis omitted). Note that scholars have since contended that Chief Judge Duane's opinion is not a statement in support of pure legislative supremacy or a complete repudiation of judicial review, but rather "a rejection of [judicial review] in a limited class of cases: judges cannot 'reject' a clearly expressed statute simply because it is 'unreasonable.'" *Id.*

[305] Kramer, *Foreword*, *supra* note 234, at 56 (quoting N.Y. Assemb. J., 8th Assemb., 1st meeting, at 33 (Oct. 4–Nov. 29, 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 291, at 312).

[306] *Id.* at 56–57 (quoting Open Letter from N.Y. Packet & Am. Advert., Nov. 4, 1784, *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 291, at 313–14).

[307] Patrick T. Conley, *The Story Behind Rhode Island's Most Important Legal Case:* Trevett v. Weeden *in 1786*, THE ONLINE REVIEW OF RHODE ISLAND HISTORY, https://smallstatebighistory.com/the-story-behind-rhode-islands-most-important-legal-case-trevett-v-weeden-in-1786/ [https://perma.cc/7MMM-VL9J].

another statute that imposed heavy fines "on those who did not accept the state's paper money as equivalent to gold or silver" and specified that actions to challenge the fine should be tried without a jury and go without appeal.[308]

When John Weeden, a butcher in Newport, refused to accept paper bills from John Trevett in exchange for meat sold in his shop, Trevett sued under the paper money laws.[309] And much like Hamilton in *Rutgers*, James Varnum, a former general in the Continental Army and member of Rhode Island's legislature, sprang to Weeden's defense and, in doing so, advanced various approaches to judicial review.[310] Varnum appealed to some combination of natural law and the Rhode Island Constitution in arguing why the Superior Court of Judicature should set aside the paper money laws of 1786.[311] He said,

> But the Judges, and all others, are bound by the laws of nature in preference to any human laws, because they were ordained by God himself anterior to any civil or political institutions. They are bound, in like manner, by the principles of the constitution in preference to any acts of the General Assembly, because they were ordained by the people anterior to and created the powers of the General Assembly.[312]

Therefore, "[t]he Judiciary . . . cannot admit any act of the Legislature as law, which is against the constitution."[313]

Though Varnum had argued that the court could exercise judicial review because judges were "ordained by the people," the legislature, also ordained by the people, still retained the ability to question the court in the aftermath of the court's decision.[314] After the decision was announced, "the governor convened a special meeting of the legislature" and "summoned the court to explain its action."[315] The General Assembly then proceeded by entering its dissatisfaction with the court's decision into the record and even "entertained a motion to dismiss the entire bench."[316] Eventually, the legislature replaced four out of the five judges on the bench during the next election.[317] Like *Rutgers*, once again here, the legislature stepped in as a coordinate branch to denounce the court's decision in *Trevett*.

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[308] Treanor, *supra* note 253, at 476.
[309] Conley, *supra* note 307.
[310] *See id.*
[311] *See* Treanor, *supra* note 253, at 476–77.
[312] *Id.* at 476–77 (quoting VARNUM, *supra* note 269, at 424).
[313] *Id.* at 477 (quoting VARNUM, *supra* note 269, at 423).
[314] *See id.* at 477–78.
[315] Kramer, *Foreword*, *supra* note 234, at 57.
[316] *Id.* at 58.
[317] *See* Treanor, *supra* note 253, at 478.

3. The Respectful Remonstrance of 1788 & Kamper v. Hawkins

The next example demonstrates how the early courts engaged in constitutional dialogue with a legislature without necessarily exercising judicial review in the first instance. In 1788, the Virginia legislature passed a statute requiring court of appeals judges to sit as district court judges.[318] The appellate judges challenged the statute as an unconstitutional diminution in their salaries.[319]

Instead of striking the statute down through judicial review, however, the judges did something rather unthinkable in modern times. They began by refusing to hire clerks and then issued "The Respectful Remonstrance of the Court of Appeals" instead.[320] Written by Chancellor Edmund Pendleton and formally addressed to the General Assembly, the Remonstrance asked the state legislators to correct their mistake and repeal the statute.[321] Otherwise, the judges

> [saw] no other alternative for a decision between the legislature and judiciary than an appeal to the people, whose servants both are, and for whose sakes both were created and who may exercise their original and supreme power whensoever they think proper. To that tribunal, therefore, the court, in that case, commit themselves, conscious of perfect integrity in their intentions, however, they may have been mistaken in their judgment.[322]

The legislature responded to the Remonstrance by "suspending the challenged act and passing a new court reorganization law designed to meet the judges' objections."[323]

Desperate to staff and run the new district court more efficiently, however, the legislature changed the law once more.[324] In 1789, the legislature gave district court judges the power to issue injunctions—a power that, at that point, had only been exercised by the high court of chancery.[325] The validity of the law came before the General Court in 1793 in *Kamper v. Hawkins*,[326] where this time, having had enough of the legislature's missteps, the judges exercised the power of judicial review, as opposed to a "straight political

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[318] *See* Kramer, *Foreword*, *supra* note 234, at 40.
[319] *Id.* at 40–41.
[320] *Id.* at 41.
[321] *Id.*
[322] *Id.* (quoting The Respectful Remonstrance of the Court of Appeals, 8 Va. (4 Call) 141 (1788)).
[323] *Id.*
[324] *See id.* at 79–80.
[325] *Id.* at 79–80.
[326] 3 Va. (1 Va. Cas.) 20 (1793).

appeal[] as it had done five years earlier."[327] The unanimous court invalidated the statute.[328]

As noted by many other scholars, *Kamper* is significant for providing one of the most detailed discussions on the bounds of judicial review up to that point.[329] In context, though, *Kamper* is also noteworthy because it demonstrates how the judges only relied on judicial review after engaging in extensive discussion with the legislature about the latter's ability to restructure the state judiciary. Rather than outright invalidating the legislature's actions and attempting to settle the debate the way modern courts do, the judges in the Remonstrance and on the *Kamper* Court demonstrated the power of judicial intervention and open dialogue with the legislature when they suspect a piece of legislation is unconstitutional.

4. Hayburn's Case

Up to now, we have discussed judicial review of state statutes. *Hayburn's Case*[330] is one of the first cases in which the Supreme Court exercised judicial review against a federal statute.[331] In 1792, Congress enacted the Invalid Pensions Act, which required pension applicants to first appear before their respective circuit court.[332] The circuit court was then supposed to inform the Secretary of War if an individual was eligible for a pension, who would then inform Congress if the individual was not.[333]

Before any case had even been brought before it, the Circuit Court for New York wrote to President George Washington that the statute was likely unconstitutional. The judges wrote, "neither the legislative nor the executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."[334] In other words, much like the court in the Remonstrance, the Circuit Court for New York started its challenge with a purely political appeal—this time to the President.

Not long thereafter, the validity of the statute actually came before another circuit court. Justices James Wilson and John Blair, and Judge Richard Peters of the Circuit Court for the District of Pennsylvania, decided not to consider William Hayburn's pension application.[335] Their decision almost immediately sparked debate on the House Floor.[336] Some members even raised the possibility

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[327] Kramer, *Foreword*, *supra* note 234, at 80.
[328] *Id.*
[329] *See id.* at 79–82; *see also* Treanor, *supra* note 253, at 515–17.
[330] 2 U.S. (2 Dall.) 409 (1792).
[331] *See* Treanor, *supra* note 253, at 533.
[332] *Id.* at 533–34.
[333] *Id.* at 534.
[334] *Hayburn's Case*, 2 U.S. (2 Dall.) at 410.
[335] Treanor, *supra* note 253, at 534.
[336] *Id.*

of impeachment,[337] though others engaged in more mild criticism, hinting that the decision was "indiscreet and erroneous."[338] Much like with *Rutgers*, the press also joined the conversation.[339] The *General Advertiser* reported, "[t]his being the first instance, in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the opinion produced a variety of opinions with respect to the measures to be taken on the occasion."[340]

In response to these grumblings, a week later, Justices Wilson and Blair and Judge Peters wrote a letter to President Washington explaining their decision.[341] Largely echoing what the Circuit Court for New York had written to Washington earlier, the judges wrote that "[b]ecause the business directed by this Act is not of a judicial nature: it forms no part of the power vested, by the Constitution, in the Courts of the United States: The Circuit Court must, consequently have proceeded *without* constitutional authority."[342]

Eventually, even the Circuit Court for North Carolina joined the debate, sending yet another advisory opinion to President Washington before a case had appeared before it, much like the Circuit Court for New York.[343] Like both Circuit Courts before them, the North Carolina Circuit Court suggested the statute was unconstitutional because it gave circuit courts a "[p]ower not in its nature Judicial."[344] In so arguing, the Circuit Court emphasized the independence of each branch: "That the Legislative, Executive, and Judicial Departments are each formed in a separate and independent manner . . . ."[345]

After all this, Hayburn eventually took the case to the Supreme Court.[346] Even there, however, before the Court had even heard the case, five of the six Justices indicated in letters that they believed the statute was unconstitutional.[347] The last Justice, Justice Thomas Johnson, ultimately sided with the others after refusing to consider pension petitions while riding circuit soon thereafter, stating that "this Court cannot constitutionally take Cognixance"

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[337] *Id.*

[338] Kramer, *Foreword*, *supra* note 234, at 77 (quoting Letter from Fisher Ames to Thomas Dwight (Apr. 25, 1792), *reprinted in* 2 WORKS OF FISHER AMES 942, 942 (W.B. Allen ed., 1983)).

[339] *See* Treanor, *supra* note 253, at 534.

[340] *Id.* (quoting GEN. ADVERTISER, Apr. 13, 1792, *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 48 (Maeva Marcus ed., 1990)).

[341] *Id.* at 535.

[342] *Id.* (emphasis added) (quoting Letter from James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792), *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 340, at 53–54).

[343] *Id.*

[344] *Id.* at 536 (alteration in original) (quoting Letter from James Iredell & John Sitgreaves to George Washington (June 8, 1792), *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 340, at 286).

[345] *Id.* (omission in original) (quoting Letter from James Iredell & John Sitgreaves to George Washington (June 8, 1792), *in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 340, at 284).

[346] *Id.*

[347] *Id.*

of the petitions.[348] Instead of formally deciding to strike down the statute once and for all in unanimity, however, "the Court decided to delay to see if Congress would respond to the constitutional concerns that had been raised and repeal the Invalid Pensions Act."[349] Taking notice of the Justices' rather public positions, in 1793, Congress repealed the 1792 Act, thereby mooting *Hayburn's Case*.[350] In other words, the very first case in which the Supreme Court and other federal circuits challenged the validity of a congressional statute involved a kind of judicial review that gave room for Congress to respond—just like many cases of earlier state courts who used, or verged on using, the power of judicial review.

More broadly though, *Rutgers*, *Trevett*, *Kamper*, and *Hayburn's Case* reveal that judicial review had been established long before Chief Justice Marshall joined the Supreme Court and penned his famous line in *Marbury*. Yet, the form that judicial review took is unimaginable today: judges invalidated statutes by engaging in political discourse with the other branches of government—not avoiding it. And this version of judicial review was so well accepted that by the time *Marbury* was decided and Marshall "chose to use the case to expound on the independent authority of the Court[, he too,] decided to act not only in a judicial manner but in a political one as well."[351] "Marshall understood that constitutional questions needed to be shared with Congress and the President."[352]

C. Constitutional Interpretation by Other Branches

This understanding of judicial review as a limited political-legal act not binding on other branches continued into the turn of the century. The examples below describe two moments in history when institutions and political actors, aside from the courts, claimed the ability to interpret the Constitution for themselves. These examples demonstrate, once again, the limited scope of judicial review in early American history—or at the very least, that the bounds of judicial review were still hotly debated then, unlike today.

1. The Kentucky and Virginia Resolutions

In 1798, the Federalist-controlled Congress passed four separate laws called the Alien and Sedition Acts during an undeclared war between the

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[348] *Id.* (quoting Extract from the Minutes of the United States Circuit Court for the District of South Carolina (Oct. 26, 1792), *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 340, at 70).

[349] *Id.*

[350] *See id.* at 536–37.

[351] Fisher, *supra* note 278, at 67.

[352] *Id.*

United States and France.[353] The Alien Acts gave the President the power to detain and deport foreigners who were considered dangerous to the country.[354] The Sedition Act made it a crime to publish false, scandalous, or malicious things about the U.S. government.[355]

Fearing that they themselves would face prosecution, Thomas Jefferson and James Madison secretly penned what came to be known as the Kentucky and Virginia Resolutions challenging the constitutionality of these laws.[356] At the time, state resolutions challenging the federal government were not necessarily groundbreaking: this was how Americans protested the Stamp Act; how Federalists in 1788 answered the Anti-Federalists' complaints that the new Constitution would weaken state power; how Pennsylvania protested the 1791 excise tax; and how Virginia opposed the Jay Treaty.[357] Yet, by 1798, something had changed.[358] Ten states, all dominated by Federalists, released their own resolutions censuring Kentucky and Virginia.[359] Some, like Rhode Island, went as far as to argue that the Constitution "vests in the federal courts, exclusively, and in the Supreme Court of the United States"[360]—an early seed of judicial supremacy that Madison vehemently rejected in his Report of 1800 for the legislature of Virginia.[361]

Today, the Kentucky and Virginia Resolutions are largely taught in law school classrooms as an example of the defeat of the problematic and now much-derided philosophy of concurrent majoritarianism, in which states can interpret the Constitution for themselves.[362] Less talked about, though, is how much more modest the Kentucky and Virginia Resolutions actually were. Instead of claiming the states' outright ability to invalidate federal legislation, the Kentucky and Virginia legislatures "resolved merely to transmit their objections to the states' representatives in Congress and to other states, so that all could jointly urge federal lawmakers to repeal the offending legislation" after expressing their disagreement through their resolutions.[363] Rightly or

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[353] Douglas C. Dow, *Virginia and Kentucky Resolutions of 1798*, Free Speech Center (July 2, 2024), https://firstamendment.mtsu.edu/article/virginia-and-kentucky-resolutions-of-1798/ [https://perma.cc/Q5Q3-HTJR].

[354] *Id.*

[355] *See id.*

[356] *See id.*; *see also* Kramer, *Foreword*, *supra* note 234, at 96.

[357] Kramer, *Foreword*, *supra* note 234, at 96.

[358] *See id.*

[359] *Id.* at 96–97.

[360] *Id.* at 97 (quoting 4 Debates on the Adoption of the Federal Constitution 533 (Jonathan Elliot ed., 1876)).

[361] *See id.* (citing James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), *reprinted in* James Madison: Writings 608, 613 (Jack N. Rakove ed., 1999)).

[362] *Cf.* Matthew P. Cassady, *"Our Liberty Most Dear": The Political Reforms of John C. Calhoun*, 7 Constructing the Past 18, 22–23 (2006) (describing how John C. Calhoun's defense of concurrent majoritarianism employed the ideals of the Kentucky and Virginia Resolutions).

[363] Kramer, *Foreword*, *supra* note 234, at 96.

wrongly, Jefferson and Madison sought to use their representatives in Congress to express their will and their doubts about the constitutionality of the Alien and Sedition Acts. In doing so, they denied "that the judicial authority is to be regarded as the sole expositor of the constitution[,]"[364] as some states like Rhode Island had argued in their own resolutions, and instead aimed to initiate a conversation between Congress—in its representative capacity of the states' interests—and the Court about what the Constitution demands in this particular scenario.

2. Dred Scott v. Sandford, Lincoln, and the Reconstruction Congress

Modern judicial supremacy of the sort Rhode Island first wrote about in its resolution more firmly took shape in one of the most infamous Supreme Court decisions: *Dred Scott v. Sandford*.[365] Writing for the majority, Chief Justice Roger Taney said that the federal government lacked the ability to abolish slavery as Black people were not citizens under the Constitution.[366] Rather than stop there, though, Chief Justice Taney then held that the Missouri Compromise of 1820 was unconstitutional—marking the second time in American history that the Court struck down a federal law.[367] To this day, *Dred Scott* remains "a significant blot on [the Court's] record, frequently referred to as a basis for doubting the Court."[368] Yet, many today also accept without question Chief Justice Taney's underlying premise that the Court can determine constitutional meaning for everyone.

When *Dred Scott* was decided, however, it was widely criticized.[369] Many at the time viewed "judicial decisions . . . as nothing more than an imposition of the Justices' own views."[370] Only a year after *Dred Scott* was decided, for instance, Stephen Douglas in the 1858 Illinois Senate race defended *Dred Scott* by arguing that:

> [i]t is the fundamental principle of the judiciary that its decisions are final. It is created for that purpose so that when you cannot agree among yourselves on a disputed point you appeal to the judicial

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[364] *Id.* at 97 (quoting JAMES MADISON, REPORT ON THE ALIEN AND SEDITION ACTS (Jan. 7, 1800), *reprinted in* JAMES MADISON: WRITINGS, *supra* note 361, at 613).

[365] 60 U.S. 393 (1857); *see also* Brad Snyder, Opinion, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO (July 27, 2022), https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155 [https://perma.cc/T5LX-LRSK].

[366] *Dred Scott*, 60 U.S. at 427.

[367] *Id.* at 489–90; Sara Rimer, *Dred Scott*, EQUAL JUSTICE INITIATIVE (Mar. 6, 2024) https://eji.org/news/dred-scott/ [https://perma.cc/CJ5C-MCST] ("It was only the second time the Court had overturned an act of Congress").

[368] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 20 (2002).

[369] *See* Friedman, *supra* note 254, at 351.

[370] *Id.*

> tribunal which steps in and decides for you, and that decision is binding on every good citizen.[371]

His opponent in the race, Lincoln, disagreed.[372] According to Lincoln, the Court's decision was "decided in favor of Dred Scott's master and against Dred Scott and his family" and therefore binding on the parties to the case.[373] But he:

> oppose[d] [*Dred Scott*] . . . as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.[374]

"'[T]he people will have ceased to be their own rulers' if 'the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions."[375] Years later, Lincoln tested that theory when he, as President, signed one of the most celebrated documents in American history: the Emancipation Proclamation.[376]

Moreover, the Civil War and Reconstruction Congresses ratified Lincoln's views by proceeding to overrule *Dred Scott* themselves in their own way.[377] In 1862, Congress abolished slavery in the District of Columbia and the federal territories.[378] In 1866, Congress recognized Black people as citizens of the United States.[379] In 1870 and 1871, Congress sought to enforce the mandates of the newly-ratified Fourteenth and Fifteenth Amendments through the Enforcement Act and the Ku Klux Klan Act.[380] And in 1875, Congress guaranteed Black people equal treatment in public transportation and accommodations.[381] To accomplish any of this, Congress and President Lincoln had

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[371] Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 984 (1987) (quoting 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 142–43 (R. Basler ed., 1953)).

[372] *See id.* at 984.

[373] *Id.* at 985 (quoting 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 371, at 516).

[374] *Id.* (second alteration and omission in original) (quoting 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 371, at 255).

[375] TUSHNET, *supra* note 196, at 9 (quoting First Inaugural Address (Mar. 4, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1907 9 (James D. Richardson ed., 1908)).

[376] Proclamation No. 95 (Jan. 1, 1863).

[377] *See* Bowie & Renan, *supra* note 43.

[378] *See* Paul Finkelman, *The Revolutionary Summer of 1862: How Congress Abolished Slavery and Created a Modern America*, PROLOGUE MAGAZINE (2017), https://www.archives.gov/publications/prologue/2017/winter/summer-of-1862 [https://perma.cc/6YRB-D3RX].

[379] *See* Julian Mark, *A Law That Helped End Slavery Is Now a Weapon to End Affirmative Action*, THE WASHINGTON POST (Nov. 6, 2023), https://www.washingtonpost.com/business/2023/11/06/civil-rights-act-1866-dei-affirmative-action/ [https://perma.cc/KA9U-ZCVN].

[380] *See* TRIBE, *supra* note 106, at 921 n.5.

[381] *See* Melvin I. Urofsky, *Civil Rights Act of 1875*, ENCYCLOPÆDIA BRITANNICA (Feb 23, 2024), https://www.britannica.com/topic/Civil-Rights-Act-United-States-1875 [https://perma.cc/43P7-NZ55].

to openly defy existing Supreme Court precedent. Yet, because both branches chose to interpret the Constitution for themselves and on behalf of the American people, the country was able to begin the process of building a multiracial democracy.

IV. Imagining a Conversation Between Congress and the Court

More than a hundred years after President Lincoln, President Ronald Reagan's Attorney General, Edwin Meese III, attempted to make the same argument: "[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."[382] To think otherwise, Meese said, echoing Lincoln, would be "to submit to government by judiciary . . . [and] would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed."[383] Like Lincoln in the 1850s, Meese in 1986 suggested that, because Supreme Court decisions are binding only on the parties to suit, the Court cannot be the only interpreter of the Constitution.[384]

Yet, somewhere between the Civil War and the swearing in of Chief Justice Rehnquist and Justice Scalia, Lincoln's message to the country got lost. The argument that the Constitution itself is above the decisions of the Court provoked intense criticism.[385] Eugene C. Thomas, then-president of the American Bar Association, asserted in response that "Supreme Court decisions are indeed the law of the land and that 'public officials and private citizens alike are not free simply to disregard' their status as law."[386] Ira Glasser, then-executive director of the American Civil Liberties Union, said Meese's speech was an "invitation to lawlessness" and "a call to defiance and to undermining the legitimacy of abiding by decisions that you disagree with."[387] And Anthony Lewis, writing for the New York Times, "accused the Attorney General of 'making a calculated assault on the idea of law in this country: on the role of judges as the balance wheel in the American system.'"[388] The criticism was so intense that Meese had to back down from his original position and publicly concede that the Court's decisions "are the law of the land" and

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[382] Meese, *supra* note 371, at 983 (omission in original) (quoting 3 Charles Warren, The Supreme Court in United States History 470–71 (1923)).

[383] *Id.* at 989.

[384] *See id.* at 985.

[385] *See* Sanford Levinson, *Could Meese be Right This Time?*, 61 Tul. L. Rev. 1071, 1074–75 (1987).

[386] *Id.* at 1074 (quoting Stuart Taylor Jr., *Liberties Union Denounces Meese*, N.Y. Times, Oct. 24, 1986, at A17).

[387] *Id.* (quoting Ronald J. Ostrow, *Meese's View that Court Doesn't Make Laws Scored*, L.A. Times, Oct. 24, 1986, §1, at 27).

[388] *Id.* (quoting Anthony Lewis, Opinion, *Abroad at Home: Law or Power*, N.Y. Times, Oct. 27, 1986, at A23).

"do indeed have general applicability."[389] No public servant has since dared to stray far from the principle of judicial supremacy[390]—so much so that by the time disability rights activists, in a last ditch effort, attempted to get the Court to recognize the change in the standard of review for disability status engendered by Congress in the ADA, any specter of legislative constitutionalism was basically a dead letter.

What happened? Some blame the Warren Court.[391] In 1958, Arkansas governor Orval Faubus violated a federal court order by ordering the Arkansas National Guard to prevent nine Black students from desegregating Central High School in Little Rock.[392] In attempting to enforce *Brown*, though, the Warren Court put its decision on par with the Constitution itself, citing *Marbury* for a proposition that it had never been used for before: that the Court was "supreme in the exposition of the law of the Constitution."[393] Subsequent Courts only doubled down on this egregious misreading of *Marbury*.[394] While ordering Tennessee to reapportion its state legislative districts, for example, the Court reiterated its new position as the "ultimate interpreter of the Constitution."[395] In opinion after opinion, the Court and the lawyers that bought into this new legal culture slowly built up "the cult of the court."[396]

Regardless of what his political motives may have been,[397] though, Meese—and really Lincoln—was correct. As Parts I and II delved into, because constitutional construction is the responsibility of all three branches of government—a responsibility bestowed upon them by the people—the judiciary cannot be the sole expositor of the Constitution's meaning. Instead, we have seen that Congress, too, can be a legitimate constitutional interpreter—especially under the Fourteenth Amendment, which expressly grants Congress the power to "enforce" the guarantees of the Amendment.[398] This Part

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[389] Edwin Meese III, *The Tulane Speech: What I Meant*, The Washington Post, Nov. 13, 1986, at A21.

[390] Kramer, *supra* note 234, at 6.

[391] *See* Snyder, *supra* note 365.

[392] *See id.*

[393] Cooper v. Aaron, 358 U.S. 1, 18 (1958). Like Lincoln suggested with respect to *Dred Scott*, *Cooper* should have also been treated as an enforcement of a specific judicial ruling.

[394] *See* Snyder, *supra* note 365.

[395] Baker v. Carr, 369 U.S. 186, 211 (1962).

[396] Ezra Klein & Larry Kramer, *Transcript: Ezra Klein Interviews Larry Kramer*, N.Y. Times (July 5, 2022), https://www.nytimes.com/2022/07/05/podcasts/transcript-ezra-klein-interviews-larry-kramer.html [https://perma.cc/74CY-RW6E].

[397] For a general criticism of whether Meese's interpretation of the Constitution was improperly influenced by his politics, *see* Lynette Clemetson, *Meese's Influence Looms in Today's Judicial Wars*, N.Y. Times (Aug. 17, 2005), https://www.nytimes.com/2005/08/17/politics/meeses-influence-looms-in-todays-judicial-wars.html [https://perma.cc/9FGD-DGY4] ("Laurence H. Tribe, a liberal law professor at Harvard, said: 'Meese was successful in making it look like he and his disciples were carrying out the intentions of the great founders, where the liberals were making it up as they went along. It was a convenient dichotomy, very misleading, with a powerful public relations effect'").

[398] U.S. Const. amend. XIV, § 5.

aims to complete the picture of what an open dialogue between Congress and the Court on the Fourteenth Amendment's mandates means in practice.

A. The Practical Import of the Court's Ability to "Invalidate" Laws

Pushing back on the principle of judicial supremacy does not mean that there is no role for the courts in our system. Courts can still exercise the more modest version of judicial review first charted out in *Marbury*.[399] But that begs the question, in a system without judicial supremacy, what does it mean for a court to exercise judicial review?

As Professor Michael Klarman explained, "it is one thing for the Court to assert the power of judicial review, as in *Marbury*. It is another thing entirely for the Court to exercise that power and to have its decisions obeyed."[400] When the Court decides a case, it is ultimately dependent on the executive and legislative branches to enforce the decision and interpretation of law now and into the future. Even Chief Justice Marshall knew that when deciding *Marbury*.[401] The "genius" of *Marbury* was that Marshall knew the Court was too weak to exercise any sort of judicial supremacy at the time.[402] If the Court back then had the political clout it does today, and "had Marshall thought that Jefferson and Madison would have complied with a Court command that they deliver Marbury's commission, he would not have engaged in the legal gymnastics necessary to manufacture a conflict between the statute and the Constitution."[403] Instead, Marshall sidestepped the entire issue by asserting that the Court lacked jurisdiction—in other words, "he issued no order that Secretary of State Madison could have defied."[404] Central to the *Marbury* debacle, then, was the idea that when the Court decides a case, it essentially does no more than express its ideas of the Constitution. In fact, it can *physically* do no more than that.[405] At least, that is certainly what President Andrew Jackson understood when he later famously said "[w]ell: John Marshall has made his decision: now let him enforce it!"[406]

When the Court decides a case, it is binding on the parties directly involved in the case—that is a baseline assumption that everyone, including

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[399] *See* discussion *supra* Part III.
[400] Klarman, *supra* note 238, at 1123.
[401] *See id.* at 1123–24.
[402] *Id.* at 1123.
[403] *Id.* at 1123–24.
[404] *Id.* at 1123.
[405] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").
[406] Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. ON S. HIST. 519, 519 (1973).

Lincoln, Meese, and even Chief Justice Marshall, share.[407] Beyond that baseline though, any exposition of constitutional meaning should be treated more like an advisory opinion[408] in which the justices have expressed their views on the political question before them—views that the other branches are free to disagree with. And to the extent that Congress does disagree, it can pass a statute or resolution that is inconsistent with the Court's decision[409]—like it did in the ADA when it disagreed with the Court's reasoning in *Cleburne* or as in the RFRA when it disagreed with the Court's decision in *Employment Division*.[410] The subsequent back-and-forth would eventually lead to a settled interpretation of the Constitution that resolved all ambiguities and counterarguments and would ultimately be more representative of the people's will.[411] The conversation, then, transforms from less like a parent telling her child to follow an order "because I said so!" (judicial supremacy), and more like two adults resolving a disagreement through conversation and compromise—with neither of them setting the rules for how and when the other can speak (popular constitutionalism as departmentalism).

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[407] *See* Meese, *supra* note 371, at 985; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated"). Interestingly, Justice Neil Gorsuch also expressed this view recently when explaining why stare decisis cannot always control. *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2279 (2024) ("[A] past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain. Instead, the Constitution promises, the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation. Unelected judges enjoy no such power").

[408] For a deeper explanation of why the Supreme Court does not currently issue advisory opinions, *see* Alicia Bannon, *Judicial Advisory Opinions, Explained*, Brennan Center for Justice (Nov. 17, 2023), https://www.brennancenter.org/our-work/research-reports/judicial-advisory-opinions-explained [https://perma.cc/R8YD-CFCT].

[409] *See* Klein & Kramer, *supra* note 396.

[410] *See* discussion *supra* Introduction and Section II.D. One could view Congress' subsequent acquiescence to the Court's decision as Congress folding and acknowledging it could not disagree with the Court. But there is good reason to believe that the legislative acquiescence was the result of a new burgeoning legal culture that repeatedly insisted that Congress had little power to disagree with the Court—an idea that was never fully accepted as the norm before the late 20th century. *See* discussion *supra* Part II. Though she was arguing against popular constitutionalism, Professor Suzanna Sherry recognized the impact that our legal culture can have on the way judges and politicians approach their roles, the media and the public talk about the law, and law students begin to think about the law and go on to practice it. *See generally* Sherry, *supra* note 253. Quite literally, for better or for worse, the way we talk about the law in the legal world "infect[s] politicians, judges, and the American public." *Id.* at 463. Limiting that conversation to just judicial supremacy has stifled thinking and practice around what is the proper congressional role in our constitutional structure.

[411] *See* discussion *supra* Part III.B.

B. The Problem of the Two-Way Ratchet

Now, some scholars have gone as far as to argue that the courts should not be involved in any sort of constitutional conversation—full stop.[412] Skeptical that the Court would actually confine itself to even the modest version of judicial review again, Professor Mark Tushnet, for example, has argued that we should abolish judicial review in all its forms.[413] To him, it is possible to have a constitution that is never enforced by the courts because "[e]liminating judicial review would not eliminate our ability to appeal to those principles in constitutional discourse outside the courts."[414] But such a constitutional structure would run straight into the problem of the two-way ratchet, first identified by Justice Harlan in *Morgan*: without a proper check on Congress' power, there is a legitimate concern that congressional interpretation of the Fourteenth Amendment might lead to the contraction—not the expansion—of civil rights and civil liberties under the Constitution.[415]

The solution to that problem, however, should not be to remove a player from the game of constitutional interpretation—whether it is the Court or Congress. Rather, the best solution is the one the framers conceived of in 1787: a system of checks and balances.[416] The greatest security against governmental encroachment on civil rights and civil liberties is "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the other"[417]—in this case, the power to disagree. If Congress enacts a law that is inconsistent with the Bill of Rights and other constitutional principles, the people can give the Court the vehicle to challenge that enactment in the form of a decision in a case. And likewise, if the Court exceeds the bounds of the Constitution, then the people do not have to wait until the Court overrules itself years later.[418] The people can vote and petition their representatives to enact a law or promulgate a regulation that disagrees with the Court's opinion. A constitutional conversation that stays true to the Constitution, in other words, requires at least two participants.

C. The Problem of Interpretive Anarchy and Legal Settlement

Finally, the best argument against concurrent constitutional interpretation is the idea of authoritative settlement. The benefit of the decision to commit to one single written constitution that is then interpreted by one authoritative

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[412] *See, e.g.*, TUSHNET, *supra* note 196, at 154–76; Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).
[413] TUSHNET, *supra* note 196, at 154–76.
[414] *Id.* at 166.
[415] *See* Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).
[416] *See* THE FEDERALIST NO. 51 (James Madison).
[417] *Id.*
[418] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

interpreter is that it leads to "[s]tability and coordination."[419] The theory goes that, because "an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done," having one interpreter will clarify and settle people's obligations under the law.[420] That idea holds, even if it means telling "actors to accept, for purposes of their own actions, constitutional interpretations they believe mistaken" for:

> asking those same officials to subjugate their own constitutional interpretations to the mistaken constitutional interpretations of Supreme Court Justices is not asking them to do anything very different from what they are required to do in taking the Constitution itself—warts and all—as a constraint on their political actions and moral judgments.[421]

Yet, today, the Supreme Court's decisions have fallen short of such optimal clarity. The Roberts Court especially, "does not appear to consider itself particularly bound by stare decisis."[422] In *Dobbs v. Jackson Women's Health Organization*,[423] the Court "discard[ed] a precedent that had existed for nearly half a century" as it upheld Mississippi's fifteen-week abortion ban.[424] In *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard College*,[425] the Court effectively ended affirmative action in college programs and implicitly overruled precedent like *Grutter v. Bollinger*.[426] In *Loper Bright Enterprises v. Raimondo*, the Court overruled the 40-year

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[419] Alexander & Schauer, *supra* note 41, at 1376. Professors Alexander and Schauer ultimately argue that the Supreme Court should be the sole interpreter of the Constitution. However, they acknowledge that many of the arguments they make can justify Congress being the sole interpreter of the Constitution as well. *Id.* at 1377–78 n.80 ("If this argument succeeds at all, it does so only for a single national legislature, because multiple legislatures could not serve the coordination function. In the context of a single legislature like Congress, the argument is not inconsistent with ours insofar as it admits the need for a single authoritative interpreter to which others must defer. The question, then, is whether that function is best served by a court or by a legislature. On this issue, our preference for a court over a legislature, and indeed over the executive as well, is explained partly by the fact that constitutions are designed to guard against the excesses of the majoritarian forces that influence legislatures and executives more than they influence courts. Further, there is little reason to believe that a legislature or an executive is best situated to determine the contours of the constraints on its own power. Finally, the authoritative settlement function is better served when there is authoritative settlement over time as well as across institutions. The existence of a regime of precedential constraint for courts but for neither legislatures nor the executive, an institutional difference predating judicial review and a deeply entrenched part of the self-understanding of different institutional roles, offers an additional argument for preferring courts to either legislatures or the executive for achieving the goals of authoritative settlement").

[420] *Id.* at 1377 (emphasis in original).

[421] *Id.* at 1379–80.

[422] Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022).

[423] 597 U.S. 215 (2022).

[424] Bridges, *supra* note 422, at 53.

[425] 600 U.S. 181 (2023).

[426] 539 U.S. 306 (2003); *see also* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113, 122–30 (2023).

practice of according administrative agencies deference in their interpretations of what the law demands.[427] One only needs to read the writing on the wall to see that it is not necessarily pure pessimism to suggest that more precedential decisions are on the Roberts Court's chopping block. And, even if one "refute[s] the notion that the Roberts Court has been any more inclined than prior Courts to overrule precedent,"[428] the point still stands: the Court's ability to overrule itself is precisely why its decisions cannot be treated as equivalent to the Constitution itself.[429] Even the Supreme Court gets the Constitution wrong sometimes.[430]

It is exactly because one branch of government can get the Constitution wrong or misunderstand how the world will change that there should never be permanent winners or losers in our system. Allowing the people to "fight it out" in the halls of Congress and the Court not only produces more legitimate constitutional determinations, but it also serves a truth-seeking function.[431] Much like John Stuart Mill's "marketplace of ideas," when "everyone comes to the [constitutional] market with his or her ideas, and through discussion everyone exchanges ideas with one another[, t]he ideas or opinions compete with one another, and we have the opportunity to test all of them, weighing one against the other."[432] From this messy, rhizomatic clash of individuals and their institutions, the best and most stable interpretation of our Constitution will emerge. For the only way to "deal with erroneous or dangerous ideas is to refute them, not to suppress them."[433] Only speaking the truth can combat error and create the stability we seek in the realm of constitutional interpretation.

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[427] 144 S. Ct. 2244 (2024).

[428] Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV. 684, 684 (2023) (citing Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 401 (2007); Jonathan H. Adler, *The Stare Decisis Court*, REASON: VOLOKH CONSPIRACY (July 8, 2018), https://reason.com/volokh/2018/07/08/the-stare-decisis-court [https://perma.cc/357T-DH69]).

[429] *See* Meese, *supra* note 371, at 989 (arguing that conflation of the Constitution with constitutional law leaves no room for the Court to overrule its own previous decisions).

[430] To be clear, adherence to precedent is not necessarily indicative of judicial soundness. The ability of the Court to overrule its own erroneous decisions can be a good thing—that is, of course, the lesson learned from the Court in *Brown* overruling the prior Court in *Plessy*. Rather, I argue that the Court's ability to break from stare decisis signifies why the Court's decisions cannot be treated as if they are on par with the Constitution itself. At any given moment, the Court may be following a misguided interpretation of the Constitution that has not been overruled yet.

[431] *See, e.g.*, Ori Aronson, *Getting It Right: Institutional Design and Epistemic Competence in Law and the Limits of Reason*, 2 JERUSALEM REV. LEGAL STUD. 32, 33–34 (2010); Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J. L. REFORM 971, 976–77 (2010); *cf.* Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendel Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMANS. 35, 77 (2010).

[432] Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas"*, 23 SOC. THEORY AND PRAC. 235, 236 (1997).

[433] *Id.* (quoting Christian Bay, *Access to Political Knowledge as a Human Right*, 7 THE HUM. CONTEXT 388, 391 (1975)).

V. Conclusion

Our Constitution begins with "We the People of the United States"[434] and ends, some 7,000 words later, with the Twenty-Seventh Amendment.[435] It contains provision after provision creating the branches of government, vesting those branches with power, and fencing off the areas of society where the government cannot go while enumerating those where it must. One of those provisions, Section 5 of the Fourteenth Amendment, explicitly commands Congress to adopt "appropriate" legislation to "enforce" its mandate that:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[436]

Yet, more than 150 years after those words were first written, the Court has arrogated the duty to enforce the Fourteenth Amendment for itself. Not just that, the Court has taken over the job of interpreting the whole Constitution. But what republic gives nine individuals sitting in robes on a bench the sole power to interpret its people's charter?

Whether they realized it or not, that's what the Members of Congress and the disability rights activists in the 1990s were pushing back against after the Court found that the text of the Constitution contains no protections for people with disabilities. It is high time the people followed suit and take back the Constitution once and for all. The first step is to return the power of constitutional enforcement to where it belongs: the American people and their representatives.

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[434] U.S. Const. Preamble.

[435] This sentence is a modified and updated version of a line from Edwin Meese's speech. *See* Meese, *supra* note 371, at 981 ("It begins 'We the People of the United States, in Order to form a more perfect Union. . .' and ends up, some 6,000 words later, with the twenty-sixth amendment").

[436] U.S. Const. amend. XIV, § 1, 5.