

# SERVING THE SYLLOGISM MACHINE: REFLECTIONS ON WHETHER *BRANDENBURG* IS NOW (OR EVER WAS) GOOD LAW

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## I. INTRODUCTION: WHAT IS THE SOURCE OF THE SUPREME COURT’S POWER TO DECIDE *BRANDENBURG*?

When asked to participate in this symposium on whether *Brandenburg v. Ohio* is still good law,<sup>1</sup> I experienced a moment of panic. I wondered whether something very important had happened to the First Amendment, but I had forgotten about it. In my seventh decade,<sup>2</sup> I am very good at

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1. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

2. Many, indeed most, of the observations in this Article about the functioning of the legal process are drawn from my years of experience in the courts. In that sense, they are merely anecdotal,

forgetting. A quick search of the Supreme Court's First Amendment docket revealed no earth-shaking changes. While *Holder v. Humanitarian Law Project* appears less willing to take risks in favor of free speech in the narrow context of international cooperation with foreign terrorists than *Brandenburg's* rhetoric might imply,<sup>3</sup> *Citizens United v. Federal Election Commission*, *Snyder v. Phelps*, *Brown v. Entertainment Merchants*, and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* make it clear that *Brandenburg's* vision of a potent First Amendment is alive and well in the Supreme Court.<sup>4</sup>

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and in no sense scientifically verified. But they do represent the considered residue of a career largely spent in court. In addition to my teaching duties at NYU Law School, I have practiced public interest law for almost fifty years—as a staff lawyer for the New York Civil Liberties Union from 1967–1972, Assistant Legal Director of the American Civil Liberties Union (ACLU) from 1972–1974, National Legal Director from 1981–1986, and as Founding Legal Director of the Brennan Center for Justice at NYU Law School since 1995. I estimate that over the past forty-eight years, I have participated in the litigation of considerably more than 500 constitutional and statutory civil rights cases. For the past fourteen years, I have served as court-appointed lead counsel in the successful settlement of a series of class actions seeking to recover Holocaust-related damages from Swiss banks and German corporations, resulting in the payment of approximately \$7.5 billion to Holocaust victims and their families. See *In re Austrian & German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001) (granting writ of mandamus to permit establishment of German Foundation to compensate victims); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (describing and approving \$1.25 billion Swiss bank settlement); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000) (describing and approving creation of \$5.2 billion German Foundation as settlement of slave labor claims). I have, therefore, asked the editors to cut me a little slack in footnoting every assertion about how the law works in the context of litigation. If you come upon an unfootnoted assertion, treat it as my personal belief and weigh it accordingly.

3. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). In my opinion, there is less to *Humanitarian Law Project* than meets the eye. The Chief Justice's carve-out from the statute's coverage of independent speech activities that are not coordinated with a foreign terrorist group, *id.* at 2731-23, 2726, 2731, parallels the distinction in campaign finance cases between independent and coordinated First Amendment activities. See *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (invalidating limits on independent expenditures); *id.* at 23-38 (upholding limits on contributions and coordinated expenditures). Limiting coordinated speech activity deemed by the President to be helpful to foreign terrorist groups does not strike me as a major blow to the First Amendment, as long as independent speech and communications involving domestic groups remain fully protected. See *Humanitarian Law Project*, 130 S. Ct. at 2730 (noting that *Humanitarian Law Project* does not apply to domestic communications).

4. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (invalidating restriction on sale of violent video games); *Snyder v. Phelps*, 131 S. Ct. 1207, 1213-20 (2011) (reversing grant of damages for picketing funeral of fallen soldier); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down public campaign subsidies keyed to spending of privately funded candidate); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (striking down restrictions on independent corporate electoral expenditures). I do confess, however, to puzzlement about the Court's approach to what constitutes "speech." While the spending of unlimited amounts of money by a corporation on the eve of an election to buy up broadcast time is treated as "pure" speech in *Citizens United*, a contribution to a candidate to enable the candidate to buy the same broadcast time is treated as a watered-down form of speech subject to significant regulation. See *Citizens United*, 130 S. Ct. at 887-88 (protecting independent expenditures); *id.* at 908-11 (distinguishing contributions from independent expenditures). Similarly, while burning an American flag is entitled to first-class speech protection, see *Texas v. Johnson*, 491 U.S. 397 (1989), burning a draft card to protest the Vietnam war is not, see *United States v. O'Brien*, 391 U.S. 367 (1968). Playing a violent video game is viewed as pure speech, equivalent to reading Dante, see *Brown*, 131 S. Ct. at 2734 n.4, but a voter's effort to cast a write-in protest ballot is

*Brandenburg* was a 1969 per curiam opinion for a unanimous Court, holding that a television broadcast of the rantings of a KKK leader to eleven other hooded figures could not be the basis of a criminal conviction under the Ohio Criminal Syndicalism statute.<sup>5</sup> The *Brandenburg* opinion held that while speech “directed to” or “likely to incite or produce” “imminent lawless action” may be suppressed, mere abstract advocacy of unlawful action is protected by the First Amendment.<sup>6</sup> Under *Brandenburg*, therefore, First Amendment protection of the “freedom of speech” often turns on a prediction about the causal nexus between the speech in question and a potential future evil.<sup>7</sup> Under the much less protective First Amendment test applied by the Court during the 1920s, if speech had a mere “bad tendency” to increase the likelihood of lawless behavior or other serious harm, it could be suppressed as outside “the freedom of speech.”<sup>8</sup> During the 1940s and 1950s, the Court appeared to tighten the required causal nexus between speech and threatened harm but eventually gave the First Amendment game away by ruling that the judiciary should defer to predictions by the political branches about the strength of the causal nexus

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not viewed as speech at all, *see* *Burdick v. Takushi*, 504 U.S. 428 (1992); *see also* *Nevada Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (casting legislative vote is not speech). The definitional acrobatics began with the Court’s decision that obscenity is not “speech,” thus freeing the Court from having to decide whether obscenity actually causes harm. *See* *Roth v. United States*, 354 U.S. 476 (1957).

5. *Brandenburg*, 395 U.S. at 448-49. The Ohio statute forbade “advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” *Id.* at 444-45 (alteration in original). The most inflammatory statement warned: “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.” *Id.* at 446. The original version of *Brandenburg* was drafted by Justice Fortas, who was forced to resign before it could be issued. *See* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 237. Justice Brennan revised the Fortas draft as a per curiam opinion of the Court. *See id.*; *see also* Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 27-28 (July-Aug. 1995). Justices Black and Douglas wrote short separate concurrences in *Brandenburg* expressing their respective opinions that the “clear and present danger” test was too restrictive of free speech, especially in time of peace. *Brandenburg*, 395 U.S. at 449 (Black, J., concurring); *id.* at 450 (Douglas, J., concurring).

6. *Brandenburg*, 395 U.S. at 447.

7. The close causal nexus between speech and threatened harm required under *Brandenburg* has been widely recognized. It was the centerpiece of the Court’s reasoning in *Brown v. Entertainment Merchants Association*. *See* *Brown*, 131 S. Ct. at 2732-40. *See generally* Hans A. Linde, “*Clear and Present Danger*” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1166-68, 1183-86 (1970); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 947 n.206 (1978) (noting how several legal commentators have discussed *Brandenburg*’s incitement requirement).

8. For examples of the “bad tendency” test in action, *see* *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

between speech and harm.<sup>9</sup> In the modern era, *Brandenburg* has been read to (1) ratchet up to a virtual certainty the required likelihood that speech will cause harm; (2) require the feared harm to be very serious; and (3) reserve to the courts the duty of: (a) policing the required causal nexus between speech and harm; and (b) determining whether “less drastic means” other than censorship exist to deal with the threatened harm.<sup>10</sup> I see no indication that the current Court is reconsidering *Brandenburg*’s highly speech-protective approach to risk allocation and necessity.

Because I could not turn two paragraphs into an article, I began thinking about what it means to say that *Brandenburg*’s imposition of powerful error-deflection norms favoring free speech is good constitutional law. Where does the Supreme Court get the power to set the First Amendment risk level for society, especially in settings where the political branches vigorously disagree over the actual risk posed by the speech in question? The power certainly does not jump out of the text, which protects “the freedom of speech” but does not tell us what kind of communicative behavior the freedom of speech protects.<sup>11</sup> Thinking about that led me to worry about where the Court’s power to construe the open-textured provisions of the Constitution comes from in general.

Today, in most functioning constitutional democracies, the scope of judicial power—especially judicial power to trump the political branches—is carefully defined in the constitutional text in an effort to adopt (and adapt) one of the most admired aspects of the United States political system: vigorous judicial protection of individual rights against the risk of majoritarian tyranny.<sup>12</sup> Ironically, it is the mother ship—the United States Constitution—that lacks explicit textual support for the judicial enterprise. Without an explicit textual basis in the Constitution, where does the kind of fine-tuned judicial power exemplified by *Brandenburg* come from?

When pressed in court or in the classroom about the roots of judicial power, I have tended to round up the usual suspects, arguing that the authority of American judges to override the will of the political majority in the name of the Constitution was firmly established more than 200 years

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9. See *Dennis v. United States*, 341 U.S. 494, 508-11 (1951) (deferring to Congress on the likelihood that speech would lead to unlawful behavior and upholding the Smith Act providing for criminalization of membership in American Communist Party); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-42 (1943) (raising causal standard and invalidating compulsory flag salutes).

10. *Brandenburg*’s methodology was applied in *Hess v. Indiana*, 414 U.S. 105, 107-09 (1973) (holding that “We’ll take the fucking street later” was protected) and *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the display of “Fuck the Draft” slogan was protected). As the cases cited *supra* note 4 suggest, the *Brandenburg* methodology continues to dominate First Amendment analysis.

11. See *supra* note 4 for efforts to define “speech.”

12. For a survey of the increased adoption of judicial review throughout the world, see MICHAEL LOUIS CORRADO, *COMPARATIVE CONSTITUTIONAL REVIEW: CASES AND MATERIALS* (2004). See also NORMAN DORSEN, MICHEL ROSENFELD, ANDRAS SAJO, & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2d ed. 2010); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2006).

ago in *Marbury v. Madison*.<sup>13</sup> But my nose gets a little longer every time I tell that particular story.

## II. *MARBURY V. MADISON*: A CONSTITUTIONAL FARCE IN THREE ACTS

### A. *Prelude to a Farce*

*Marbury* unfolds against the comic-opera backdrop of the election of 1800, the first electoral transfer of presidential power in the nation's history.<sup>14</sup> Before the adoption of the Twelfth Amendment in 1804, each presidential elector cast two votes without designating which was for President and which for Vice President.<sup>15</sup> The only restriction was that one of the presidential candidates had to be from a different state than the elector.<sup>16</sup> As the original text of Article II, Section 1, Clause 3 makes clear, the Founders had envisioned a purely meritocratic presidential election with the candidate with the most electoral votes becoming President and the runner-up becoming Vice President.<sup>17</sup> That is how it worked during Washington's two terms.<sup>18</sup> That is how it worked in 1796, the first

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13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The literature on *Marbury* is vast. My recitation of the well-known facts of the case is drawn from several excellent secondary sources. See CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (2009); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996); Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607 (2001); David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996) (providing valuable biographical data on the participants); Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. 143 (1960); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235 (2003) (defending the decision). For a useful summary of facts and the contemporary political climate, see Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2d ed. 2009). For a classic legal critique of the opinion, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

14. The story of the election of 1800 is told in RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 43-52 (1971); JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 90-109 (2002); and FRANK VAN DER LINDEN, *THE TURNING POINT: JEFFERSON'S BATTLE FOR THE PRESIDENCY* (2002). All three earlier presidential elections had been won by Federalists. See SIMON, *supra*, at 27-37. The Presidency passed to the Jeffersonian-Republicans in 1800 and stayed there until the election of John Quincy Adams by the House of Representatives in 1824. See ELLIS, *supra*, at 267-84.

15. U.S. CONST. art. II, § 1, cl. 3.

16. The U.S. CONST. art. II, § 1, cl. 3 (1804), as originally ratified, provided: "The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves."

17. The U.S. CONST. art. II, § 3, cl. 2 (1804) originally provided: "In every Case, after the Choice of the President, the Person having the greatest number of Votes of the Electors shall be Vice President."

18. See *Historical Election Results*, U.S. ELECTORAL COLLEGE, [http://www.archives.gov/federal-register/electoral-college/votes/1789\\_1821.html#1788](http://www.archives.gov/federal-register/electoral-college/votes/1789_1821.html#1788) (last visited Dec. 19, 2011). In 1788 and 1792, Washington was the unanimous selection of the electors. See *id.* John Adams received the second highest number of electoral votes on each occasion. See *id.* In the election of 1788, because neither

contested presidential election, when Jefferson lost to Adams in the Electoral College by three votes and became Vice President.<sup>19</sup> Although the 1796 election featured slates for the first time—John Adams and Charles Pinckney versus Thomas Jefferson and Aaron Burr—the relatively large number of candidates receiving electoral votes (thirteen) avoided ties between running mates.<sup>20</sup> The Founders’ meritocratic electoral vision could not, however, survive the emergence of nascent political parties in 1800 with discrete ideologies and separate candidates for President and Vice President.<sup>21</sup> In the more disciplined election of 1800, the voters and the presidential electors were once again confronted with rival slates: Adams–Pinckney for the Federalists versus Jefferson–Burr for the Jeffersonian-Republicans.<sup>22</sup> This time every electoral vote, save one, went to the standard bearers of the two emerging political parties.<sup>23</sup> Electors pledged to the Jefferson–Burr slate won a close but clear 73–65 victory in the Electoral College,<sup>24</sup> but Jefferson almost blew the presidential election by failing to assure that at least one of his electors failed to cast his second vote for Aaron Burr.<sup>25</sup> The Federalists got it right. One Federalist elector from Rhode Island withheld his vote from Pinckney and cast it for John Jay

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North Carolina nor Rhode Island had ratified the Constitution, eleven states chose a total of sixty-nine electors, each with two votes. *See id.* Washington received sixty-nine electoral votes. *See id.* John Adams received thirty-eight. *See id.* John Jay was third with nine. *See id.* Nine others received at least one electoral vote. *See id.* In the election of 1792, North Carolina and Rhode Island participated for the first time, joined by the newly admitted states of Vermont and Kentucky. *See id.* Fifteen states chose 132 electors, each with two votes. *See id.* Washington received 132 votes. *See id.* John Adams received seventy-seven. *See id.* George Clinton, mounting the first organized opposition, received fifty electoral votes. *See id.* Thomas Jefferson received four votes. *See id.* Aaron Burr received one vote. *See id.* *See generally* 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790 (Gordon DenBoer ed., 1989) (1788 election); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 288-92 (1993) (1792 election).

19. *See* ELKINS & MCKITRICK, *supra* note 18, at 513-18; *Historical Election Results, supra* note 18. The election of 1796 was the first contested presidential election. *See* ELKINS & MCKITRICK, *supra* note 18, at 513-18. John Adams and Thomas Pinckney ran against Thomas Jefferson and Aaron Burr as the principal candidates, although nine others received electoral votes, including two for George Washington despite his refusal to run for a third term. *See Historical Election Results, supra* note 18. Adams received seventy-one electoral votes. *See id.* Jefferson received sixty-eight. *See id.*

20. *See* sources cited *supra* notes 18-19.

21. For a discussion of the political context of the election of 1800, see the sources cited *supra* note 14.

22. *See* sources cited *supra* note 14.

23. *See Historical Election Results, supra* note 18.

24. *Id.* Jefferson’s narrow victory in the Electoral College was attributable generally to the increased Congressional representation enjoyed by the Southern states under the Three-Fifths Compromise (Article I, Section 2, Clause 3) that counted each slave as three-fifths of a person for legislative apportionment purposes, thereby increasing the number of electors allocated to slave states under Article II, Section 1, Clause 2; and, specifically, to Aaron Burr’s success in detaching New York’s electoral votes from Adams, who had received them in 1796, and transferring them to the Jefferson–Burr ticket. *See* sources cited *supra* note 14 and *infra* note 30, for a description of Burr’s political role during the election.

25. *See infra* note 27 and accompanying text.

so that the Adams–Pinckney electoral vote was 65–64.<sup>26</sup> Not only did the Jeffersonian electors fail to withhold a vote from Burr, but Anthony Lispenard, an elector from New York, actually sought to cast both his votes for Burr (presumably in an effort to cancel out the vote that was to be withheld from Burr elsewhere).<sup>27</sup> Because electors were constitutionally forbidden under Article II, Section 1, Clause 3 from casting two votes for candidates from the same state as the elector, Lispenard eventually was persuaded to cast his two votes for Jefferson and Burr.<sup>28</sup> Ironically, Lispenard could have swung the election to Burr by merely withholding his second vote or casting it for someone other than Jefferson.

When the Electoral College ballots were all counted in December 1800, Jefferson and Burr were tied at seventy-three votes each.<sup>29</sup> Once the 73–73 tie was announced, Burr infuriated Jefferson by failing to take affirmative steps to withdraw his candidacy for President,<sup>30</sup> throwing the formally tied presidential election into the House of Representatives, where, under Article II, Section 1, Clause 3, each of the sixteen state congressional delegations was entitled to cast one vote.<sup>31</sup> The votes of nine states were

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26. See *supra* note 18 (listing Rhode Island’s electoral vote).

27. For a description of Lispenard’s attempt to cast two ballots for Burr, see GEORGE C. EDWARDS, III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 12-13 (2004).

28. See *id.*

29. See *Historical Election Results*, *supra* note 18. There was a problem with Georgia’s four electoral votes. See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 582-87 (2004). While there is no doubt that the Georgia electors actually voted for Jefferson and Burr, the votes were recorded in a technically defective certificate that failed to follow the prescribed formula. See *id.* at 607-08. Jefferson, presiding over the electoral count as Vice President, ignored the procedural defect and counted the Georgia electoral votes for himself. See *id.* at 609. If the four Georgia votes had been disqualified on a technicality, the electoral vote would have been 69–65 in favor of Jefferson, throwing the election into the House of Representatives because no candidate would have obtained the necessary majority of seventy under Article II, Section 1, Clause 3. See U.S. CONST. art. II, § 1, cl. 3; Ackerman & Fontana, *supra*, at 610-13. Because Jefferson eventually won the election in the House, the counting of the Georgia votes probably did not affect the outcome of the presidential election although it is possible that the Federalists in the House might have been more aggressive in seeking to support Burr if no candidate had actually received a majority of the electoral votes. See Ackerman & Fontana, *supra*, at 620.

30. Burr’s failure to affirmatively stand aside for Jefferson in 1800 and his failure as Vice President to support the repeal of the Midnight Judges Act in 1802 were never forgiven. For Burr’s role as Vice President during the Senate’s deliberations over repealing the Midnight Judges Act, see SAMUEL H. WANDELL & MEADE MINNIGERODE, 1 AARON BURR 238-40 (1925). Burr went on to infamy, killing Alexander Hamilton in a duel in 1804, and surviving a treason trial in 1807 arising out of an alleged plot to transfer the allegiance of several frontier states to a new country, with Burr at its head. The Hamilton–Burr duel is described in THOMAS FLEMING, DUEL: ALEXANDER HAMILTON, AARON BURR AND THE FUTURE OF AMERICA 321-31, 380-94 (1999). Treason charges against Burr were dismissed in *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D). Chief Justice John Marshall presided over the Burr treason trial while riding circuit. See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) for a discussion of Supreme Court circuit riding. For Burr’s side of the story, see NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* (2007).

31. See Ackerman & Fontana, *supra* note 29, at 600-01. Article II, Section 1, Clause 3, as originally ratified, provided:

needed to elect the President.<sup>32</sup> Although the Jeffersonian-Democrats won a 68–38 majority in the new House of Representatives,<sup>33</sup> under the Constitution as originally written, the newly elected Congress did not take office until March 4, 1801,<sup>34</sup> leaving the Federalist-controlled, lame-duck House of Representatives with the power to choose the next President.<sup>35</sup> Although the Federalists controlled the lame-duck House by a 60–46 margin, they controlled only eight of the sixteen state delegations.<sup>36</sup> Jeffersonian-Democrats controlled seven delegations.<sup>37</sup> Vermont was evenly split.<sup>38</sup> The House conducted thirty-six ballots from February 11 to 17, 1801.<sup>39</sup> The vote was always 8–6–2.<sup>40</sup> Jefferson consistently carried

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The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President . . . . But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote . . . .

U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend. XII.

32. See Ackerman & Fontana, *supra* note 29, at 620 n.191. The admission of Tennessee in 1796 had brought the number of states in 1800 to sixteen. See *State Facts*, TENN. DEP'T OF STATE, <http://www.tn.gov/sos/symbols/facts.htm> (last visited Dec. 19, 2011). The Twelfth Amendment, requiring separate ballots for President and Vice President, was designed to prevent a replay of 1800. See Ackerman & Fontana, *supra* note 29, at 563.

33. See *House History*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://artandhistory.house.gov/house\\_history/partyDiv.aspx](http://artandhistory.house.gov/house_history/partyDiv.aspx) (last visited Dec. 19, 2011). The Jeffersonians gained twenty-two seats in the Seventh Congress in the 1800 House election. See *id.*

34. See U.S. CONST. art. I, § 4, cl. 2, which, as originally ratified, provided that a new Congress is to assemble no later than the first Monday in December, unless a different date is selected by law.

35. For the partisan makeup of the House immediately prior to the 1800 elections, see *House History*, *supra* note 33, and see also KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS, 1789-1983* (Clifford Lee Lord & Ruth Anderson Rowles eds., 1982). The Twentieth Amendment seeks to deal with the lame-duck problem by providing that the newly elected Congress takes office on January 3. See U.S. CONST. amend. XX, § 1. The President takes office on January 20. *Id.*

36. See MARTIS, *supra* note 35.

37. See *id.*

38. See *id.*

39. See JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 186-96 (2004). The balloting in the House of Representatives is described in *id.* at ch. 12. For an additional careful narrative of the election of 1800 and the Congressional balloting, see EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2008). The following chart, drawn from Ferling's and Larson's accounts, summarizes the balloting in the House:

	1st ballot	2nd ballot	35th ballot
<b><u>Georgia</u></b>	Jefferson (1-0-0)	Jefferson (1-0-0)	Jefferson (1-0-0)
<b><u>Kentucky</u></b>	Jefferson (2-0-0)	Jefferson (2-0-0)	Jefferson (2-0-0)
<b><u>New Jersey</u></b>	Jefferson (3-2-0)	Jefferson (3-2-0)	Jefferson (3-2-0)
<b><u>New York</u></b>	Jefferson (6-4-0)	Jefferson (6-4-0)	Jefferson (6-4-0)

eight states: the seven states controlled by Jeffersonians—Kentucky, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, and Virginia—plus Georgia, whose sole surviving Federalist Congressman (Benjamin Talieferro) voted for Jefferson.<sup>41</sup> Six Federalist states—Delaware, South Carolina, Connecticut, Massachusetts, New Hampshire, and Rhode Island—voted consistently for Burr.<sup>42</sup> The Vermont delegation, evenly split, cast a blank ballot.<sup>43</sup> The Maryland delegation, controlled by Federalists, also maneuvered to cast a blank ballot.<sup>44</sup> Barely two weeks before the scheduled March 4, 1801, inauguration, on the thirty-sixth ballot, James Bayard, the sole Federalist Congressman from Delaware, persuaded Federalist allies in the evenly split Vermont and Maryland delegations to cast blank ballots, throwing both states to Jefferson.<sup>45</sup> At the same time, Bayard shifted his Delaware vote from Burr to blank and persuaded the

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<b><u>North Carolina</u></b>	Jefferson (9-1-0)	Jefferson (6-4-0)	Jefferson (6-4-0)
<b><u>Pennsylvania</u></b>	Jefferson (9-4-0)	Jefferson (9-4-0)	Jefferson (9-4-0)
<b><u>Tennessee</u></b>	Jefferson (1-0-0)	Jefferson (1-0-0)	Jefferson (1-0-0)
<b><u>Virginia</u></b>	Jefferson (16-3-0)	Jefferson (14-5-0)	Jefferson (14-5-0)
<b><u>Maryland</u></b>	no result (4-4-0)	no result (4-4-0)	Jefferson (4-0-4)
<b><u>Vermont</u></b>	no result (1-1-0)	no result (1-1-0)	Jefferson (1-0-1)
<b><u>Delaware</u></b>	Burr (0-1-0)	Burr (0-1-0)	no result (0-0-1)
<b><u>South Carolina</u></b>	Burr (0-5-0)	Burr (1-3-0)	no result (0-0-4)
<b><u>Connecticut</u></b>	Burr (0-7-0)	Burr (0-7-0)	Burr (0-7-0)
<b><u>Massachusetts</u></b>	Burr (3-11-0)	Burr (3-11-0)	Burr (3-11-0)
<b><u>New Hampshire</u></b>	Burr (0-4-0)	Burr (0-4-0)	Burr (0-4-0)
<b><u>Rhode Island</u></b>	Burr (0-2-0)	Burr (0-2-0)	Burr (0-2-0)

40. See FERLING, *supra* note 39, at 193; LARSON, *supra* note 39, at 262-68.

41. See FERLING, *supra* note 39, at 176, 186-87. Georgia's other Federalist member of Congress, James Jones, had died on January 11, 1801. See LARSON, *supra* note 39, at 244.

42. See FERLING, *supra* note 39, at 176, 187.

43. *Id.* at 187; LARSON, *supra* note 39, at 264.

44. See FERLING, *supra* note 39, at 187.

45. See *id.* at 189-93.

South Carolina Federalist delegation to similarly switch from Burr to blank.<sup>46</sup> So, the final vote for Jefferson was 10–4–2.<sup>47</sup>

On February 17, 1800, when Jefferson's election was finally announced, the Supreme Court's prestige was at its lowest ebb, in large part because the six Justices<sup>48</sup> decided only a small number of appellate cases (the Supreme Court decided only fifty cases in its first decade) and were routinely assigned to "ride circuit" throughout the country to serve as circuit judges, a demanding task requiring arduous travel.<sup>49</sup> Washington's first Chief Justice, John Jay, had resigned in 1795 to become Governor of New York, in part because the Supreme Court did so little and in part because circuit riding was so exhausting.<sup>50</sup> Under the Judiciary Act of 1789, the federal courts were divided into three familiar tiers—district, circuit, and the Supreme Court.<sup>51</sup> But the original circuit courts were not classic intermediate appellate courts. There were no permanent circuit judges. Initially, a circuit court consisted of two Supreme Court Justices sitting twice a year with a local district judge.<sup>52</sup> In 1793, the burden was lessened by requiring only one Supreme Court Justice, although that created the possibility of a split two-judge circuit court.<sup>53</sup> The two judges sat as

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46. *Id.*

47. *Id.* at 193.

48. The first section of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, set the number of Supreme Court Justices at six—a Chief Justice and five Associate Justices. As the number of circuits increased with the admission of new states, Congress added additional Supreme Court Justices needed to ride circuit. See Act of Feb. 24, 1807, ch. 16, 2 Stat. 420, 420-27; e.g., Act of March 22, 1808, ch. 38, 2 Stat. 477, 477-78. In 1807, a seventh Justice was added to meet the needs of Kentucky, Tennessee, and Ohio. § 5, 2 Stat. at 421. In 1837, after a twenty-year hiatus, the country was reorganized into nine circuits, with the corresponding addition of two more Justices. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176, 176. In 1855, California, soon joined by Oregon, became the Tenth Circuit, with a short-lived tenth Justice in 1863. See Act of Mar. 2, 1855, ch. 142, 10 Stat. 631, 631, *repealed by* Act of Mar. 3, 1863, ch. 100, 12 Stat. 794, 794, *amended by* Act of Feb. 19, 1864, ch. 11, 13 Stat. 45. Congress shrunk the Court to seven in 1866 to prevent President Johnson from filling vacancies, Act of July 23, 1866, § 1, 14 Stat. 209, 209, but restored the Court to nine members in 1869, Act of Apr. 10, 1869, ch. 22, 16 Stat. 44, 44, where it has remained to the current day, surviving the Roosevelt court-packing plan in 1937. See MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 556-63 (2002).

49. The practice of Supreme Court circuit riding is described in Glick, *supra* note 30, at 1763-82. For a summary of the early work of the Supreme Court, see generally FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928).

50. See Glick, *supra* note 30, at 1780-81. For a brief biography of John Jay, maintained by Columbia University in connection with the John Jay papers, see *A Brief Biography of John Jay*, COLUM. UNIV. LIBR., <http://www.columbia.edu/cu/lweb/digital/jay/biography.html> (last visited Dec. 21, 2011) (noting Jay's aversion to circuit riding and describing his resignation in 1795 to become Governor of New York).

51. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73-75. The history of the early federal courts is recounted in RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20-34 (6th ed. 2009). For the classic summary of lower court jurisdiction in the early years of the nation, see Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928).

52. See sources cited *supra* note 51.

53. Judiciary Act of 1793, ch. 22, 1 Stat. 333.

multimember original trial courts for certain important cases and as an intermediate appeal forum for certain other cases.<sup>54</sup>

After Jay's resignation in 1795, John Rutledge of South Carolina received a recess appointment in July 1795 as the second Chief Justice, only to have the Senate deny confirmation after he had presided for less than six months.<sup>55</sup> Rutledge, who apparently had suffered a mental breakdown after the death of his wife, was said to have been so distraught at the rejection that he attempted suicide by jumping into the Ashley River.<sup>56</sup> Some slaves nearby fished him out.<sup>57</sup> Washington finally appointed Oliver Ellsworth in 1796.<sup>58</sup> Ellsworth served for four uneventful years.<sup>59</sup> He was in Europe negotiating a treaty with Napoleon when news of Jefferson's likely election victory reached him.<sup>60</sup> Ellsworth wasted no time in immediately sending a resignation letter, dated September 30, 1801, to Adams to give the outgoing President time to nominate a successor.<sup>61</sup> Adams received Ellsworth's resignation on December 15 and immediately nominated John Jay without bothering to ask him whether he would serve once again.<sup>62</sup> The Senate quickly confirmed Jay on December 19, but he declined the nomination on January 2, 1801.<sup>63</sup> Adams received Jay's declination on January 19.<sup>64</sup> The next day, after rejecting congressional advice to nominate Justice

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54. § 9, 1 Stat. at 77; *supra* note 53. Circuit courts had original jurisdiction over diversity suits involving an alien where the amount in controversy exceeded \$500, § 11, 1 Stat. at 78, and concurrent jurisdiction over alien tort actions alleging a violation of a treaty or the "law of nations," § 9, 1 Stat. at 77 (current version at 28 U.S.C. § 1350 (2006)).

55. See 1 HARRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 632-42 (1874); JAMES HAW, *JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA* 245-47, 255 (1997).

56. See HAW, *supra* note 55, at 257; SLOAN & MCKEAN, *supra* note 13, at 124.

57. See HAW, *supra* note 55, at 258.

58. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 95 (1995).

59. See *id.* at 95, 119.

60. See *id.* at 120-25.

61. See generally SIMON, *supra* note 14, at 134 (explaining how Adams had to act quickly to nominate a replacement for Ellsworth). It is possible that Ellsworth's resignation letter dated September 30, 1800, was occasioned by ill-health—not by a desire to give Adams the chance to appoint a successor. If I were cross-examining, I would want to know why a letter dated September 30 was not received by Adams until December 15. It is possible that it took ten weeks to get from Paris to Washington, but I am doubtful. Moreover, although the formal electoral balloting was not decided until December 1800, when South Carolina gave its eight electoral votes to Jefferson, it was clear as early as April 1800 that New York would support Jefferson, making him the likely winner. *Id.* at 120-21. Upon his return to the United States, Ellsworth served on the Connecticut Governor's Council until 1807. See WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905), reprinted in *THE LIFE OF OLIVER ELLSWORTH* 329-34 (Da Capo Press ed. 1970).

62. The effort to nominate Jay is recounted in SMITH, *supra* note 13, at 10, 529 n.51 (1996). See also RICHARD B. MORRIS, *WITNESS AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION* (1985).

63. SMITH, *supra* note 13, at 14, 530 n.73.

64. *Id.* at 14, 530 n.74.

Paterson,<sup>65</sup> Adams turned to his recently appointed Secretary of State, forty-five-year-old John Marshall, who had been leader of the Federalists in the House of Representatives but had never served as a judge.<sup>66</sup> The Senate confirmed Marshall as Chief Justice on January 27, with the one-week delay probably attributable to the unhappiness of certain High Federalist Senators from New England who viewed Marshall as too moderate.<sup>67</sup> Marshall took office on February 4, 1801, thirteen days before Jefferson was finally named President-elect.<sup>68</sup> At Adams's request, Marshall agreed to continue serving as acting Secretary of State, as well as Chief Justice, for another month until the close of Adams's term on March 4.<sup>69</sup> In February 1801, Secretary of State was where the real power lay. It was Federalist patronage headquarters.

### B. Building the Set: A Large Patronage Trough

The facts of *Marbury* unfolded during the politically charged two weeks between Jefferson's delayed election as President on February 17,

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65. See SLOAN & MCKEAN, *supra* note 13, at 32-37. Adams claimed to feel that a Paterson nomination would slight the senior Justice Cushing, who hailed from Massachusetts. *Id.* at 33. It is more likely that Adams was angry with Paterson, whom he viewed as too close to Alexander Hamilton and the High Federalists. *Id.*

66. SMITH, *supra* note 13, at 14, 530 n.76. Despite never having served as a judge, Marshall enjoyed a reputation as an excellent lawyer. *Id.* at 12. In 1789, Washington offered him the post of United States Attorney for Virginia. *Id.* at 145. Marshall declined. *Id.* In 1795, at the age of thirty-seven, Washington asked him to serve as Attorney General. *Id.* at 178. When Marshall declined for financial reasons, the job went to Charles Lee, who served as counsel in *Marbury*. *Id.* at 299-300. In 1797, Marshall accepted Adams's nomination as one of three commissioners to France. *Id.* at 184. He was expelled from France as part of the XYZ affair, burnishing his political reputation in the United States. See WILLIAM STINCHCOMBE, THE XYZ AFFAIR 108-17 (1980) (describing Talleyrand's unsuccessful effort to extort a bribe from the United States Commissioners and their expulsion from France upon refusing to pay). In 1798, again moved by financial considerations, Marshall declined an offer by Adams of a nomination as an Associate Justice of the Supreme Court and recommended Bushrod Washington. SLOAN & MCKEAN, *supra* note 13, at 245. In 1799, Marshall reluctantly agreed to run for the House, winning a close election largely on the basis of his popularity as a result of the XYZ affair. *Id.* at 240-50. Marshall served as Federalist leader in the House until Adams nominated him as Secretary of War in early May 1800. *Id.* at 265-66. When Marshall refused the post because of financial considerations, Adams renominated him as Secretary of State one week later, with a salary large enough to permit Marshall to give up his law practice. *Id.* at 266-67. Nine months later, Adams nominated Marshall as the fourth Chief Justice. SMITH, *supra* note 13, at 278-81.

67. SMITH, *supra* note 13, at 15, 531 nn.80-81.

68. See Turner, *supra* note 13, at 162.

69. *Id.* Marshall's political influence was initially founded on his successful leadership of the Federalists in the House of Representatives. His patronage power increased in January 1801, when Adams tapped him to become Secretary of State, one of whose tasks was to affix the seal of the United States to all federal governmental appointments. See Turner, *supra* note 13, at 150 n.31; see also GAILLARD HUNT, THE DEPARTMENT OF STATE OF THE UNITED STATES 128-29 (1914) (describing role of early Secretaries of State in connection with issuing commissions and supervising judges). After his confirmation as Chief Justice on February 4, 1801, Marshall agreed to continue to serve simultaneously as Chief Justice and acting Secretary of State until the close of the Adams Administration, thus thrusting himself into the midst of the patronage scramble. See SMITH, *supra* note 13, at 277-80.

1801, and his inauguration on March 4, as Federalists scrambled for patronage jobs before their party lost control of the national government it had dominated since 1789.<sup>70</sup> The patronage bonanza was fueled by congressional passage of the District of Columbia Organic Act on February 27, 1801, just five days before the Federalists went out of power, giving the outgoing President the ability to appoint an entire government from scratch for the new District of Columbia.<sup>71</sup> The D.C. Organic Act provided for a full complement of officials, ranging from an unlimited number of Justices of the Peace (JPs), to marshals, notaries, surveyors, lawyers, and military officers.<sup>72</sup> All told, considerably more than 100 potential new jobs were created.<sup>73</sup> On March 2, Adams nominated forty-two JPs for the new district, as well as a full complement of notaries, federal marshals, and other executive officials.<sup>74</sup> The five-year low-level judicial posts were unsalaried with compensation based on fee-for-service involving the issuance of writs.<sup>75</sup> Jurisdiction was capped at \$20.<sup>76</sup> The judicial position appears to have been partially honorific, but carried inchoate, potential legislative power, and the general duty to maintain public order.<sup>77</sup> Because the population of the District of Columbia in 1801 was approximately 5,000 whites and 2,000 blacks (including 400 freedmen), forty-two JPs—one for every 166 residents—seems excessive.<sup>78</sup> Jefferson eventually settled on thirty.<sup>79</sup>

The D.C. Organic Act also provided for an Article III three-judge circuit court with lifetime terms.<sup>80</sup> Marshall's younger brother, James, received one of the circuit judgeships, as did Abigail Adams's nephew, William Cranch.<sup>81</sup> But, with only four days to perform the task, time ran out on Marshall's effort to find a chief judge for Adams to appoint.<sup>82</sup>

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70. See SMITH, *supra* note 13, at 15. The story of *Marbury* has been told many times. For a particularly lively account, see SLOAN & MCKEAN, *supra* note 13, at 85-141. For a more scholarly treatment, see SMITH, *supra* note 13. The scope of the patronage scramble is attested to by the fact that President Adams submitted 217 nominations to the Senate during his final month in office, including ninety-three judicial nominations. See SLOAN & MCKEAN, *supra* note 13, at 53.

71. District of Columbia Organic Act, ch. 15, § 3, 2 Stat. 103, 105 (1801).

72. *Id.* § 11, 2 Stat. at 107.

73. See *id.* §§ 11-15, 2 Stat. at 107-08.

74. See SLOAN & MCKEAN, *supra* note 13, at 62.

75. See SMITH, *supra* note 13, at 618 n.41 (describing the office as “piddling”).

76. See § 11, 2 Stat. at 107 (provisions governing compensation of the JPs). The Jeffersonian Congress rescinded the power to charge fees. Forte, *supra* note 13, at 400 n. 264.

77. See Forte, *supra* note 13, at 399 (briefly describing JPs' legislative and law enforcement power).

78. For the District of Columbia 1800 population figures by race, see U.S. CENSUS BUREAU, <http://www.census.gov/population/www/documentation/twps0056/tab23.pdf> (last visited Dec. 21, 2011).

79. SLOAN & MCKEAN, *supra* note 13, at 77.

80. See Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 551-53 (2002).

81. See *id.* at 551 & n.6; see also SMITH, *supra* note 13, at 617 n.30.

82. SLOAN & MCKEAN, *supra* note 13, at 60-61.

Adams's first choice, ex-Supreme Court Justice Thomas Johnson, unexpectedly said no, leaving the plum appointment to Jefferson.<sup>83</sup> Jefferson promptly appointed a staunch supporter: William Kilty of Maryland.<sup>84</sup>

The judicial patronage scramble did not stop at the District of Columbia. On February 13, 1801 (four days before Jefferson was named President-elect and three weeks before the Federalists went out of power), President Adams persuaded Congress to pass the so-called Midnight Judges Act, creating sixteen new lifetime Article III circuit judgeships throughout the country,<sup>85</sup> in addition to the three for the District of Columbia to be created by the D.C. Organic Act two weeks later.<sup>86</sup> While they were at it, Congress, as part of the Midnight Judges Act, also prospectively reduced the number of Supreme Court Justices to five (in an apparent effort to deny Jefferson an appointment); abolished circuit riding by Supreme Court Justices as no longer necessary because there was now a permanent corps of sixteen new circuit judges; and granted federal question jurisdiction to the lower federal courts.<sup>87</sup> The abolition of circuit riding, creation of permanent intermediate appellate courts, and grant of federal question jurisdiction were needed reforms. Each was eventually adopted.<sup>88</sup> But the claimed justification for moving from six to five Supreme Court Justices—a desire to avoid ties—seemed a transparent effort to deny Jefferson a Supreme Court nomination. It poisoned the entire bill, causing the legislation to be widely viewed as a partisan effort to perpetuate Federalist power through the judiciary after the party's defeat at the polls.

The entire Midnight Judges Act was repealed a year later on March 8, 1802, by the newly elected Jeffersonian Congress,<sup>89</sup> returning the Supreme Court to six members; reinstating circuit riding; revoking the grant of

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83. *Id.* at 61.

84. See SMITH, *supra* note 13, at 617 n.30; Bloch & Ginsburg, *supra* note 80, at 551-52. Kilty resigned in 1806 to become Chancellor of Maryland. See *The Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (search "Kilty"; then follow hyperlink) (last visited Dec. 21, 2011).

85. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (Midnight Judges Act). See generally Erwin C. Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53 (1958); Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965).

86. See Bloch & Ginsburg, *supra* note 80, at 550.

87. The provisions of the Midnight Judges Act are summarized in SLOAN & MCKEAN, *supra* note 13, at 54-56.

88. Circuit riding was limited in 1869 and abolished in 1891. See Act of April 10, 1869, ch. 22, 16 Stat. 44, 44-45; Act of March 3, 1891, ch. 517, 26 Stat. 826. The appellate courts were restructured in 1887-1888, 1891, 1911, and 1925. Act of March 3, 1887, ch. 373, 24 Stat. 552, amended by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433; Act of March 3, 1911, ch. 231, 36 Stat. 1087 (formally abolishing mixed Circuit courts); Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (providing for discretionary review by Supreme Court). Federal question jurisdiction was granted in 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

89. Judiciary Act of 1802, ch. 8, §§ 1-2, 2 Stat. 132, 132 (the Repeal Act).

federal question jurisdiction to the lower federal courts; and throwing the newly appointed “lifetime” circuit judges out of work.<sup>90</sup> No similar effort was made to repeal the Organic Act for the District of Columbia, though, leaving the forty-two low-level, five-year JP judgeships and the three lifetime D.C. Circuit judgeships unscathed.

### C. Enter the Players

Once it became clear in December 1800 that Jefferson had defeated Adams in the Electoral College, Marshall, chief of patronage for the outgoing Federalists,<sup>91</sup> faced intense, ongoing pressure to produce jobs.<sup>92</sup> The pressure, which intensified after it became clear on February 17, 1801, that Jefferson would, in fact, become the new President, apparently told on Marshall.<sup>93</sup> In late February, he botched the delivery of a district court commission to Federalist Senator Ray Greene of Rhode Island, who had resigned from the Senate to accept Adams’s judicial nomination.<sup>94</sup> Greene had been named to the district court, but his commission incorrectly recited a circuit court nomination.<sup>95</sup> Jefferson claimed that the typo voided Greene’s appointment and named a new district judge for Rhode Island over howls of outrage from New England Federalists.<sup>96</sup> Greene wound up losing both his Senate seat and the district court judgeship.<sup>97</sup> Adams paid a price as well. Greene’s Rhode Island Senate vacancy was filled by Christopher Ellery, a Jeffersonian who voted in 1802 to repeal the Midnight Judges Act.<sup>98</sup> Because repeal barely passed the Senate by a vote of 16–15 (with Vice President Burr in the chair in opposition), the botched Greene nomination probably cost Adams his sixteen midnight circuit judges.<sup>99</sup>

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90. *Id.*

91. *See supra* note 70.

92. *See* SLOAN & MCKEAN, *supra* note 13, at 31, 54.

93. *See id.* at 51-52.

94. *See* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 392-93 & n.66 (2005); *see also* Hiller B. Zobel, *Those Honorable Courts—Early Days on the First First Circuit*, 73 FED. RULES DECISIONS 511, 521-22 (1977) (expounding on the botched effort to nominate Sen. Ray Greene as a district judge). Commissions were written records of appointment, signed and sealed by the appointing officer. *See* Hartnett, *supra*, at 398. Military officers received a commission, as did other government officials. *See id.* at 391-98. In 1801, as *Marbury* makes clear, it was unclear whether receipt of a commission was merely a record of appointment or constituted an integral part of the appointment itself.

95. *See* Hartnett, *supra* note 94, at 393. For an excellent description of the frenzied efforts by Adams and Marshall to appoint the Midnight Judges, *see* Turner, *The Midnight Judges*, *supra* note 85. For a discussion of the Greene fiasco, *see id.* at 498 n.31.

96. *See* Turner, *The Midnight Judges*, *supra* note 85, at 498 n.31.

97. *See id.*

98. *See* SLOAN & MCKEAN, *supra* note 13, at 105-13.

99. *See id.* at 111 (discussing the Senate’s vote to repeal the Midnight Judges Act and the crucial 16–15 vote). Just before New Year’s Day 1803, Senator Ellery was the subject of a brutal caning and physical assault by John Rutledge, a Federalist congressman from South Carolina and the son of John Rutledge, who had attempted suicide when his nomination as Chief Justice was rejected. *See id.* at 124.

Most importantly for Marbury, Marshall also failed to deliver many of the District of Columbia patronage commissions.<sup>100</sup> Because the office-seekers did not even have offices to seek until passage of the D.C. Organic Act on February 27, 1801; had not been nominated by the President until March 2; and were not confirmed by the Senate until March 3, it would have taken a Herculean effort in those pre-word-processing days to prepare, sign, seal, and deliver the numerous commissions of office before the expiration of Adams's term on March 4.<sup>101</sup> Preparing and delivering the commissions were made even more difficult because Marshall had graciously lent Jacob Wagner, the chief clerk of the State Department, to Jefferson as a temporary secretary on February 17, as soon as Jefferson was named President-elect.<sup>102</sup> When Jefferson became President on March 4, he discovered dozens of undelivered commissions on Marshall's desk at the State Department.<sup>103</sup> Furious over the Federalists' patronage shenanigans, Jefferson instructed his acting Secretary of State, Levi Lincoln,<sup>104</sup> to withhold Marbury's commission along with the numerous others found undelivered in Marshall's office.<sup>105</sup> Analogizing the commissions to deeds that did not pass title to real property until physical delivery, Jefferson argued that failure to deliver the commissions left the Adams patronage appointments incomplete and subject to revocation by a new President.<sup>106</sup>

The Federalists accepted the analogy for low-level executive patronage appointments.<sup>107</sup> For example, Adams's appointment of James Lingan as a federal marshal for the District of Columbia failed because the commission had not been delivered in time.<sup>108</sup> Ironically, before learning that his appointment had failed, Lingan served as a marshal at Jefferson's inauguration, escorting him to the ceremony.<sup>109</sup> But the Federalist legal

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100. See SLOAN & MCKEAN, *supra* note 13, at 75-77.

101. *Id.* at 62-63.

102. See SMITH, *supra* note 13, at 617 n.33.

103. See SLOAN & MCKEAN, *supra* note 13, at 75-77. For a possibly apocryphal story that Levi Lincoln, Jefferson's acting Secretary of State, appeared at the State Department on the stroke of midnight on March 4, 1801, and directed Marshall to cease work on the uncompleted commissions, see JAMES PARTON, LIFE OF THOMAS JEFFERSON 585-86 (1874). Marshall's most distinguished biographer rejects the tale. 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 561 n.2 (1916).

104. Levi Lincoln was also serving in two capacities, as Attorney General-designate and acting Secretary of State, pending the arrival of James Madison, who was delayed in Virginia. See SMITH, *supra* note 13, at 286, 316, 612 n.37. Madison took over as Secretary of State on May 2, 1801. See *id.* at 612 n.37.

105. See SLOAN & MCKEAN, *supra* note 13, at 75-77.

106. See *id.* at 617 n.34.

107. See SMITH, *supra* note 13, at 624 n.44. For Jefferson's successful efforts to dismantle Federalist control of Executive offices, see Carl Prince, *The Passing of the Aristocracy: Jefferson's Removal of the Federalists (1801-1805)*, 57 J. AM. HIST. 563 (1970).

108. See Forte, *supra* note 13, at 362-63 (describing the failed Lingan nomination).

109. *Id.* at 363. Lingan, a Revolutionary War veteran and close associate of Washington, died at the hands of a mob in 1812 while attempting to defend the right of a Baltimore antiwar newspaper to publish. See GEORGE WASHINGTON PARKE CUSTIS, AN ADDRESS OCCASIONED BY THE DEATH OF GENERAL LINGAN, WHO WAS MURDERED BY THE MOB IN BALTIMORE (1812).

brain trust (consisting largely of Charles Lee and John Marshall) rejected the analogy as applied to judicial appointments, insisting that even a low-level local judicial appointment, like Marbury's, involving presidential nomination and Senate confirmation, became final after Senate confirmation, with delivery of the commission merely a formality.<sup>110</sup>

After being sworn in by Chief Justice Marshall on March 4, 1801, Jefferson asked acting Secretary of State John Marshall to continue serving for one more day until Levi Lincoln, Jefferson's choice for Attorney General, could stand in for James Madison.<sup>111</sup> John Marshall apparently made no effort to deliver the patronage commissions during the one-day reprieve.<sup>112</sup> The same cannot be said for his younger brother James, a newly appointed lifetime D.C. Circuit judge.<sup>113</sup> In a bizarre episode, James Marshall appeared at the State Department on March 4 and scooped up twelve undelivered JP commissions for the City of Alexandria,<sup>114</sup> claiming that it was important to deliver them to assure that a sufficient number of JPs would be in office to maintain order in the face of anticipated rioting over Jefferson's inauguration.<sup>115</sup> James Marshall does not appear to have signed a receipt for the commissions and seems to have returned most, if not all, undelivered by the end of the day.<sup>116</sup> There was no rioting in connection with the inauguration.<sup>117</sup>

William Marbury, a Georgetown Federalist and protégé of Navy Secretary Benjamin Stoddert, had snagged one of the forty-two JP appointments.<sup>118</sup> Marbury was a Jeffersonian nightmare.<sup>119</sup> The youngest

110. See SMITH, *supra* note 13, at 624 n.44. Given Marshall's insistence that delivery of the commission was not required to complete the judicial appointments process in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157-59 (1803), it is unclear why Marbury needed the commission in the first place. See Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343, 350 (2003).

111. See SMITH, *supra* note 13, at 17, 531 n.92.

112. See Forte, *supra* note 13, at 399. John Marshall later expressed regret to his brother about the failure to deliver the commissions. See 6 PAPERS OF JOHN MARSHALL 90 (Herbert Johnson et al. eds., 1990) (letter dated March 18, 1801: John Marshall to James Marshall).

113. See Bloch & Ginsburg, *supra* note 80, at 551.

114. See SLOAN & MCKEAN, *supra* note 13, at 137-38 (describing James Marshall's affidavit describing his March 4 visit to the State Department). Marbury's was not among the Alexandria County commissions. See Forte, *supra* note 13, at 397. He was from Georgetown in Washington County. See *id.*

115. See SLOAN & MCKEAN, *supra* note 13, at 137-39.

116. See *id.*

117. See Forte, *supra* note 13, at 397. Boisterous street demonstrations greeted Jefferson's election on February 17, 1801. See *id.* A large crowd marched through Georgetown demanding that houses be illuminated to celebrate Jefferson's victory. See *id.* William Cranch, Abigail Adams's nephew (soon to be appointed a District of Columbia Circuit Judge), complied with the crowd's demands. *Id.* Marbury adamantly declined to illuminate his house. See *id.* The crowd dispersed, vowing vengeance. See *id.*

118. See *id.* at 353. Marbury's nomination on March 2, 1801, as one of twenty-three JP nominees for Washington County is recorded in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 388 (Mar. 21 1801) (1838). Poor Marbury—they couldn't even spell his name right on the nomination; he is listed as William "Marberry." *Id.*

119. See Forte, *supra* note 13, at 365-88, for a detailed account of Marbury's life, political background, and history of financial speculation. In addition to fitting the mold of financial speculator

son of a youngest son, Marbury was landless.<sup>120</sup> He made his fortune, such as it was, as a banker, financial speculator, and Maryland government bureaucrat.<sup>121</sup> He had served as Agent for the State of Maryland (the state's highest unelected office), where he functioned as a tax farmer and dabbled in government procurement, most dramatically on behalf of Navy Secretary Stoddert.<sup>122</sup> A hint of scandal dogged his work in connection with a Maryland shipbuilding contract.<sup>123</sup> Marbury had also been active in Maryland Federalist politics, seeking unsuccessfully to alter the Maryland Electoral College voting scheme to prevent Jefferson from receiving any Maryland electoral votes in the 1800 election.<sup>124</sup> Although Jefferson granted recess appointments to many of Adams's JP nominees, he drew the line at Marbury and several other Federalist stalwarts.<sup>125</sup> Nine months into Jefferson's first term, Marbury, joined by three other disappointed Adams JP nominees, Dennis Ramsay, Robert Hooe, and William Harper,<sup>126</sup> demanded commissions from Madison, who fobbed them off on his chief clerk, Jacob Wagner.<sup>127</sup> Wagner claimed to know nothing about the matter and sent them to Levi Lincoln, who had been acting Secretary of State from March 5 to May 7, 1801, when Madison took over.<sup>128</sup> Lincoln was unhelpful.<sup>129</sup> Rebuffed by Madison and Wagner, the four, represented pro bono by Charles Lee (who had been the nation's third Attorney General from 1795–1801 in both the Washington and Adams Administrations), complained directly to the Supreme Court on December 16, 1801.<sup>130</sup> The

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(a Jefferson *bête noire*), Marbury had actively, but unsuccessfully, sought to change Maryland's Electoral College voting procedure to a winner-take-all system to deny Jefferson any Maryland electoral votes. *Id.* at 395. Because a swing of five electoral votes was involved, had Marbury succeeded, Adams would have won the election 70–68. *See id.* The unsuccessful effort to alter Maryland's system is recounted in *id.* at 395–97. As David Forte notes: "Marbury must have been one of the easiest cuts for Jefferson to make." *Id.* at 402. It was not the only cut aimed at Marbury. On July 9, 1801, in the wake of substantial cost overruns at the Washington Navy Yard, Jefferson's Secretary of War dismissed Marbury as naval agent. *Id.* at 385.

120. *See id.* at 355–59.

121. *See id.* at 365–87.

122. *See id.* at 368–69.

123. *See id.* at 375–88 (describing the ill-fated shipbuilding contract).

124. *See id.* at 395–97.

125. *See id.* at 399–400. Jefferson's recess appointments were announced on March 16, 1801. *Id.* at 400. He reduced the number of JPs from forty-two to thirty, appointing fifteen from each of Washington and Alexandria counties. *Id.* Twenty-five of the thirty JPs were on Adams's original list; Marbury was not among them. *See id.*; SMITH, *supra* note 13, at 300.

126. *See* SLOAN & MCKEAN, *supra* note 13, at 95. Ramsay, Hooe, and Harper had been appointed to serve in Alexandria County. *Id.* Marbury was to serve in Washington County. *Id.* Ramsey had been one of the six army comrades to serve as honorary pallbearers at Washington's funeral. *Id.* Harper had wintered at Valley Forge, and had commanded an artillery company at Washington's funeral. *Id.* In between military service, he fathered twenty-nine children. *Id.* Hooe was a successful real-estate speculator and former sheriff of Fairfax County. *Id.*

127. *Id.* at 96.

128. *See id.*

129. *Id.*

130. *See id.* at 94–96 (describing the filing of the petition in *Marbury*).

date *Marbury* was filed—December 16, 1801—is suspiciously close to Jefferson’s first address to Congress on December 8, 1801, widely viewed as calling for the repeal of the Midnight Judges Act.<sup>131</sup> Filing *Marbury* was probably the Federalists’ answer to Jefferson’s speech. In invoking the Supreme Court’s original jurisdiction, Lee relied on a provision of the Judiciary Act of 1789 authorizing the Supreme Court to issue writs of mandamus to federal officials.<sup>132</sup>

Marbury’s petition claimed that he had been nominated by the President and confirmed by the Senate; that his commission had been duly signed by President Adams; and that the seal of the United States had been duly affixed by none other than John Marshall, as acting Secretary of State.<sup>133</sup> Charles Lee asked Marshall for a writ of mandamus directing Madison to carry out his clear legal duty to deliver the four duly signed and sealed JP commissions.<sup>134</sup> Congress, the President, and the Supreme Court then staged a legal farce in three acts worthy of Monty Python.

### 1. Act I: The Disappearing Supreme Court Term

Act I begins with Jefferson’s refusal even to acknowledge Marbury’s petition. Although Jefferson’s Attorney General, Levi Lincoln (who had served as acting Secretary of State from March 5 to May 7, 1801), was physically present in the Supreme Court chamber when the petition was presented to the Court on December 17, 1801, the Jefferson Administration ignored it.<sup>135</sup> When Madison failed to respond, Marshall scheduled a hearing on the merits for the fourth day of the upcoming 1802 Supreme Court Term.<sup>136</sup> In an obvious effort to prevent Marbury’s petition from

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131. *Id.* at 91-92, 97.

132. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. The statute provided, in its privately published 1796 form, “The Supreme Court shall . . . have appellate jurisdiction from the circuit courts and from the courts of the several states in the cases herein after provided for: And shall have power to issue writs of prohibition to the district courts . . . and writs of mandamus to any courts appointed, or persons holding office, under the authority of the United States.” It is possible to read the 1789 statute as granting power to issue writs of mandamus only in aid of pending Supreme Court appeals. Much depends on whether the privately printed 1796 version, which uses a colon to introduce the clause, or the 1845 official printed version which uses a semicolon is used. The colon implies the existence of a freestanding mandamus power. The semicolon implies that mandamus is to be used in connection with pending appeals. If Marshall had dismissed the case on statutory grounds, no one would ever have heard of it. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456 (1989) (arguing that the mandamus provision in *Marbury* was not an independent grant of jurisdiction).

133. SLOAN & MCKEAN, *supra* note 13, at 96.

134. The nature of the writ of mandamus in 1801 as the appropriate means of seeking affirmative relief is briefly described in Paulsen, *supra* note 110, at 347-49. See also Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283 (2003) (discussing section 13 of the Judiciary Act of 1789 and its provision regarding writs of mandamus).

135. Lee’s presentation of the petition and supporting affidavits to the Court and Lincoln’s refusal to respond is described in SLOAN & MCKEAN, *supra* note 13, at 97-98.

136. See *id.* at 99; SMITH, *supra* note 13, at 300-01.

being heard, Jefferson persuaded the newly elected, Jeffersonian-controlled Congress to prorogue the 1802 Term of the Supreme Court, delaying the Court's next sitting for fourteen months.<sup>137</sup> Instead of an 1802 appellate term, the six Supreme Court Justices were bundled into stagecoaches and sent jolting all over the country as circuit judges.<sup>138</sup>

In canceling the Supreme Court's 1802 Term, Jefferson was probably more concerned over *Stuart v. Laird*, a case with the potential to challenge Congress's decision to abolish the sixteen lifetime circuit judgeships created under the Midnight Judges Act, and to throw the newly minted Article III judges out of work.<sup>139</sup> Because no problem existed with their commissions, no deposed circuit judge brought a proceeding in the Supreme Court analogous to *Marbury's*, although all twelve deposed Federalist circuit judges, led by Oliver Wolcott, unsuccessfully petitioned Congress for relief.<sup>140</sup> Nor, given the procedural problems discussed in Part II.C.3, did a deposed circuit judge seek to challenge the elimination of the Article III judgeships in the lower courts.<sup>141</sup> Instead, in *Stuart v. Laird*, Charles Lee, seeking a test case, questioned whether judgments issued by the sixteen deposed circuit judges while they were in office could be enforced by Supreme Court Justices riding circuit as trial judges.<sup>142</sup> Lee argued that the Repeal Act of 1802 was invalid on two grounds: lack of power to throw the Article III circuit judges out of office and lack of power to make Supreme Court Justices function as trial judges.<sup>143</sup>

Marshall could have accepted either of Lee's arguments in *Stuart v. Laird* and precipitated a showdown with Jefferson and Congress. In fact, Lee's second argument about Congress's severely limited power under Article III to vest the Supreme Court with original trial jurisdiction is the basis for Marshall's opinion in *Marbury*.<sup>144</sup> Marshall appears to have tried to organize resistance to the repeal inside the Court by a series of letters to the Justices but failed to obtain majority support.<sup>145</sup> In the end, Marshall

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137. SMITH, *supra* note 13, at 304; *see* Act of April 29, 1802, ch. 31, § 1, 2 Stat. 156, 156 (proroguing the Spring 1802 Supreme Court Term to permit Justices to ride circuit). Supreme Court Justices had ridden circuits to sit as trial judges since the 1790s. *See* Glick, *supra* note 30. The Midnight Judges Act of 1801 had ended circuit riding, but its repeal in March 1802 had resurrected the practice. *Id.* at 1786.

138. Glick, *supra* note 30, at 1786. Repeal of the Midnight Judges Act in March 1802 had reinstated Supreme Court circuit riding. *See id.*

139. *See* *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL AND THE RISE OF PRESIDENTIAL DEMOCRACY* 93-94 (2005) (discussing the political context of *Stuart v. Laird*).

140. *See* SMITH, *supra* note 13, at 310, 313-14.

141. A reported effort by a dismissed midnight judge to file a subsequently abandoned lower court challenge to the repeal is described in ACKERMAN, *supra* note 139, at 138.

142. *See* *Stuart*, 5 U.S. (1 Cranch) at 302-03.

143. *See id.* at 308.

144. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803).

145. *See* SMITH, *supra* note 13, at 307-08 (suggesting that the Justices' refusal to challenge the repeal of the Midnight Judges Act pleased Marshall); 6 PAPERS OF JOHN MARSHALL, *supra* note 112, at

and the rest of the Court blinked. Marshall, riding circuit as a trial judge, upheld his power to enforce a judgment issued by a deposed midnight circuit judge.<sup>146</sup> He then recused himself on appeal to the full Court.<sup>147</sup> One week after the decision in *Marbury*, Justice Paterson, writing for the remaining four members of the Court who were in Washington, affirmed.<sup>148</sup>

## 2. Act II: How Not to Find Facts

Act II of *Marbury* opens in early February 1803, after the Justices had limped back home in various stages of disrepair.<sup>149</sup> The Court was not able to scrape together a quorum until February 10.<sup>150</sup> Justice Cushing was so banged up that he never did make it to Washington for the 1803 Term.<sup>151</sup> Justice Moore's ailments delayed him in North Carolina until mid-February and caused him to miss the evidentiary hearing and oral argument in *Marbury*.<sup>152</sup> Justice Chase was so ill that the Supreme Court deliberations in *Marbury* had to be adjourned from the Court's cramped and drafty chamber in the Capitol to the comparative comfort of the Justices' residence at Stelle's Hotel.<sup>153</sup>

As the moving parties, Marbury and his co-petitioners, who had alleged back in December 1801 that their commissions had been duly signed by President Adams and had been duly sealed by Secretary of State Marshall, had the burden of proving the truth of their allegations.<sup>154</sup> The JP nominations had not been made until March 2, 1801, and had not been confirmed by the Senate until March 3.<sup>155</sup> Because Adams's term expired on March 4 (he left the White House for Boston at 4 a.m. on March 4 to avoid attending Jefferson's inauguration)<sup>156</sup> and Marshall was busy swearing in the new President on the morning of March 4, there was not much time to prepare, sign, and seal the forty-two JP commissions plus the

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105-06, 108, 117-18. Unsuccessful efforts by Federalist lawyers to raise the same issue as in *Stuart v. Laird* before Justices Bushrod Washington, Cushing, and Paterson while each was riding circuit are described in SMITH, *supra* note 13, at 310.

146. See *Stuart*, 5 U.S. (1 Cranch) at 308. Marshall sat as the Circuit Judge in *Stuart*, rejecting the constitutional arguments. See SMITH, *supra* note 13, at 311. He recused himself on appeal to the full Court. See *Stuart*, 5 U.S. (1 Cranch) at 299. Marshall's lower court ruling is not officially reported but is described in the headnotes to *Stuart v. Laird*. See *id.* at 299-302.

147. See *Stuart*, 5 U.S. (1 Cranch). at 299.

148. *Id.*

149. See SLOAN & MCKEAN, *supra* note 13, at 130-31. When the Supreme Court Term opened on February 7, 1803, only Justice Paterson was present. *Id.* None of the other five Justices had yet been able to make it to Washington. *Id.*

150. *Id.* at 131.

151. *Id.*

152. *Id.*

153. *Id.* at 143.

154. *Id.* at 131-32.

155. *Id.* at 62-63.

156. *Id.* at 65.

numerous other commissions needed for the newly appointed notaries public, registers of wills, judges of the orphan's court, marshals, surveyors, military officers, and a D.C. attorney.<sup>157</sup> Getting through all the paperwork was particularly difficult because President Adams was working out of the unfinished White House while Secretary of State Marshall was working out of rented rooms housing the Department of State about a quarter-mile away, necessitating the shuttling of more than 100 documents from the White House, where they were signed by the President, to the Department of State, where they were sealed by the Secretary of State for delivery to the appointees.<sup>158</sup> Although the weather on the night of March 3 appears to have been clear, the roads were unlit and unpaved. The operation appears to have run out of time, almost certainly leaving at least one or more of the JP commissions in *Marbury* unfinished when time ran out.<sup>159</sup>

As petitioner, it was Marbury's obligation to demonstrate that his commission had, in fact, been duly signed and sealed.<sup>160</sup> Otherwise, there was no basis for claiming that Madison was avoiding his clear duty to deliver the completed commission.<sup>161</sup> Because Jefferson was boycotting the proceedings, the Supreme Court was never able to get its hands on the actual commissions, if any, which had probably been destroyed before Madison arrived in town on May 1, 1801.<sup>162</sup> Not only did Jefferson decline to produce the commissions, he arranged for a friendly Senate to refuse to provide any information about whether Marbury and his co-petitioners had actually been confirmed in executive session.<sup>163</sup>

In order to allow Charles Lee to prove the allegations in Marbury's petition, Chief Justice Marshall held an evidentiary hearing in the Supreme Court chamber on February 10-11, 1803, before four Justices.<sup>164</sup> The

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157. See *supra* note 71 for the District of Columbia Organic Act creating the offices.

158. See SLOAN & MCKEAN, *supra* note 13, at 62-63.

159. See *id.* at 63. Presumably, that is why only three of the original four petitioners in *Marbury* presented their claims to the Court. *Id.* at 128. By that time, Harper had dropped out. *Id.*

160. See *id.* at 131.

161. See *id.*

162. See *id.* at 137. Levi Lincoln stated that "he 'did not know that [the commissions] ever came to the possession of Mr. Madison" when Madison finally assumed his duties as Secretary of State in early May 1801. *Id.* For a summary of Lincoln's testimony, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144-45 (1803). See generally SLOAN & MCKEAN, *supra* note 13, at 71-72 (describing Levi Lincoln's role as acting Secretary of State).

163. See SMITH, *supra* note 13, at 316. Because, in 1803, the Senate held confirmation votes in executive session, no public record of the debates or votes exists. See SLOAN & MCKEAN, *supra* note 13, at 128-29. On January 27, 1803, the day after Oliver Wolcott's petition on behalf of the Midnight Judges had been rejected on a 13-15 party-line vote, Marbury, Hooe, and Ramsay petitioned for a certified copy of the Senate's Executive Journal from March 1801, attesting to their confirmation. See *id.* at 127-28; SMITH, *supra* note 13, at 314-15. Acting under Jefferson's orders, the Senate rejected the petition, also on a straight 13-15 party-line vote. See SMITH, *supra* note 13, at 314-15; SLOAN & MCKEAN, *supra* note 13, at 128-30.

164. See SLOAN & MCKEAN, *supra* note 13, at 131. Justices Cushing and Moore were absent. See *id.* at 131. For a description of the evidentiary hearing in *Marbury*, see SMITH, *supra* note 13, at 316-18 and SLOAN & MCKEAN, *supra* note 13, at 131-39.

hearing opened with compelled testimony from two State Department clerks.<sup>165</sup> Jacob Wagner, the chief clerk of the State Department, denied personal knowledge of the events because he had been temporarily assigned to President-elect Jefferson.<sup>166</sup> Wagner stated that he believed that two commissions had been signed but that at least one remained unsigned.<sup>167</sup> Daniel Brent, the ranking assistant clerk, testified that Marbury's commission had been on the list to be signed and that, while he lacked personal knowledge of the signing, he was "almost certain" it had been signed.<sup>168</sup> Charles Lee then turned to Attorney General Levi Lincoln, who had been Jefferson's acting Secretary of State from March 5 to May 7, 1801, and called him as a surprise witness.<sup>169</sup> Lincoln declined to testify, claiming that he had no instructions from the President.<sup>170</sup> Astonishingly, Lincoln also invoked the self-incrimination protections of the Fifth Amendment, presumably because he had destroyed the commissions during his tenure as acting Secretary of State.<sup>171</sup> Lincoln also claimed a rudimentary form of executive privilege concerning facts learned by a cabinet officer in the course of his duties.<sup>172</sup> It could have been a scene from the Nixon tapes case.

Levi Lincoln eventually agreed to consider written questions.<sup>173</sup> The next day, he answered three of the four written questions propounded by Lee.<sup>174</sup> Lincoln recalled seeing a large number of completed but undelivered commissions on the morning of March 4 but could not recall if Marbury's was among them.<sup>175</sup> Lincoln then implied that he never turned over a commission for Marbury to James Madison.<sup>176</sup> Significantly, despite Lee's prodding, Marshall did not insist on learning what, if anything, Lincoln had actually done with Marbury's commission, assuming it ever existed.<sup>177</sup> Either Marshall wanted to spare Lincoln from having to take the Fifth again, or he knew that the commission had never been completed

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165. See SLOAN & MCKEAN, *supra* note 13, at 132-33; see also *Marbury*, 5 U.S. (1 Cranch) at 139-42 (summary of the testimony).

166. See SLOAN & MCKEAN, *supra* note 13, at 133-34.

167. See *id.* at 134.

168. *Marbury*, 5 U.S. (1 Cranch) at 143; see also SLOAN & MCKEAN, *supra* note 13, at 135 (describing Brent's testimony as aiding Lee by establishing that Marbury and Hooe's commissions had been signed). In fact, Brent's testimony established merely that they had been on a list to be signed. See SLOAN & MCKEAN, *supra* note 13, at 134. In addition, the testimony said nothing about a seal. See *id.* at 134-35. Brent's testimony described the shuttling of paper between Adams and Marshall. See *Marbury*, 5 U.S. (1 Cranch) at 142.

169. See SLOAN & MCKEAN, *supra* note 13, at 135.

170. See *id.*

171. See *id.* at 135-36.

172. See *id.* at 135.

173. See *id.* at 135, 137-38.

174. See *id.* at 137-38.

175. See *id.*

176. See *id.* at 137.

177. *Id.*

because, as acting Secretary of State, Marshall was the person who would have completed it. Somehow, I doubt that Marshall was worried about Lincoln being forced to take the Fifth.

In the end, the only evidence of Marbury's signed commission produced at the February 10 hearing was an affidavit from the fiercely partisan James Marshall, John Marshall's younger brother, describing his unauthorized March 4, 1801, foray into the State Department, where he claimed to have seen signed commissions for Hooe and Harper on a table.<sup>178</sup> James Marshall's affidavit should have forced the recusal of his older brother, especially because the brothers had corresponded over John Marshall's failure to have delivered the commissions. Moreover, the affidavit said nothing about a commission for Marbury.

Charles Lee, aware of the hole in his proof, sought to supplement the record after the close of the February 11 hearing and argument by submitting an affidavit from a third clerk, Hazen Kimball, whom Lee claimed had returned to Washington without his knowledge immediately prior to the hearing.<sup>179</sup> Kimball, a partisan Federalist, was listed as one of President Adams's private secretaries and had left the State Department after Jefferson's election.<sup>180</sup> Kimball swore that he had seen signed commissions for Marbury and Hooe on the evening of March 3.<sup>181</sup> Kimball's affidavit, which is the only evidence that Marbury's commission was actually signed by President Adams, appears to have been treated as untimely. It was never proffered for cross-examination or rebuttal.<sup>182</sup> Nor does the affidavit say anything about the commission having been sealed.<sup>183</sup> Only John Marshall could testify to that point. The untimely Kimball affidavit does not appear to have been accepted by the Court.<sup>184</sup>

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178. *Id.* at 138. James Marshall appears to have been considerably more partisan than his older brother, John. Shortly after Jefferson's inauguration, James Marshall and William Cranch, as newly appointed D.C. Circuit judges, issued an order directing the D.C. attorney to commence a common law seditious libel prosecution against the Jeffersonian newspaper, *The National Intelligencer*. *See id.* at 77-78. The Chief Judge, William Kilty, did not join the order. The D.C. attorney, a Jefferson appointee, apparently ignored the order. No prosecution was commenced. A decade later, John Marshall put an end to federal common law criminal prosecutions on separation of powers grounds. *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 417 (1816); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812).

179. The Court record indicates that, "[o]n a subsequent day, and before the court had given an opinion[.]" Lee offered the Hazen Kimball affidavit as proof of the Marbury commission. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803). The record does not indicate whether the untimely affidavit was accepted. *See id.* at 146. Kimball was never formally examined. *See id.* at 153; *see also* LAWRENCE GOLDSTONE, *THE ACTIVIST: JOHN MARSHALL, MARBURY V. MADISON, AND THE MYTH OF JUDICIAL REVIEW* 278 n.20 (2008).

180. *See SMITH, supra* note 13, at 624 n.53.

181. *See id.* at 624-25 n.53. Kimball's affidavit is summarized in *Marbury*, 5 U.S. (1 Cranch) at 153, 155.

182. *Marbury*, 5 U.S. (1 Cranch) at 157.

183. *See id.* at 158-59.

184. One assumes that Marshall, a stickler for fair procedure, would have provided an opportunity to challenge the untimely Kimball affidavit if the Court were inclined to rely on it. The recitation of the

The factual record supporting Marbury's petition, especially if one ignores the untimely Kimball affidavit, is very thin. The President did not appoint Marbury until March 2, 1801.<sup>185</sup> The Senate, acting in executive session, did not confirm Marbury, his forty-one JP colleagues, and the numerous other newly appointed D.C. officials until sometime on March 3.<sup>186</sup> We know that Adams went to bed at 9 p.m. on the evening of March 3 in order to catch the 4 a.m. coach out of town. We know that in the short period between the Senate confirmation and Adams's 9 p.m. bedtime, a river of commissions had to be signed by President Adams in the White House and shuttled to John Marshall at the State Department for signing, sealing, and delivering. We know that the paperwork was being prepared in the absence of the chief clerk, Jacob Wagner, who was then working for President-elect Jefferson, and in two locations a quarter-mile apart linked by an unlit dirt road. We know that Marshall had no time to do anything with the paperwork on March 4 because, wearing his Chief Justice hat, he was busy accompanying Jefferson to the swearing-in ceremony, where he administered the oath of office.<sup>187</sup> The fact is that we will never know whether Marbury's commission was actually signed by President Adams before he retired for the night at 9 p.m., or, if signed, whether John Marshall affixed the seal of the United States before time ran out. What we do know is that the only two witnesses with personal knowledge of whether Marbury's commission was duly signed and sealed—John Adams and John Marshall—failed to represent that the document was timely signed and sealed.<sup>188</sup>

Act II concludes when, after due consideration of the factual issues raised at the February 10-11 evidentiary hearing, Chief Justice John Marshall solemnly accepts the word of his younger brother, James, that Marbury's missing commission had, indeed, been duly signed and sealed by John Adams and John Marshall before the expiration of Adams's term.<sup>189</sup> Justice Moore joined the opinion, even though he was not present for the evidentiary hearing.<sup>190</sup> Can you say "Banana Republic"?

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Kimball affidavit in *Marbury* occurs solely in the introductory material prepared by William Cranch in his capacity as court reporter, not in Marshall's opinion itself.

185. SMITH, *supra* note 13, at 300.

186. *Id.*

187. *See id.* at 617 n.33.

188. *Id.* at 617 nn.33-34.

189. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154-55 (1803).

190. *See SLOAN & MCKEAN, supra* note 13, at 131 (explaining that Judge Moore did not arrive in Washington until a week after the evidentiary hearing).

*A Short Musical Interlude*

The Chief Justice then leads the Court in a stirring hymn to the rule of law.<sup>191</sup> Marshall announces that the Supreme Court is duty-bound to pass on the legality of the President's behavior in refusing to deliver the commission to Marbury.<sup>192</sup> Because, intones Marshall, Madison is under a clear legal duty to deliver the commission, Jefferson should be ashamed of himself for flouting the rule of law.<sup>193</sup>

*3. Act III: Find the Missing Court*

Act III begins as poor Marbury, all but drunk on the rule of law, holds out his hands for his commission, only to have John Marshall wallop him with a rolled up copy of the Constitution. Marshall tells the stunned Marbury that, despite his clear legal rights, the Supreme Court can do nothing for him because his fancy lawyer, Charles Lee, had mistakenly sought relief directly from the Supreme Court, instead of starting in a lower court and appealing.<sup>194</sup> The farce concludes with a bewildered Marbury on his hands and knees frantically searching for the lower court where he should have filed his petition. Guess what? There was no lower court. The joke's on Marbury—and on us.

Marbury needed a mandamus directing Madison to act affirmatively to deliver the commission.<sup>195</sup> A traditional negative injunction prohibiting Madison from doing something would not have been sufficient. Nor would a damage action for lost salary, because the job was unsalaried and the fees were unpredictable.<sup>196</sup> Federal declaratory judgments seeking a clarification of the law were not invented until 1934.<sup>197</sup> Thus, in 1803, Marbury's only plausible remedy was a writ of mandamus designed to enforce his right to receive his commission. If, however, Marbury had sought such a remedy in the lower courts, he would have faced a procedural double-whammy—jurisdictional and remedial. After the repeal of the Midnight Judges Act on March 8, 1802, lower federal courts lacked subject-

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191. *Marbury*, 5 U.S. (1 Cranch) at 162-73.

192. *See id.*

193. *See id.* at 173.

194. *See id.* at 173-81.

195. *See id.* at 173. A writ of mandamus compels an official to take affirmative action required by clearly established law. BLACK'S LAW DICTIONARY 980 (8th ed. 2004). It differs from the classic negative injunction, which is prohibitory. The modern evolution of the affirmative injunction has blurred the distinction. In 1803, however, mandamus was the classic vehicle for compelling the performance of affirmative activity. *See sources cited supra* note 134.

196. *See sources cited supra* note 76 (concerning the lack of a salary).

197. *See Calderon v. Ashmus*, 523 U.S. 740 (1998); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

matter jurisdiction to decide issues of federal law.<sup>198</sup> They would not be given such power again until 1875.<sup>199</sup> In the absence of some backup grant of subject-matter jurisdiction, it would have been futile for Marbury to have filed a federal question case in the lower federal courts in December 1801, in the teeth of Jefferson's request a week earlier to a friendly Congress to repeal it.<sup>200</sup> The logical backup would have been "diversity jurisdiction" over cases involving citizens of different states. But diversity jurisdiction was unavailable to Marbury in 1801.<sup>201</sup> As a resident of Georgetown and citizen of the District of Columbia, Marbury would not have been deemed a citizen of any "state" for the purposes of the diversity statute.<sup>202</sup> Citizens of the District of Columbia did not attain that status until 1949.<sup>203</sup>

Moreover, as a remedial matter, in 1801, only the Supreme Court had statutory power to issue an affirmative mandamus.<sup>204</sup> In 1808, Cesar Rodney, Jefferson's last Attorney General, formally ruled that lower federal courts lacked power to issue writs of mandamus.<sup>205</sup> Lower federal courts would not receive such power from Congress until 1962.<sup>206</sup> State courts lacked power to issue a writ of mandamus to a federal official in 1801.<sup>207</sup> Indeed, they probably lack the power today.<sup>208</sup> It might have been possible for Marbury to seek mandamus in the newly created District of Columbia Circuit Court, which had survived repeal of the Midnight Judges Act. As a practical matter, though, the D.C. Circuit was off-limits because one of the judges was James Marshall, John Marshall's younger brother.<sup>209</sup> Even John Marshall would not have had the chutzpah to decide an appeal from his younger brother, James, involving factual findings about John's own

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198. See *supra* notes 89-99 and accompanying text (discussing the repeal of the Midnight Judges Act).

199. See *supra* note 88.

200. If Marbury had filed in a lower federal court on December 16, 1801, instead of in the Supreme Court, the case would have been dismissed as soon as the Midnight Judges Act was repealed on March 8, 1802. See *supra* note 89. Repeal of a statute granting subject-matter jurisdiction requires dismissal of pending cases whose subject-matter jurisdiction is solely dependent on the repealed statute. *Ex parte McCordle*, 74 U.S. 506 (1868). Once a decision becomes final, however, it may not be disturbed. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

201. See *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1804).

202. See *id.*

203. 28 U.S.C. § 1332(e) (2005) currently treats D.C. citizens as citizens of a state for diversity purposes. The practice dates from 1940 and was barely upheld by a fragmented Supreme Court. See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

204. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (recognizing that the Judiciary Act of 1789 granted mandamus power to the Supreme Court).

205. REPORT OF THE ATT'Y GEN., July 15, 1808, published in *Aurora General Advertiser*, No. 5464, at 2-3 (Aug. 9, 1808).

206. 28 U.S.C. § 1361 (1962); see Clark Bye & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Non Statutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

207. See *McClung v. Silliman*, 19 U.S. (6 Wheat) 598, 605 (1821).

208. See *In re Tarble*, 80 U.S. (13 Wall.) 397 (1871).

209. See *supra* notes 80-81 and accompanying text.

conduct; although, that did not stop big-brother John from relying on little-brother James's affidavit to prove the existence of a completed commission.<sup>210</sup> Moreover, William Kilty, Chief Judge of the D.C. Circuit Court—before whom the case would probably have been filed—was a staunch Jeffersonian who got the job because Adams and Marshall ran out of time to fill it.<sup>211</sup> Finally, while the Supreme Court eventually upheld the D.C. Circuit's mandamus power in 1838,<sup>212</sup> its existence was far from clear in 1801—the year the court was created.<sup>213</sup> Moreover, even if the D.C. Circuit had mandamus power, neither federal question nor diversity jurisdiction would have been present.<sup>214</sup>

The ACLU test-case lawyer in me says that in December 1801, Charles Lee was right in deciding that the indirect approach in *Stuart v. Laird* was the only way to choreograph a lower court challenge to the repeal of the Midnight Judges Act, and that for Marbury, it was the Supreme Court or nothing. It turned out to be nothing.

#### D. *Requiem for an Epilogue*

In the case's famous epilogue, a solemn John Marshall turned to the audience and explained that he was obliged to turn Marbury away out of respect for the rule of law, despite Marbury's clearly established legal rights.<sup>215</sup> Marshall explained that Congress's 1789 grant of "original" mandamus jurisdiction directly to the Supreme Court violated Article III of the 1787 Constitution and was, therefore, unconstitutional.<sup>216</sup> But, hold the applause. Judge for yourself whether the Chief Justice protested too much.

The two sentences of Article III defining the powers of the Supreme Court provide:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>217</sup>

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210. SMITH, *supra* note 13, at 317-18.

211. *See supra* notes 80-84 and accompanying text.

212. *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524, 625-26 (1838).

213. *See* Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 52 n.271 (2003) (finding it "highly doubtful" that the D.C. Circuit would have asserted authority to issue a writ of mandamus in 1803).

214. *See supra* note 88 (granting federal question jurisdiction); *supra* note 203 (diversity jurisdiction) and accompanying text.

215. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167-68 (1803).

216. *See id.* at 173-81.

217. U.S. CONST. art. III, § 2, cl. 2.

John Marshall, the first literalist, argued that because Marbury was not an Ambassador, a public Minister, or a Consul, his case could not be heard by the Supreme Court as an original matter, no matter what Congress said in 1789.<sup>218</sup> Marbury responded that the concluding phrase, “with such Exceptions, and under such Regulations as the Congress shall make,” provided Congress with flexibility to move Supreme Court cases back and forth between appellate and original jurisdiction.<sup>219</sup> Marshall insisted, however, that the exceptions and regulations language applied only to the second quoted sentence dealing with appellate jurisdiction, giving Congress the power to remove cases from the Supreme Court’s appellate jurisdiction, but not the power to add them to the Court’s original jurisdiction.<sup>220</sup> In fairness, Marshall’s reading has a slight grammatical edge because the use of a comma instead of a semicolon to introduce the exceptions and regulations language implies that it modifies only the second sentence of Article III, Section 2, Clause 2. But, just as the use of capital letters in the Constitution is notoriously arbitrary, punctuation in 1787 was an art, not a science. The difference between a 1787 comma and a semicolon is a thin reed on which to rest a reading of Article III that places the Supreme Court’s appellate jurisdiction at the perpetual political mercy of Congress, without assuring that the case is put somewhere else. Moreover, even if the exceptions and regulations language applies only to the second sentence of Article III, the first sentence describing the Court’s mandatory original jurisdiction may be read as describing a jurisdictional floor, not as imposing a jurisdictional ceiling.

In the end, a fair reading of the literal text of Article III simply does not tell us for certain whether Congress may—or even must—remove a case from the Supreme Court’s appellate jurisdiction by shifting it to original jurisdiction, instead of just dropping it into a legal black hole.<sup>221</sup> Structurally, Marshall’s reading is a separation of powers disaster, empowering Congress to eliminate the Supreme Court’s crucial appellate jurisdiction without putting the cases anywhere else.<sup>222</sup> When President

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218. See *Marbury*, 5 U.S. (1 Cranch) at 173-81. As a literal matter, it is not clear to me why Marbury’s case did not “affect” James Madison in his role as a “public Minister.” The argument does not appear to have been raised by Marbury’s excellent lawyer, Charles Lee. See *generally id.* at 137-53 (noting Charles Lee’s arguments). On the other hand, if you eschew literalism and apply context, “public Minister” is squeezed between “Ambassadors” and “Consuls,” implying that a public Minister is a diplomatic official of a foreign power. See U.S. CONST. art. III, § 2, cl. 2.

219. *Marbury*, 5 U.S. (1 Cranch) at 147, 173-74 (quoting U.S. CONST. art. III, § 2, cl. 2).

220. See *id.* at 175.

221. See U.S. CONST. art. III, § 2, cl. 2.

222. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868). It may be argued that Marshall was protecting the Supreme Court by shielding it from being drowned in a tidal wave of original actions to the detriment of the Court’s ability to carry out its appellate function. Subjecting the Supreme Court’s appellate jurisdiction to ongoing political jeopardy at the hands of Congress is, however, a curious way of protecting it, especially because the Court usually delegates onerous fact-finding duties in original cases to court-appointed Special Masters. See Anne-Marie C. Carstens,

Bush and a complaisant Congress sought to strip the Supreme Court of appellate jurisdiction over appeals from detainees at the military prison at Guantanamo Bay, they were merely accepting the invitation issued by John Marshall in *Marbury*.<sup>223</sup>

But wait, there's more. How could John Marshall, in 1803, have substituted his reading of an ambiguous Article III, drafted in 1787, for a plausible alternative reading embraced by the 1789 Congress, many members of which were personally involved in the drafting, consideration, and ratification of Article III itself? And, why adopt a reading of Article III that makes mincemeat of Congress's thoughtful policy decision in 1789 to trust the Supreme Court—and only the Supreme Court—with immediate mandamus power over a badly misbehaving federal official? It took the Civil War to persuade Congress to begin undoing the regulatory void created in *Marbury* by finally vesting general federal question jurisdiction over federal officials in the lower federal courts.<sup>224</sup> Mandamus power was not given until 1962.<sup>225</sup>

Most importantly, why adopt an interpretation of the Constitution leaving *Marbury* with nowhere to enforce his “clearly established” legal rights? How does it advance the rule of law to adopt a reading of the Constitution that deprives deserving litigants of access to the courts?

### III. THE DIRTY LITTLE SECRET

It seems reasonably clear to me that, unlike a conscientious judge in a one-witness treason case, where the collision between the constitutional text and a statute authorizing a treason conviction on the testimony of a single witness is an unavoidable “train wreck,”<sup>226</sup> Chief Justice Marshall had a

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*Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 641-44 (2002). In any event, in 1803, the real threat to the Supreme Court's appellate power was coerced circuit riding, which rendered the job very onerous and left little time for the appellate docket, as seen by Jefferson's use of circuit riding to eliminate the 1802 Term of the Court. See Glick, *supra* note 30, at 1754-55, 1784-89. Believe me, the Justices would have gladly traded the risk of additional original jurisdiction under *Marbury* to be freed from riding circuit. See *id.* at 1754.

223. See *Boumediene v. Bush*, 553 U.S. 723, 776-79 (2008) (rejecting an effort to strip courts of habeas corpus jurisdiction over detainees at Guantanamo Bay); *Hamdan v. Rumsfeld*, 548 U.S. 557, 575-84 (2006) (construing a statute to reject Congressional efforts to strip the Supreme Court and the lower courts of appellate jurisdiction and original jurisdiction over detainees at Guantanamo Bay); *Ex parte McCordle*, 74 U.S. (7 Wall.) at 513 (upholding the removal of appellate jurisdiction over a case challenging the constitutionality of Reconstruction after oral argument).

224. See *supra* note 88.

225. See *supra* notes 206-13 and accompanying text.

226. Marshall cites the requirement of two witnesses for a conviction of treason as an example of a clearly expressed constitutional norm that cannot be ignored by a judge who has sworn an oath to support and defend the Constitution as the supreme law of the land. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). He is right. In train wreck cases, Marshall's arguments work well as a justification for judicial review. Other courts had already accepted them. See Gordon Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. &

choice in *Marbury*, which he exercised poorly (or politically) in deciding whether to construct a collision between *Marbury* and the Constitution. The fact is, in 1803, Marshall did not dare to direct Madison to deliver *Marbury*'s commission. Jefferson, riding high politically, would simply have ignored the Court. Instead, Marshall maneuvered and pulled a rabbit out of his hat by boldly asserting the Court's once and future power without giving Jefferson any chance to shoot back. But Marshall's nimble political slight-of-hand does not explain why it was legitimate for him to reject a plausible reading of Article III (or of the 1789 statute) that would have saved the constitutionality of Congress's handiwork.<sup>227</sup>

The dirty little secret of American constitutional law is that the Supreme Court—following *Marbury*—often does not distinguish between what I call “train wreck” cases involving an unavoidable collision between the Constitution and a statute, and cases where a constitutional collision can plausibly be avoided by reading the Constitution to avoid the legal train wreck.<sup>228</sup> Invoking the iconic power of *Marbury* and relying on the fact that judicial protection of individual rights is one of our most admired contributions to the art of democratic governance,<sup>229</sup> the Court simply plows ahead, proclaiming its “duty” to “say what the law is.”<sup>230</sup> Sometimes, as in *Stuart v. Laird*, the Court appears to maneuver to avoid a collision between a statute and the Constitution; sometimes, as in *Marbury*, the Court appears to labor to construct the collision. But why should such a power exist at all? More than two centuries after *Marbury*, we are in the uncomfortable

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LEE L. REV. 787, 796-97, 809 (1999) (noting that pre-*Marbury* judicial review was confined to train wreck cases). *But see* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 456-58 (2005) (arguing that, at least in cases affecting the judicial process, pre-*Marbury* judicial review had gone beyond train wreck settings).

227. I am not asking a new question. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136-38 (1893) (arguing that judicial review should be confined to cases where a clear collision exists between the Constitution and a statute); *see also* Larry D. Kramer, *The Supreme Court, 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 5-6 (2001).

228. The canon of constitutional avoidance calls on the Court to adopt a reading of an ambiguous statute that will avoid raising a constitutional question. *See* Anthony Vitarelli, *Constitutional Avoidance Step Zero*, 119 YALE L. J. 837, 837 (2010). No similar canon guides the Court in reading the text of the Constitution itself.

229. Even the historic standard bearers for parliamentary supremacy—Great Britain and France—have adopted a form of judicial review. *See* Human Rights Act of 1998, c. 42 (U.K.) (subjecting British courts to review under the European Convention of Human Rights), and Organic Law 2009-1523 (Dec. 10, 2009) (establishing an expanded procedure for presentation of constitutional claims to the French Conseil Constitutionnel). As the material cited in *supra* note 12, reveals, virtually every democracy established since the end of World War II has adopted a variant of judicial review, usually involving a specialized court with the authority to enforce the constitution against the political branches. My informal, unscientific survey reveals fifty-eight constitutional courts, although I do not warrant the efficacy of them all. For example, I am not confident that the Constitutional Court of Myanmar is particularly protective of human rights.

230. *See* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

position of being deeply committed to judicial review because it works so well in protecting the individual against majoritarian tyranny, while lacking an intellectually satisfying explanation of where such muscular judicial power comes from in the United States Constitution. It is like trying to explain the origin of babies to young children—the product is glorious, but the means of producing the product remains shrouded in myth and euphemism.

In today's legal world, the truth is that the stork often brings us our constitutional rights—including our First Amendment rights in *Brandenburg*. Is there a more convincing explanation than Marshall's for what constitutional judges do all day?

#### IV. JOHN MARSHALL'S MIRACULOUS SYLLOGISM MACHINE

In *Marbury*, Marshall explained—and justified—the act of constitutional judging as the operation of a syllogism machine.<sup>231</sup> A judge, burdened with the statutory duty to resolve a case or controversy, kick-starts the syllogism machine by discovering and announcing the preexisting governing legal rule (the major premise) in the form of a command from a political superior with a gilt-edged democratic pedigree—Congress, the President, or the Founders.<sup>232</sup> If more than one command exists, the judge applies a democratically derived political hierarchy: a constitutional command trumps a statutory command, which, in turn, trumps an executive regulation, which displaces the judge-made common law.<sup>233</sup>

With the legal major premise locked into place, the judge (or jury) then “finds” the facts (the minor premise) by reconstructing a preexisting

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231. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154, 175-80 (1803) (laying out questions for the Court and discussing the answer to the first question). A syllogism is a system of logic used extensively by Aristotle consisting of a major premise, usually stating a general rule; a minor premise, usually describing the specifics of the situation; and a conclusion following logically from the combination of the two premises. See, e.g., IRVING M. COPI, INTRODUCTION TO LOGIC 158-59 (4th prtg. 1955). Legal reasoning is usually either syllogistic or analogic (like things should be treated alike).

232. See generally *Marbury*, 5 U.S. (1 Cranch) at 154-63 (analyzing the laws applicable to the disputed commission). I am ignoring “common law” judging, a unique aspect of the Anglo-American legal heritage authorizing judges, as a matter of *stare decisis*, to enforce judge-made common law rules in the absence of legislative action. Common law judging was once assimilated into the syllogism machine model by pretending that common law rules were logically deducible from an externally mandated understanding of first principles, a rudimentary form of natural law. See RICHARD A. POSNER, HOW JUDGES THINK 232 (2008). The construct fell apart in the early twentieth century under pressure from “legal realists” who derided the notion of transcendental legal rules written in the sky and was ultimately reconstituted at the federal level in radically diminished form as a duty to enforce externally mandated common law rules made by state judges. See *id.* at 213. Compare *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10-15 (1842) (recognizing the existence of judicially enforceable immutable rules underlying the common law), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1983), with *Erie*, 304 U.S. at 79-80 (rejecting the idea of transcendental writing in the sky). Nobody asks where state judges get the power to make the common law rules that bind both themselves and federal diversity judges under *Erie*. Maybe that is why so many state judges are democratically elected.

233. See *Marbury*, 5 U.S. (1 Cranch) at 164-68.

objective reality from the witnesses' narratives and the other available evidence. Marshall's evidentiary hearing in *Marbury* is a particularly unedifying example of a fact-finding process designed to lock in a minor premise.

Once the externally mandated major and minor premises are in place, the syllogism machine goes to work and spits out a logically preordained judicial conclusion. A simple example of the syllogism machine in action looks like this:

Major premise:

It is unlawful to drive faster than 55 m.p.h. on the Long Island Expressway (LIE).

Minor premise:

Neuborne was clocked at 70 m.p.h. on the LIE.

Conclusion:

Neuborne is guilty of unlawful speeding.

In the Neuborne hypothetical discussed above, both the major and minor premises are imposed on the judge by external mandate; the 55 m.p.h. speed limit is the result of a clearly expressed legislative command; the 70 m.p.h. clocking is an objective fact registered by a reliable machine. The judge's conclusion of guilt is logically preordained. Even if, like John Marshall in *Marbury*, Neuborne gets to be the judge in his own case, he would be required to find himself guilty.

It has been fashionable for years in advanced circles on both the left and the right to ridicule the syllogism machine as an explanation of the mystery of judging.<sup>234</sup> No one except several Republican members of the Senate Judiciary Committee, who apparently live in a cartoon world without ambiguity, actually believes that the syllogism machine can explain—and justify—the full range of American judging. The rest of us know that text, especially constitutional text, is too indeterminate to provide a clear external command to a judge in all cases and that facts are often too slippery and subjective to provide an externally mandated, genuinely objective reality.<sup>235</sup> Somewhat immodestly, however, I think that the death

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234. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 148-68 (2004); POSNER, *supra* note 232, at 12-13, 174-203.

235. The Critical Legal Studies (CLS) movement took dead aim at the syllogism machine, arguing that virtually all adjudication is an act of political will, not a search for preexisting legal and factual norms. For a bibliography of early CLS criticism, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461, 464-90 (1984). For fully developed examples of CLS criticism, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* 73-96 (1997); see also MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010) (describing the Constitution as

of the syllogism machine has been greatly exaggerated. In my experience,<sup>236</sup> not only does Marshall's miraculous machine work in a surprisingly large percentage of cases, the integrity of the rule of law may well depend on it.<sup>237</sup> The very idea of a rule of law in the context of litigation assumes that we are embedded in a web of generally applicable legal rules that were in place before we acted—and before any judge is asked to announce which rule governs. If the governing rule of law (conceived of as a major premise) is not a preexisting norm capable of constraining judges in the bulk of cases, we live, not under the rule of law, but under the whim of black-robed bureaucrats who make the law up as they go along after the parties have acted.

Similarly, the idea of a rule of law assumes that the facts of a case (conceived of as a minor premise) are hard-edged, objective phenomena capable of imposing themselves on neutral fact-finders and interacting syllogistically with the externally mandated governing law to produce significantly constrained, principled judicial results. A legal universe where fact-finders are generally free to construct the facts without external constraint cannot be squared with the rule of law. Although it is fair game to criticize the accuracy or thoroughness of judicial fact-finding, and fair game to argue about how we should deflect error about facts when we are not certain about them,<sup>238</sup> questioning the very existence of an objective, discoverable factual reality may work in philosophy and science fiction, but it is a nonstarter in law.<sup>239</sup>

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important in structuring politics rather than the government itself); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing for a populist Constitution).

236. See *supra* note 2.

237. See Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1939-44 (2009), for a defense by an extraordinary judge of the idea that judges respond to external commands in resolving many cases. (Judge Edwards sits on the D.C. Circuit.) For early criticism of CLS, see Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 423-53 (1984) and Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1446-57, 1466 (1984).

238. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that every element of a criminal offense must be proved beyond reasonable doubt); *Martin v. Ohio*, 480 U.S. 228, 235-36 (1987) (stating that the burden of persuasion on defense may be shifted to the defendant); *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that clear and convincing evidence is required to terminate parental relationship); *Addington v. Texas*, 441 U.S. 418, 431-32 (1979) (holding that clear and convincing evidence is required in civil commitment proceeding); *Patterson v. New York*, 432 U.S. 197, 216 (1977) (stating that the burden of persuasion on defense may be shifted to the defendant); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding that due process requires proof of guilt beyond reasonable doubt in criminal cases when liberty is at stake); *In re Winship*, 397 U.S. 358, 368 (1970) (same); *Woodby v. INS*, 385 U.S. 276, 277 (1966) (holding that clear and convincing evidence is required for deportation).

239. See generally HENRI BERGSON, *THE CREATIVE MIND* (1946) (questioning objective reality). In settings where the raw material for objective fact-finding is absent, the political question doctrine may forbid judicial resolution of the controversy. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

In addition to validating the rule of law, the syllogism machine, when it works, packs an immense payoff for judges. If the law and the facts really are external mandates, a conscientious and competent judge bears neither moral nor political responsibility for a controversial judgment. If the judicial product does not taste good, the syllogism machine places the blame, not with a lousy judicial cook, but with the democratically generated ingredients that spoiled the recipe. You can be sure that the very first thing John Marshall said to William Marbury after screwing him out of his judgeship was, “It’s not my fault. I was just doing my job.” At that point, the syllogism machine delivers more than psychological absolution to the judge. It delivers political legitimacy to the process of judging. Our political culture justifiably demands that coercive legal rules display a veneer of democratic legitimacy. Because the syllogism machine purports to reflect commands from democratic lawgivers, it absolves judges from charges that they are acting undemocratically.

The centrality of the syllogism machine to the operation of the rule of law, coupled with its psychological and political value to judges, has generated a powerful cultural stake within the legal community in upholding the syllogism machine’s insistence that the definition of good judging begins and ends with (1) identifying an externally imposed major premise (the governing legal rule) in the form of a textual command from a democratically legitimate superior; and (2) identifying an externally imposed minor premise in the form of preexisting objective facts. Heaven help the intellectually honest judge who admits to deciding too many cases in which these external commands could not be found.<sup>240</sup> Fortunately for democracy and the rule of law, in my experience, and as Justice Sotomayor insisted during her testimony concerning her seventeen years on the district and circuit courts, the syllogism machine works tolerably well much of the time—not all of the time, but much of the time.<sup>241</sup> My experience has been

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240. The formulaic questions and answers at confirmation hearings for recent Supreme Court nominees Sonia Sotomayor and Elena Kagan bear powerful witness to the hold that the syllogism machine model exerts on the popular conception of good judging. The Georgetown Law Library has compiled an extremely valuable archive that includes materials related to Supreme Court confirmation hearings. See *Supreme Court Nomination Research Guide*, GEORGETOWN LAW LIBRARY, [http://www.ll.georgetown.edu/guides/supreme\\_court\\_nominations.cfm](http://www.ll.georgetown.edu/guides/supreme_court_nominations.cfm) (last visited Dec. 21, 2011).

241. Justice Sotomayor set the tone for her confirmation hearing in her opening statement:

In the past month, many Senators have asked me about my judicial philosophy. It is simple: fidelity to the law. The task of a judge is not to make the law—it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress’s intent; and hewing faithfully to precedents established by the Supreme Court and my Circuit Court. In each case I have heard, I have applied the law to the facts at hand.

*Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary*, 111th Cong. 59 (2009) (opening statement of the Hon. Sonia Sotomayor), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/1343-1344.pdf>.

that competent judges—bound by stare decisis; respect for text when it has a reasonably plain meaning; respect for context, structure, and democratic purpose in interpreting an ambiguous text; deference to administrative expertise in appropriate settings; and respect for the conventions of judicial fact-finding—often do, as Judge Edwards and Justice Sotomayor argue, play out hands dealt to them by someone else.<sup>242</sup> But not in hard constitutional cases, like *Brandenburg*, where judges self-consciously break with the past to forge new constitutional doctrine.<sup>243</sup>

As many have noted, the difficulty with the syllogism machine in hard constitutional cases goes far deeper than incompetence, ideology, or resource imbalance.<sup>244</sup> Often, despite a careful search by principled judges anxious to abide by the syllogism machine, the fuel for the machine—objective, preexisting commands at the level of both the major and minor premise—simply does not exist. In recent years, waves of conspicuously right-handed repair specialists, inspired by Justice Antonin Scalia,<sup>245</sup> have urged greater judicial respect for text—both constitutional and statutory—as a source of binding, externally mandated objective commands, arguing that fidelity to the literal text, or adherence to the text’s “original” meaning, is capable of providing a constitutional judge with a democratically legitimate, externally mandated major premise for the syllogism machine.<sup>246</sup> In my experience, however, text-intensive techniques like literalism and various schools of originalism generally fail to deliver persuasive, externally mandated objective legal commands, leaving judges with precisely the choice between and among plausible major premises that broke the machine in the first place. Given the chronic ambiguity of the text in hard constitutional and statutory cases, literalism is almost always useless as a principled decisional technique.<sup>247</sup> What is the literal meaning

242. This is not the place to attempt a fuller account of the success or failure of the syllogism machine in so-called “garden variety” cases in the lower courts. In the interest of space, I omit in this version a discussion of the success of the syllogism machine in many settings and move directly to hard cases, like *Brandenburg*, where the machine cannot provide a persuasive explanation of judicial behavior.

243. See *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam).

244. See sources cited *supra* notes 234, 235 and 237 and accompanying text.

245. The right-handed repair efforts, centered on enhanced respect for an allegedly binding text, are championed in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

246. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutman ed., 1997) (providing an essay by Justice Antonin Scalia about the role of federal courts in interpreting the Constitution and laws, as well as multiple critical responses by distinguished professors); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007) (providing a foreword by Justice Scalia, followed by essays supporting and opposing originalism). Useful articles on the debate over textualism include: Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); John F. Manning, *What Divides Textualist from Purposivists?*, 106 COLUM. L. REV. 70 (2006); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

247. See generally John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665-73 (2004) (discussing modes of constitutional

of phrases like “due process of law,” “the equal protection of the laws,” “cruel and unusual punishment,” or “the freedom of speech”?

If literalism is a nonstarter in hard constitutional cases like *Brandenburg* because the text of the First Amendment is so open-ended, originalism also does not work in delivering a single right answer. Originalists claim to have repaired the syllogism machine by insisting that ties between competing textual readings of the Constitution may be broken by reference to the objectively knowable intentions, assumptions, or both, of the original Founders—viewed as empirically provable historical facts.<sup>248</sup> Early originalists sought to discover the subjective intention of the “drafters.” Later versions stressed the subjective intentions of the “ratifiers.” More recently, certain originalists have looked to the so-called objective understanding of the “general public” (whatever that may mean—does it include women?) at the time the constitutional text was promulgated.<sup>249</sup> But originalism does not work any better than literalism as a right-handed repair device.<sup>250</sup>

First, as the evolution of originalist thinking demonstrates, it is not clear whose original intention should govern: James Madison’s; the various drafters of the Constitution’s provisions; the members of the Constitutional Convention who adopted the body of the text; the members of the House and Senate who voted on amendments; the members of state ratifying conventions who approved the 1787 text; the members of Congress and the state legislatures who approved the twenty-seven amendments; the electorate who chose the delegates to the ratifying conventions or the state legislatures; or the members of the so-called general public to whom the document was directed. It is hard enough to derive a collective intent about legislative meaning from a single body of contemporaneous legislators (that is one of the reasons why Justice Scalia so mistrusts legislative history);<sup>251</sup> it is well-nigh impossible when the very identities of the relevant 200-year-old original “intenders” are in dispute. There exists an irony in the fact that so many conservative theoreticians, like Justice Scalia, who reject the idea of a coherent legislative purpose at the level of statutes,<sup>252</sup> claim to be able

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interpretation); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2454-75 (2003) (providing the literal baseline for absurdity analysis).

248. See generally ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 246 (providing an example of the substantial, recent literature on originalism); REPORT TO THE ATT’Y GEN.: ORIGINAL MEANING JURISPRUDENCE: A SOURCE BOOK, OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE (Mar. 12, 1987) (providing a collection of earlier writings on originalism).

249. See Steven G. Calabresi, *Introduction* to ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 246, at 35.

250. See Berman, *supra* note 246, at 93-96; Brest, *supra* note 246, at 205-24, 229-34.

251. See JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 116-20 (2009). See generally John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006) (providing a useful summary of Justice Scalia’s approach to the legislative process).

252. See Manning, *supra* note 251, at 35-40.

to ascertain the Founders' "original" collective purpose repackaged as an objective historical fact.

Second, even if we could figure out whose original intent mattered, it is not clear why we would want to lock ourselves into reading the Constitution under an eighteenth century mindset that accepted slavery, oppressed women, and glorified landed wealth. The worst case ever decided by the Supreme Court, *Dred Scott v. Sandford*, is an originalist nightmare, illustrating the enormous moral cost of locking our Constitution into the distant past.<sup>253</sup> Dred Scott, a highly skilled slave who was taken by his owner from Missouri (a slave state) into Illinois (a free state) and Wisconsin territory (from which slavery had been banned under the Missouri Compromise of 1820), and then brought back into the slave states of Missouri and Louisiana, sued his master in Missouri federal court seeking a judicial declaration that he was a free man.<sup>254</sup> Federal jurisdiction was premised on diversity of citizenship.<sup>255</sup> Dred Scott's lawyers relied on a celebrated 1768 opinion by Lord Mansfield in *Somerset's Case*, holding that a slave brought from Virginia (where slavery was legal) into Great Britain (where slavery was legally questionable)<sup>256</sup> was entitled to have his legal status determined by the laws of Great Britain, not Virginia.<sup>257</sup> Of course, a major distinction existed between James Somerset and Dred Scott. Somerset sought his freedom under a writ of habeas corpus while in Great Britain.<sup>258</sup> Dred Scott had been returned to a slave state (Missouri) before his lawsuit was filed in the slave state.<sup>259</sup> If the law of the forum governed, Dred Scott would have lost on the unremarkable ground that Missouri slave law, not Illinois or Wisconsin territory free law, defined his legal status.<sup>260</sup>

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253. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

254. *Id.* at 431-32.

255. *Id.* at 400.

256. *Id.* at 529, 534. (McLean & Curtis, JJ., dissenting). I say "legally questionable" instead of "unlawful" because some have argued that Lord Mansfield's opinion merely limited one of the incidences of slavery in England—denying the power to sell a slave to the West Indies—but did not necessarily mean that slavery itself was unlawful. See STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* 193-95 (2005). I read the opinion more broadly, but that is because I take Lord Mansfield's words literally—always a risk. *Somerset's Case* was read very broadly in the early United States. The purpose of the Fugitive Slave Clause was to checkmate the expansion of *Somerset's Case* to escaped slaves. See *id.* at 201-02; Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Repercussions*, J. NEGRO HIST. 193-208 (1966).

257. *R. v. Knowles, ex parte Somerset*, (1772) 98 Eng. Rep. 499 (K.B.).

258. *Id.*

259. *Dred Scott*, 60 U.S. (19 How.) at 529-30 (McLean, J., dissenting).

260. See *id.* at 400. Dred Scott's lawyers had invoked federal diversity jurisdiction in a Missouri federal court. *Id.* I assume that the lawyers were relying on *Swift v. Tyson* in asking a federal diversity judge to use general federal common law to determine Dred Scott's status under *Somerset's Case*. The tactic could not work today. A modern federal judge, operating under *Erie v. Tompkins*, would be obliged to apply Missouri forum law recognizing slavery, unless Missouri was somehow constitutionally

As did Marshall in *Marbury*, Chief Justice Taney elected to ignore that possible nonconstitutional way out. Instead, he constructed a collision between the Constitution and *Dred Scott*. Marshall had constructed his collision in *Marbury* by insisting on a literal reading of Article III that makes little structural sense. Taney constructed his collision by relying on originalism to ossify and magnify the racism infecting American society in 1787.<sup>261</sup> Relying on the Founders' adoption of a Constitution protective of slavery, Taney construed the Due Process Clause of the Fifth Amendment to invalidate Congress's attempt in the Missouri Compromise to outlaw slavery in the territories because, according to Taney, it deprived slave owners of property without due process of law.<sup>262</sup> Taney also ruled that the Framers' original understanding prevented blacks from being recognized as citizens of any state for the purpose of Article III federal diversity jurisdiction.<sup>263</sup> It took the Civil War and the Thirteenth and Fourteenth Amendments to overturn Taney's toxic exercise in originalism.<sup>264</sup>

Finally, even if we wanted to rely on the original meaning of the Constitution, it turns out that the Founding generation was just as divided about the meaning of the open-ended provisions of the constitutional text as we are today.<sup>265</sup> *Dred Scott* was not only appalling morality and incorrect law, it was bad history. Taney claimed to discover the Founders' original intentions and relied upon a purported national political consensus about the legally subordinate role of blacks in the new nation.<sup>266</sup> But no such historical consensus existed. In fact, the Founding generation was bitterly divided about slavery and the legal consequences of race. The two most obvious manifestations of racism in the original Constitution—acquiescence in the slave trade until 1808<sup>267</sup> and the Fugitive Slave Clause<sup>268</sup>—demonstrate the deeply divided nature of the Founding generation's approach to slavery and race. The Importation Clause was a compromise between slaveholding states opposed to any limit on the slave

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obliged to apply the law of a free state or territory. *See generally* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1939) (mandating the application of state law in federal courts exercising diversity jurisdiction).

261. *See Dred Scott*, 60 U.S. (19 How.) at 407-16.

262. *Id.* at 432-54.

263. *Id.* at 403-07.

264. The language of the Fourteenth Amendment, guaranteeing “[a]ll persons born or naturalized in the United States” citizenship in the state where they reside, was designed to overturn the citizenship holding in *Dred Scott*. U.S. CONST. amend. XIV, § 1.

265. Consider the disagreement in 1793 between Hamilton and Jefferson in Washington's first cabinet over the power to create the First Bank of the United States. *See* MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, *THE CONSTITUTION OF THE UNITED STATES* 66-74 (2010) (setting forth the conflicting opinions of Jefferson and Hamilton on the scope of federal power).

266. *See Dred Scott*, 60 U.S. (19 How.) at 407-12.

267. *See* U.S. CONST. art. I, § 9, cl. 1 (the Importation Clause).

268. U.S. CONST. art. IV, § 2, cl. 3 (the Fugitive Slave Clause).

trade and free states seeking its immediate prohibition.<sup>269</sup> Great Britain did not succeed in abolishing its Atlantic slave trade until 1807. The free states did not do too badly in ending importation of slaves into the United States a year later in 1808.<sup>270</sup> The Fugitive Slave Clause also emerged from the divided nature of the Founders' approach to slavery.<sup>271</sup> The Clause was designed to prevent the application of *Somerset's Case* to escaped slaves by assuring that an allegedly escaped slave would be returned from a free state to a slave-state court for ultimate adjudication of status.<sup>272</sup> The Clause was precipitated by the fear that free states like Pennsylvania would seek to expand the core holding in *Somerset's Case* by requiring that an allegedly escaped slave's legal status be adjudicated under the laws of the free-state forum.<sup>273</sup> Without the intense opposition to slavery in the free states that made such a patent expansion of *Somerset's Case* a distinct possibility, neither the Fugitive Slave Clause nor Justice Story's unfortunate decision in *Prigg* would have been necessary.<sup>274</sup> An intellectually honest historical analysis by Taney would not have ignored such mixed signals.

In fact, in my experience, intellectually honest historical research in almost all hard constitutional cases reaches a similarly equivocal result.<sup>275</sup> Given the equivocal nature of the historical evidence surrounding original meaning in any hard constitutional case, originalist judges must inevitably

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269. See Thomas Jefferson, *Bill to Prevent the Importation of Slaves*, in THE PAPERS OF THOMAS JEFFERSON, 2:22-23, available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_9\\_1s1.html](http://press-pubs.uchicago.edu/founders/documents/a1_9_1s1.html) (last visited Dec. 19, 2011) for useful compendium of the Founders' discussion on the Importation Clause.

270. See Slave Trade Act, 1808, 47 Geo III, c. 36, § 1 (ending the Atlantic slave trade). For an inspiring chronicle of the fight against slavery in the British Empire, see ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES (2005).

271. See DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 217-18, 220-21, 42 (2001) (stressing the compromises in the Constitution). For a less charitable view of those compromises, see James Oakes, "The Compromising Expedient: Justifying a Proslavery Constitution, 17 CARDOZO L. REV. 2023, 2024-26 (1996).

272. The first Supreme Court decision interpreting the Fugitive Slave Clause was *Prigg v. Pennsylvania*, 41 (16 Peters) U.S. 539 (1842) (invalidating Pennsylvania's anti-kidnapping law forbidding slave catchers from removing allegedly escaped slaves from Pennsylvania without a hearing).

273. See COVER, *infra* note 274, at 16-17, 166-77. *Dred Scott* was an effort to expand *Somerset's Case* to a setting where a master had voluntarily introduced a slave into free territory and then returned him to a slave state. Long before *Dred Scott*, though, Northern abolitionists had sought to press the envelope even further by arguing that *Somerset's Case* applied even when a slave's presence in a free state was the result of an escape. One purpose of the Pennsylvania statute struck down in *Prigg* was to provide an escaped slave with a chance to raise *Somerset's Case* in a sympathetic free state forum. See *id.* at 166-67.

274. For a powerful critique of Justice Story's opinion in *Prigg*, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

275. Consider the massive investment in historical research in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008) (involving the original meaning of the Second Amendment) and *Boumediene v. Bush*, 553 U.S. 723 (2008) (involving the original meaning of the Suspension Clause). The Court split 5-4 in each case, in large part because the historical research generated a tie, which had to be broken by a subjective judicial judgment. See *Heller*, 554 U.S. 570; *Boumediene*, 553 U.S. 723.

choose between and among multiple plausible candidates for the major premise in the judicial syllogism. They just will not admit it. Even Justice Scalia, a founding father of textualism, concedes that equivocal historical evidence about original meaning often leaves judges with a choice about which version of history is correct.<sup>276</sup> Justice Scalia insists, however, that a choice about originalist history is preferable to a choice about current values.<sup>277</sup> His point might be more persuasive if the Justices' contested choices about original historical meaning did not always seem to reinforce their own values.<sup>278</sup> Original intent in hard constitutional cases almost always turns out to be a contested, judicially constructed concept, not an externally mandated objective historical fact. Taney's opinion in *Dred Scott* illustrates just how manipulable, and disingenuous, the concept can be.

In the end, therefore, despite an enormous expenditure of intellectual energy, the right-handed repair efforts founded on textualism and originalism have failed to rescue the syllogism machine by delivering an objective major premise in hard constitutional cases. Can a left-handed repair effort do better?

#### V. ERROR DEFLECTION: A LEFT-HANDED REPAIR MANUAL FOR THE BROKEN MACHINE

Most efforts to repair the syllogism machine concentrate on the law-based major premise. Justice Scalia asks the Founding "general public" what they thought the text meant. Justice Brennan claimed to have carried out a similar left-handed repair of the syllogism machine at the level of the major premise by rotating a hypothetical, reasonable Founder 200 years into the future and asking him how he would construe the "living Constitution" today.<sup>279</sup> Unfortunately, Justice Brennan's theory of the "living Constitution," although it delivered marvelous constitutional law, did not succeed in repairing the syllogism machine. Like Justice Scalia's conversations with the Founding general public, Justice Brennan's vision of

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276. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 246, at 3, 45-47.

277. See *id.*

278. Compare *Dist. of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (Justice Scalia insisting that original meaning of Second Amendment protects the individual right to possess guns), with *Boumediene v. Bush*, 553 U.S. 723, 843-50 (2008) (Scalia, J., dissenting) (Justice Scalia insisting that original meaning of habeas corpus clause does not protect noncitizens detained at the American naval base at Guantanamo Bay, Cuba).

279. Justice Brennan initially described his theory of the "living Constitution" in a speech at Georgetown University. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985), reprinted in ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES* 607 (8th ed. 1987).

“constructive originalism” does not generate an external, objective legal command. Nocturnal conversations with the ghosts of fictive Founders—past hardly qualify as a serious effort to discover an externally mandated, objective command. Not surprisingly, Justice Brennan’s hypothetical reasonable Founders agreed with him as often as Justice Scalia’s Founding general public agrees with Justice Scalia—in short, always.<sup>280</sup>

Ronald Dworkin and Jeremy Waldron, two of the best minds in the legal academy, view constitutional judges as minor-league Immanuel Kants,<sup>281</sup> heroically articulating major premises designed to capture the best version of a constitutional right.<sup>282</sup> Waldron thoughtfully argues that over time, well-functioning legislatures operating in rights-respecting societies will perform better than judges in reasoning toward the correct definition of a human right.<sup>283</sup> Dworkin argues brilliantly that politically insulated judges seeking to develop principled constitutional doctrine reflective of the best moral intuition of the culture are more likely to get closer to the right answer than legislators.<sup>284</sup> Watch me hold my breath and tell two of the smartest guys I know that they are both wrong about what constitutional judges actually do.

I believe that we err in concentrating our attention on the syllogism machine’s major premise. In my experience, constitutional judges do not do moral philosophy. Instead, they worry about deflecting error in a world of radical uncertainty. Madison noted in *The Federalist* #51 that if life were certain, and if people were angels, government would be easy. But life is anything but certain, people are anything but angels, and government is anything but easy. Sometimes, as the unfortunate history of the twentieth

280. See Scalia, *supra* note 276, at 18-20; Brennan, *supra* note 279, at 435-39. For a sophisticated effort to defend the power of judges to use values in selecting the major premise, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). The most influential defense of the idea of a “living Constitution” is found in the writings of Ronald Dworkin. The evolution of Dworkin’s theory of constitutional interpretation may be traced through RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 135-41 (1977); RONALD DWORIN, *A MATTER OF PRINCIPLE* 119-67 (1985); RONALD DWORIN, *LAW’S EMPIRE* 355-99 (1986); RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 72-117 (1996); RONALD DWORIN, *JUSTICE IN ROBES* 241-60 (2006); RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 99-157 (2011). Although Dworkin’s work has evolved and has become increasingly subtle, he expressed his core concept of constitutional adjudication in his vision of a judge as Hercules, initially set forth in his seminal article, Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1084-86 (1975) (arguing that the judicial role is to derive particular rules from general principles using the moral commitment of the community as the primary guide).

281. I cite Kant as the modern paradigm of the effort to derive fundamental principles from rigorous logical thought. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Werner S. Pluhar trans., Hackett Publishing, Co., Inc., 1996).

282. See *supra* note 280 for Ronald Dworkin’s vision of constitutional judging. Jeremy Waldron’s more skeptical view of constitutional judging is described in JEREMY WALDRON, *GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* (2002); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346 (2006) [hereinafter Waldron, *The Core of the Case*].

283. See Waldron, *The Core of the Case*, *supra* note 282, at 1361-65.

284. See DWORIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 280, at 84-86.

century attests, pathological monsters, like Hitler and Stalin, get control of government and turn their pathologies into legally sanctioned violence. Sometimes, as the continued existence of terrorists, pirates, and mobsters illustrate, knaves outside of government succeed in mocking the very idea of law. Most of the time though, both the governors and the governed are well-intentioned enough, but operate in a fog of ignorance. The governed—most of us—blunder through life in a state of chronic uncertainty, making more or less educated guesses about the future, driven by the baffling mix of self-interest, cluelessness, and altruism that defines the human condition. Arguing about how we will react to the world around us and to efforts to regulate, or refrain from regulating, that world (and us), is the raw material of democratic politics.

The governors, even when well-intentioned, are equally ignorant. Occasionally, the predictions and assumptions underlying a government's decision to regulate—or to refrain from regulating—are proven wrong by events like a financial collapse. More often, they are simply unverifiable, with democratic politics consisting of disagreements over (1) the data purportedly justifying a government's decision to regulate or remain passive; (2) the likely short-term effects of a decision to regulate or refrain from regulating; and (3) the likely long-term consequences of a government's decision about regulation or the lack thereof. Because most government action, or inaction, even when well-intentioned, takes place under conditions of radical uncertainty as to sincerity, justification, short-term effect, and long-term consequence, it follows that democratic government can break down on at least three levels: (1) improperly motivated decision making; (2) factually erroneous beliefs about justification; and (3) factually erroneous predictions about short-term effects and long-term consequences.

Ordinarily, we rely on the democratic process to deal with the potential breakdowns. For the cynics among us, Winston Churchill's famous observation that democracy is the least bad way of governing will suffice.<sup>285</sup> For the occasional romantic, Jeremy Waldron's argument that democracy is not just the least bad way to govern, it is both a morally and empirically superior way to govern, might make us a little more enthusiastic about the process.<sup>286</sup> As a certifiable romantic, I stand with Waldron. But the

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285. Churchill's actual words, delivered in the House of Commons on November 11, 1947, were: Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7566 (Robert Rhodes Jones ed., 1974). Churchill was speaking as Leader of the Conservative opposition against a Labor Party bill reducing the suspensive veto power of the House of Lords from two years to one. *Id.* For an excellent recent biography of Churchill, see PAUL JOHNSON, CHURCHILL (2010).

286. See JEREMY WALDRON, THE DIGNITY OF LEGISLATION 1-6 (1999).

moment we acknowledge that democratic government can be improperly motivated and even when properly motivated, often operates in a fog of factual ignorance as to justification, effect, and consequence, we must ask whether there are democratically legitimate ways to minimize the risk of bad motive and to mitigate the risk that the political majority is wrong about one or more of justification, effect, and consequences. Most of the time, the answer is no. In a democracy, we live and die with the political majority's best guess as to what will achieve the greatest good for the greatest number,<sup>287</sup> knowing that the guess will often be wrong, sometimes even perverse. But, even taking Bentham at his word, in relatively rare settings involving values of fundamental importance to a society (usually catalogued in a rights-bearing document like a constitution or a bill of rights), where risk exists that the political majority may err, intentionally or unintentionally, it makes sense to (1) make an increased effort to screen for bad motive, and (2) insist upon a second judicial opinion on whether the factual predicate allegedly justifying the majority's decision to regulate in derogation of the cherished value is tolerably accurate. That is, I believe, where constitutional judges come in. In my experience, constitutional judging is not about defining rights in the Kantian sense. Rather, most of the time, it is about minimizing the risk of impermissible motivation and deflecting factual error about the adequacy of the factual predicate, demonstrating (1) a need for, (2) the short-term effects of, and (3) the long-term consequences of government regulation in derogation of cherished values.

An often overlooked example of judicial review takes place whenever a judge rides herd on a jury. As we have seen, judges operating the syllogism machine need a fact-based minor premise to link to the law-based major premise in order to close the judicial syllogism. In garden-variety civil lawsuits for damages and criminal prosecutions, the power to determine and announce the fact-based minor premise is retained by the people in the form of a jury reflecting a cross section of the community.<sup>288</sup> Today's randomly selected jury is as close to a pure democratic body as it gets in modern political life. Indeed, until relatively recently, the jury exercised substantial law-declaring power, especially in criminal cases.<sup>289</sup>

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287. The phrase is derived, of course, from Jeremy Bentham's principle of utilitarianism. See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 3 (Wilfrid Harrison ed., Basil Blackwell 1967) (1823).

288. See U.S. CONST. amends. VI & VII.

289. See *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (Jay, C.J.) (recognizing a jury's right to declare law). The pre-revolutionary period had recognized the jury's law-declaration power. See *Bushell's Case*, 124 Eng. Rep. 1006, 1011-12 (1670). In 1736, Alexander Hamilton, defending John Peter Zenger charged with seditious libel, successfully argued that the jury was empowered to decide the law as well as the facts. See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE *NEW YORK WEEKLY JOURNAL* 78 (Stanley Nider Katz ed., 2d ed. 1972). Zenger published a verbatim account of the trial. See generally *id.* at 36-37. The decline of the criminal

An ancient Athenian would recognize it in a minute.<sup>290</sup> As with legislators and presidents, we recognize that jurors operate in a state of great uncertainty. We recognize that the effort to use narrative testimony and surviving documents to reconstruct the preexisting objective adjudicative facts of a lawsuit is a form of hubris. So many things can go wrong, even with gilt-edged eyewitness testimony<sup>291</sup>—inaccurate perception, flawed memory, ambiguous description, and flat-out lying. We know that cross-examination acts as an unpredictable tool for finding truth; it can obscure as much as it clarifies. Consequently, we have learned to live with the knowledge that the risk of factual error is inescapable in judicial proceedings. To compensate, we single out values we care deeply about and erect an error-deflection shield to minimize the number of times a jury will impinge on those values under a mistake of fact. We call the shield the “burden of proof,” or more precisely, the “burden of persuasion.”<sup>292</sup>

Depending on the values in play, we place one of three burdens of persuasion on a jury.<sup>293</sup> In ordinary civil litigation about money, we ask the jury to decide in accordance with the “preponderance of the evidence.” In

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jury’s law declaring power in the United States dates from Justice Story’s opinion in *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14, 545), directing a jury bent on conviction to construe a criminal statute as exempting the defendant’s conduct. *Id.* at 1046. We would, today, view Justice Story’s action in *Battiste* as the granting of a motion to dismiss, as opposed to an expression of opinion on jury nullification. The last trace of the jury’s law-declaring power in criminal cases is found, today, in the controversial concept of jury nullification. See *Sparf v. United States*, 156 U.S. 51, 74 (1895) (noting that a jury may not disregard instructions on content of law). The best modern judicial discussion of jury nullification occurs in a debate between Judges Leventhal and Bazelon in *United States v. Dougherty*, 473 F.2d 1113 (Leventhal, C.J.), 1139 (Bazelon, C.J., dissenting) (D.C. Cir. 1972), over whether a jury is entitled to be instructed on its power of nullification. Writing for the majority, Judge Leventhal recognized the power to nullify but deemed it too dangerous to inform the jury of its power. See *id.* at 1130-37. Chief Judge Bazelon dissented, arguing in favor of a fully informed jury. See *id.* at 1139-44 (Bazelon, C.J., dissenting). The area is exhaustively (if one-sidedly) canvassed in Andrew J. Parmenter, Note, *Nullifying the Jury: The “Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379 (2007). A similar debate exists over the modern jury’s power to ignore the judge’s rulings on the law in civil cases. Modern directed verdict and summary judgment practices have virtually eliminated the civil jury’s historic law declaring power. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 397-99 (2009); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L. Q. 687, 687-90 (2004); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140-43 (2007). The leading common law case of the Founders’ era supporting enhanced jury power in a civil context is *Gibson v. Hunter*, 126 Eng. Rep. 499, 510 (1793) (stating a civil case may not be removed from a jury in absence of both parties’ consent).

290. See R. K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN ATHENS* (1988).

291. For recent judicial discussions of the potential flaws in eye-witness testimony, see *Perry v. New Hampshire*, No. 10-8974, 2011 WL 4905478, at \*1 (U.S. Oct. 17, 2011) and *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

292. See generally George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L. J. 880, 929-30 (1968) (discussing how placing the burden of persuasion on defendants to prove a defense “provides a sufficient institutional check against acquitting the guilty”).

293. See JACK B. WEINSTEIN ET AL., *EVIDENCE: CASES AND MATERIAL* 1085-1237 (9th ed. 1997) for an overview of the size and allocation of the burdens of production and persuasion.

preponderance cases, we hardly deflect error at all; although, even in preponderance cases, allocation of the burden of persuasion can determine who wins in settings where neither party is able to marshal significant evidence about a disputed fact.<sup>294</sup> But in cases where constitutionally protected values are in play, we put a finger on the factual scales in favor of those values.<sup>295</sup> For example, in cases involving deportation, civil commitment, or termination of the parent-child relationship, we require more than preponderance of the evidence. We insist the evidence be “clear and convincing.”<sup>296</sup> And, in criminal cases where personal liberty is at stake, we insist that the jury be certain “beyond a reasonable doubt” before finding a defendant guilty.<sup>297</sup> In all three settings, federal judges carefully instruct jurors about how “sure” they must be before making the factual determination that will function as a minor premise for the judicial syllogism.<sup>298</sup> In very rough terms, we want the jurors to be 50.1% sure in ordinary cases; 75% sure in deportation, civil commitment, and parental termination cases; and at least 95% sure in criminal cases. If the jury disregards the judge’s instructions about the burden of persuasion by issuing a verdict without enough evidence to support the necessary level of factual certainty, a judge is duty-bound to set it aside—in effect, declaring the jury verdict unconstitutional.<sup>299</sup>

Parliaments evolved from courts.<sup>300</sup> Indeed, not too long ago, juries found the law as well as the facts. It should come as no surprise, therefore,

294. *See id.* In such settings, we often use presumptions to shift aspects of the burden of proof. *See id.* at 1158-1237.

295. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (each element of offense must be proved beyond reasonable doubt); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (clear and convincing evidence required to terminate parental relationship); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (clear and convincing evidence required in civil commitment proceeding); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (due process requires proof of guilt beyond reasonable doubt when liberty at stake); *In re Winship*, 397 U.S. 358, 368 (1970) (same).

296. *See Santosky*, 455 U.S. at 769; *Addington*, 441 U.S. at 433.

297. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 704; *In re Winship*, 397 U.S. at 368.

298. *See* FED. R. CIV. P. 51.

299. *See id.* at 12(b)(6), 50, 56, & 59. The unconstitutionality of convicting a defendant in a criminal case on the basis of evidence too weak to permit a reasonable juror to find guilt beyond a reasonable doubt is obvious. *See In re Winship*, 397 U.S. at 363. It deprives the defendant of liberty without due process of law. *Id.* at 367. That is why Justice Story was clearly right in *Battiste* in preventing a jury from convicting under an incorrect reading of a criminal statute. *See United States v. Battiste*, 24 F. Cas. 1042, 1044 (C.C.D. Mass. 1835) (No. 14,545). The same liberty/due process justification for strict judicial control of a jury applies in civil settings like civil commitment, parent-child termination, and deportation, involving a constitutionally heightened burden of proof. *See supra* notes 295-96. In preponderance cases, even though the burden of proof is not constitutionally heightened, permitting the plaintiff to win when no reasonable person could find that it is more likely than not that the necessary facts have been established is equally subject to due process criticism. To my mind, given the constitutional protection of the right to jury trial, the due process point is the only persuasive justification for directed verdicts and summary judgment.

300. The evolution of the modern parliament and judicial system from the *curia regis* is described in RICHARD W. KAEUPER, WAR JUSTICE AND PUBLIC ORDER: ENGLAND AND FRANCE IN THE LATER MIDDLE AGES 286-90 (1988) and A.F. POLLARD, THE EVOLUTION OF PARLIAMENT (1920).

that the supervisory relationship between a constitutional judge and a legislature resembles the supervisory relationship between a trial judge and the jury. In both settings, the judge's supervisory function includes the power to establish and enforce a set of error-deflection rules designed to preserve constitutionally protected values from potentially erroneous democratic fact-finding. Constitutional adjudication is, therefore, not a grand exercise in moral philosophy at the level of the major premise. Rather, it is about managing and fine-tuning the risk of democratic error as to motive, justification, impact, and consequence under conditions of great uncertainty. In other words, the care and feeding of a fact-based, democratic error-deflection safety net designed to protect cherished values. Unlike moral philosophy, it's what judges do best.

#### A. Screening for Bad Motive

Political majorities rarely confess to improper motives like racial bias, religious prejudice, gender bias, political intolerance, class hatred, xenophobia, localism, or personal greed. Legislators are very good at cloaking improper motive in high-sounding rhetoric. Empirical efforts to distinguish good legislative motive from bad legislative motive almost always fail because of impossible problems of proof and conceptual definition.<sup>301</sup> At best, legislative action is often an untidy mix of bad motives and sincere concerns by individual legislators, generating a quagmire of uncertainty over whether or not a law was improperly motivated, whose motive counts, and what it means to say that a legislature has a collective purpose.<sup>302</sup>

Given the difficulty of identifying impermissible legislative motive, I believe that constitutional doctrine often identifies settings where the risk of impermissible motive is particularly acute and screens prophylactically for its existence.<sup>303</sup> For example, in constitutionally sensitive areas like free speech and equality, if a substantial mismatch exists between the asserted government purpose and an unnecessarily draconian means of achieving it, I believe that courts correctly perceive a risk of improper motivation. Race, religion, and politics are emotionally fraught areas central to the political culture where one might plausibly worry about impermissibly motivated legislation. Not surprisingly, constitutional doctrine in each of those

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301. See *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). For an excellent survey of judicial efforts to discover legislative motive, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

302. *O'Brien*, 391 U.S. at 384. For one of the classic descriptions of the extreme difficulty of establishing legislative motive, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 214-17 (1962).

303. See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (arguing that First Amendment doctrine often screens for bad motive).

sensitive settings imposes a form of strict judicial scrutiny asking whether the government interest offered to justify the regulation is genuinely compelling, whether the regulation is more onerous than necessary to advance the government's proffered interest, and whether the government's interest could have been advanced by "less drastic means."<sup>304</sup> The majority's resort to unnecessarily harsh regulatory techniques to deal with a relatively trivial concern is treated by a reviewing court as circumstantial evidence of impermissible legislative motive, generating a risk that is too great to ignore.<sup>305</sup> In short, constitutional doctrine in all three areas guards against a perceived risk of impermissible motive by invalidating the unnecessarily draconian regulation, just as a trial judge invalidates a criminal conviction when, given the factual record, the risk of erroneous deprivation of liberty is too great to ignore. Paraphrasing the error-deflection language we routinely use at the jury level, constitutional doctrine often reflects a judicial risk-management decision that it is better to have multiple permissibly motivated but needlessly draconian statutes struck down than to risk upholding a single impermissibly motivated effort at censorship or discrimination.<sup>306</sup>

### *B. Deflecting Error on Justification or Consequence*

Given the inevitable fog of ignorance surrounding even permissibly motivated government regulation, a second risk remains to be judicially managed: the risk that the legislature guessed wrong about the need for the statute, its short-term effects and/or long-term consequences. When garden-variety values are in play, all we ask is a rational basis for a legislative decision.<sup>307</sup> Risk of error is dealt with by the democratic process.<sup>308</sup> Even at the "rational basis" level of constitutional review (comparable to preponderance of the evidence review in jury cases), when a

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304. Paradigmatic exercises of strict scrutiny took place in *RAV v. St. Paul*, 505 U.S. 377 (1992), *Texas v. Johnson*, 491 U.S. 397 (1989), and *Cohen v. California*, 403 U.S. 15 (1971). For early examples of race-based Equal Protection strict scrutiny, see *Loving v. Virginia*, 388 U.S. 1 (1967) and *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); and see also Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). For the emergence of gender-based Equal Protection intermediate scrutiny, see *United States v. Virginia*, 518 U.S. 532 (1996), *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), *Craig v. Boren*, 429 U.S. 190 (1976), and *Reed v. Reed*, 404 U.S. 71 (1973).

305. See Kagan, *supra* note 303, at 452.

306. The Achilles heel of the judicial risk-management process is the institutional competence of the judiciary to second-guess the legislature on the relative efficacy of differing forms of regulation. But that is an argument about deference, not definition.

307. For examples of classic rational basis review, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

308. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process").

reviewing court finds that legislative performance falls below the level of rationality, risk-alarm bells sound at two levels—the irrational legislation might have been impermissibly motivated; or its vulnerable regulatory targets may suffer harm for no reason at all.<sup>309</sup> Reviewing judges manage those risks by declaring statutes unconstitutional in the rare case when there was no rational basis for their enactment.<sup>310</sup>

When values of constitutional dimension are in play, however, constitutional doctrine often imposes a burden of legislative justification far more demanding than “rational basis.”<sup>311</sup> As in the “clear and convincing” or “beyond a reasonable doubt” jury context, once we accept the inevitability of well-intentioned legislative error about a law’s justification or its effects and consequences, a risk emerges that core constitutional values may be legislatively eroded under an erroneous factual predicate. Heightened judicial scrutiny manages that risk by deflecting factual error at the level of the minor premise in favor of the constitutional values.<sup>312</sup> The Supreme Court calibrates the precise level of error deflection value by value (and sometimes, context by context within the same value) and enforces it by insisting on a showing of a sufficiently strong legislative factual predicate to satisfy the heightened burden of legislative justification.<sup>313</sup> In the absence of a showing that the required level of justification has been satisfied, I believe that a constitutional judge invalidates a statute just as she would invalidate a criminal conviction in the absence of enough evidence to justify a finding of guilt beyond a reasonable doubt.

Our most cherished constitutional values include free speech, religious toleration, racial equality, and procedural fairness. Not surprisingly, constitutional doctrine in these areas is designed to deflect error against erroneously impinging on values.<sup>314</sup> Once again paraphrasing the way we talk about it at the jury stage, constitutional doctrine in the areas of race, religion, speech, and fair procedure embodies the principle that when the factual justification for a regulation is thin, it is better to strike down marginally justified efforts at regulation than to risk upholding a regulation that may impinge unnecessarily on crucial constitutional values. Thus, under the Court’s current First Amendment risk-management approach in *Brandenburg*, error is radically deflected towards free speech, even in

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309. See *Romer v. Evans*, 517 U.S. 620 (1996) (involving the invalidation of an amendment to the Constitution of the State of Colorado for lack of a rational basis); *City of Cleburne*, 473 U.S. at 450.

310. See *City of Cleburne*, 473 U.S. at 450.

311. See *id.* at 440.

312. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 529 (1997) (summarizing Supreme Court standards of review).

313. See generally R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002) (exhaustively summarizing Supreme Court standards of review in varying constitutional contexts).

314. See generally *id.*

settings like selling violent video games to children, in which a plausible fear exists that the target speech may well cause harm.<sup>315</sup> Under current doctrine, campaign finance regulation is also a prime example of First Amendment risk-allocation.<sup>316</sup> Merely identifying a plausible risk that uncontrolled spending by the massively wealthy may cause harm to the democratic process is not sufficient to justifying limiting the target speech.<sup>317</sup> The harm must be extremely serious, and the causation must be virtually certain.<sup>318</sup> The same risk-management strategy is at work in the Supreme Court's race cases.<sup>319</sup>

Finally, procedural fairness under the Due Process Clause also involves managing risk. In *Caperton v. A.T. Massey Coal Co.*, the issue was whether a judge violated due process of law by refusing to recuse himself despite having enjoyed \$3 million in campaign support from one of the litigants before him.<sup>320</sup> Justice Kennedy, writing for the five-Justice majority, noted that no affirmative evidence existed that the judge was actually biased.<sup>321</sup> Nevertheless, reasoned Justice Kennedy, the risk of bias—even unconscious bias—was too great to ignore.<sup>322</sup> In effect, the Court allocated the burden of persuasion on the issue of bias to the defendant, and then ordered the judge to recuse himself when, given the \$3 million expenditure, the defendant was unable to eliminate the perceived risk that bias existed.<sup>323</sup> Chief Justice Roberts and Justice Scalia, dissenting separately, each argued that because it was impossible for the challenger to prove the existence of bias affirmatively, no remedy was possible under the Due Process Clause.<sup>324</sup> In the end, therefore, the real disagreement between the majority and dissenters in *Caperton* had little to do with reading the text of the Due Process Clause and everything to do with how to allocate the persuasion burden on the bias issue.

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315. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam). For a classic example of free speech error-deflection, see *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down a ban on the sale of violent video games to children because the risk of harm, while plausible, was not sufficiently certain).

316. See *Citizens United v. FEC*, 130 S. Ct. 876, 947 (2010); *Buckley v. Valeo*, 424 U.S. 1, 101 (1976).

317. See *Brandenburg*, 395 U.S. at 448-49 (abandoning the bad tendency test).

318. See *supra* note 7 and accompanying text.

319. See cases cited *supra* note 304.

320. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 2256-57 (2009).

321. See *id.* at 2263.

322. See *id.* at 2264.

323. See *id.* at 2264-66.

324. *Id.* at 2267 (Roberts, C.J., dissenting); 2274-75 (Scalia, J. dissenting).

VI. THE LEFT-HANDED REPAIR MANUAL IN OPERATION: ERROR-DEFLECTION IN *BROWN*, *ROE*, AND *BRANDENBURG*

*Brown v. Board of Education*, one of the most justly celebrated cases ever decided by the Supreme Court, illustrates the limits of the syllogism machine at the level of both constitutional law (major premise) and constitutional fact (minor premise), as well as the potential for left-handed repair of the machine.<sup>325</sup> Although *Brown* deservedly enjoys iconic status, it is impossible to explain or justify the *Brown* decision as simply a syllogism machine-like processing of external democratic commands and objective factual realities. *Brown* was initially argued before the Supreme Court in 1952.<sup>326</sup> When the Court was unable to reach a consensus decision (the rumor is that the original vote was 5–4 in favor of segregation), the case was scheduled for re-argument in 1954.<sup>327</sup> In the interim, Chief Justice Vinson, a Kentucky politician who was not known for his progressive racial views, died suddenly on September 8, 1953.<sup>328</sup> President Eisenhower named Earl Warren, a popular Republican governor of California who had supported the establishment of Japanese internment camps during WWII, as the new Chief Justice.<sup>329</sup> After re-argument, Warren is widely credited with persuading his colleagues to issue a unanimous opinion striking down segregated education.<sup>330</sup> Justice Frankfurter is reported (perhaps apocryphally) to have observed that Chief Justice Vinson’s death in the period between the two oral arguments and his replacement by Warren was the only evidence of God’s existence that he had ever seen.<sup>331</sup>

The precise legal issue in *Brown* was whether state laws mandating “separate but equal” primary education for black and white children violated the Fourteenth Amendment’s command that no person be denied the equal protection of the laws.<sup>332</sup> In 1954, a major premise for the syllogism machine commanding the abolition of “separate but equal” segregated education was hardly self-evident. The literal constitutional text does not yield a single meaning. Originalism was no help. Contemporary opinion at the time of the adoption of the Fourteenth Amendment apparently did not believe that the Amendment forbade “separate but equal”

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325. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

326. *Id.* at 488. For the classic celebration of *Brown*, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976).

327. See KLUGER, *supra* note 326, at 614, 617.

328. *Id.* at 589, 656.

329. *Id.* at 657.

330. See *id.* at 679-99, 708.

331. *Id.* at 656.

332. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88 (1954). The relevant provisions of the Fourteenth Amendment, adopted in 1868, provide: “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.” U.S. CONST. amend. XIV, § 1.

racially segregated education.<sup>333</sup> Stare decisis was no help, either. Indeed, it was an obstacle. In 1896, in *Plessy v. Ferguson*, eight members of the Supreme Court had ruled that requiring separate but equal transportation facilities for black and white railroad passengers was not a denial of the equal protection of the laws, a precedent that had been applied to segregated schools throughout the first half of the twentieth century.<sup>334</sup> Justice Henry Billings Brown, the paragon of judicial virtue who wrote *Plessy*, was an equal-opportunity bigot.<sup>335</sup> He purchased a substitute to take his place in the Civil War, connived a meeting with Jefferson Davis in 1876, and ascribed the biblical refusal of the Jews to carry out Pharaoh's building commands to an aversion to hard work.<sup>336</sup> Thus, whatever the moral force of *Brown*, no intellectually honest case can be made that the Court was merely responding to an objective legal command from prior precedent or from the drafters of the Fourteenth Amendment to abolish racially segregated education.

Not surprisingly, given the ambiguous text, hostile precedent, and racist history, *Brown* does not turn on the legal major premise. Chief Justice Warren's opinion for a unanimous Court adopted a consensus, anodyne reading of the Fourteenth Amendment—one that everyone could agree with—prohibiting state laws about race only if a law actually harmed members of a racial minority.<sup>337</sup> The real action in *Brown* was at the level of the minor premise in deciding, as a matter of constitutional fact, whether “separate but equal” racially segregated education actually harms black children.<sup>338</sup> Because the litigant who wants the court to do something usually has the burden of demonstrating the necessary facts, the *Brown* Court simply assumed that the black challengers had the burden of proving harm, just as *Marbury* had the burden of proving that his commission had actually been signed and sealed before Adams's term ran out.<sup>339</sup> The factual issue was particularly difficult because *Plessy* had purported to find that separate but equal segregation did not impose real harm on the subordinate race, ruling that any psychological harm was a function of an overly sensitive nature.<sup>340</sup>

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333. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1 (1955); see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957 (1995); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995).

334. See *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896); see also *Gong Lum v. Rice*, 275 U.S. 78, 86-87 (1927); *Cumming v. Cnty. Bd. of Educ.*, 175 U.S. 528, 542-44 (1899).

335. See Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553, 555, 591-602 (1973).

336. *Id.*

337. See *Brown*, 347 U.S. at 493-94.

338. See *id.* at 494-95.

339. See *id.*

340. See *id.* (rejecting contrary finding in *Plessy*).

Having announced a noncontroversial legal major premise requiring a showing of harm and having placed the burden of proving harm on the challengers, the Warren Court then proceeded to construct the crucial fact-based minor premise—finding as a constitutional fact that young black children are psychologically harmed by legally mandated segregated education, even when the separate educational facilities are formally equal.<sup>341</sup> The Court rested its factual findings concerning harm largely on several experiments, carried out by Dr. Kenneth Clark, purporting to show a weak self-image among young black children who had been subjected to legally mandated racial segregation.<sup>342</sup> Thus, the syllogism machine in *Brown* operated as follows:

Major premise:

The Fourteenth Amendment forbids states from enacting laws that harm members of a racial minority because of their race.

Minor premise:

Laws mandating separate but equal racially segregated primary education impose psychological harm on black children.

Conclusion:

Laws mandating racially segregated education are unconstitutional.

*Brown* was magnificent morality, but if one assumes that the challengers had the burden of proving actual harm by a preponderance of the evidence, the opinion is not a persuasive operation of the syllogism machine. The Court's factual minor premise about harm may well be right, but it may well be wrong and certainly cannot qualify as objectively correct. Legally mandated racial segregation does, indeed, express the majority's contempt for, and fear of, the minority race. As such, legally mandated racial segregation is deeply immoral and independently unconstitutional. But the psyches of black people are not nearly as fragile as the Supreme Court seemed to believe. Black people, left to themselves (and provided with genuinely equal educational opportunities), will do just fine, thank you. They don't need to associate with whites to build self-worth. Thus, while I am confident that *Brown* was correctly decided, it was not because the Supreme Court was responding to external legal commands or objective facts.

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341. *Id.*

342. *Id.* at 494 & n.11; see Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224, 227-40 (1959).

*Brown* is good constitutional law, even under the syllogism machine, because the burden of proof on the issue of harm (or its absence) properly rested on the State, not the challengers.<sup>343</sup> The modern Fourteenth Amendment constitutional doctrine that ultimately evolved from *Brown* requires the State to demonstrate that any purposive use of racial classifications is necessary to advance a compelling state interest without imposing harm on the target race. If *Brown* were decided today, therefore, the State would bear the burden of demonstrating lack of harm. Because, under a proper allocation of the burden of proof on constitutional fact, it is impossible for the State to prove that racial segregation in public schools does not harm the subordinate race, the fact-based risk of harm would be too great to ignore—unquestionably dooming the practice. In fact, the principal legal legacy of *Brown* (as opposed to its massive political effect) has been to impose a demanding burden of proof on constitutional fact on anyone wishing to use racial criteria in the making of law. Sound familiar? It's the *Brandenburg* error-deflection test in a racial context.<sup>344</sup>

Like *Brown*, the Court in *Roe v. Wade* purported to operate a syllogism machine.<sup>345</sup> As in *Brown*, it was impossible for the *Roe* Court to pretend that an external major premise existed commanding the decriminalization of abortion. As in *Brown*, neither precedent, nor text, nor history clearly supported the existence of a constitutional right to an abortion.<sup>346</sup> The text of the Due Process Clause points in two directions, purporting to protect “liberty,” but also providing protection for “life.”<sup>347</sup> Precedent was equivocal. The Court had protected the right to procreate and to use birth control, but it had not decided whether those cases governed a post-fertilization situation.<sup>348</sup> History was murky. Recent history pointed

343. See *Brown*, 347 U.S. at 494-95. Modern cases challenging purposive legislative efforts to use racial criteria unquestionably place the burden of proving absence of harm on the State. See *supra* text accompanying note 304.

344. *Brown* is correct, as well, because it was the beginning of the end of legislation premised on racial stereotypes. It began the evolution of a new Fourteenth Amendment major premise that invalidates stereotypically racist and gender-based lawmaking without the need to prove harm—a clearly preferable reading of the Fourteenth Amendment. But that new major premise, however welcome, was hardly externally commanded. Perhaps most importantly, *Brown* removed law as a barrier to the only hope for achieving enduring racial understanding—interracial association in the common experience of living. Thus, while freedom of association did not formally make its way into American constitutional law until *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958), three years after *Brown*, it is possible to read—and defend—*Brown* on First Amendment associational grounds. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV 1, 33-35 (1959).

345. *Roe v. Wade*, 410 U.S. 113 (1973).

346. See *supra* notes 332-38 and accompanying text.

347. U.S. CONST. amend. XIV, § 2. The Due Process Clause of the Fourteenth Amendment provides that no person shall be “deprive[d] . . . of life, liberty, or property, without due process of law.” *Id.*

348. While a right of constitutional privacy had been recognized in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, 452-55 (1972) in connection with contraception, the right’s applicability to post-conception settings involving a fetus was—and is—

against a constitutional right to abortion. A majority of the states had banned it.<sup>349</sup> On the other hand, the Founders' history has virtually nothing to say on the subject one way or the other.<sup>350</sup>

Like *Brown*, the *Roe* Court propounded a consensus, anodyne legal major premise, reading the Fourteenth Amendment as forbidding the government from permitting the taking of an innocent life but limiting the government's regulatory power in the absence of such a life.<sup>351</sup> Like *Brown*, the heavy lifting in *Roe* was done at the level of the fact-based minor premise. Justice Blackmun's opinion, influenced by his years as general counsel at the Mayo Clinic,<sup>352</sup> adopted a medically inspired factual sliding scale to measure when life begins, finding as a constitutional fact that a fetus gradually progresses towards life during the gestation period, achieving life at approximately the end of the second trimester—the point at which it was able to survive, unaided, outside the womb.<sup>353</sup> Thus, the syllogism that emerged from *Roe* was the following:

Major premise:

While government must prohibit the taking of an innocent life, the state has limited regulatory power in the absence of such a life.

Minor premise:

A fetus does not attain life until it is capable of existing, unaided, outside the womb—an event that occurs at the beginning of the third trimester of pregnancy.

Conclusion:

During the first two trimesters, government may not prohibit abortions because they do not constitute the taking of a life.

If *Brown*'s foray into social science fact-finding was difficult to square with the syllogism machine, *Roe*'s purported medical fact-finding about when life begins is impossible to defend empirically. No external factual metric exists to determine when life begins precisely because the question is philosophical, not empirical.<sup>354</sup> Like *Brown*, *Roe* is good constitutional law

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bitterly contested. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2067-72 (2011).

349. *Roe*, 410 U.S. at 118 & n.2.

350. See *id.* at 129-47 (canvassing the history of the regulation of abortion).

351. See *id.* at 150, 152-56.

352. The finest biography of Justice Blackmun is LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

353. See *Roe*, 410 U.S. at 163.

354. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927-41 (1973).

under the syllogism machine, not because its minor premise about when life begins is demonstrably correct, but because the risk of erroneous constitutional fact-finding is too great no matter which minor premise is chosen. In the abortion context, it is impossible to impose any fact-based minor premise about when life begins without posing an unacceptably high risk to the constitutional values of life, liberty, and equality.

Until *Roe*, almost every state, in the name of protecting life, had forbidden a woman from terminating an unwanted pregnancy, forcing women to bear the social, medical, and economic costs of unwanted childbearing.<sup>355</sup> Because childbearing imposes a dramatic burden on the ability of women to compete equally with men in the marketplace of talent, unless women can opt out of unwanted reproductive “time outs,” they will always be competing uphill, rendering it impossible to attain equal status with men.<sup>356</sup> It is no coincidence that no society has ever approached gender equity without permitting women to control their reproductive lives.<sup>357</sup> Thus, if the Court imposed a minor premise that life begins at conception, and that turned out to be wrong, the constitutional values of gender equity and personal autonomy would be dealt massive, unnecessary blows.<sup>358</sup> If, on the other hand, the Court imposed a firm minor premise that life begins at some later point during pregnancy, and that turned out to be wrong, the constitutional value of life would be erroneously put in jeopardy. Because all possible minor premises about when life begins (1) are incapable of objective verification and (2) pose unacceptably high risks to constitutionally protected values, the imposition of appropriate error-deflection rules at the level of the minor premise forbids government from imposing any version of the minor premise on a nonbeliever. The state can seek to persuade its citizens about when life begins, but it cannot adopt an official position on the question in order to close the judicial syllogism one way or the other because, in view of the inevitable uncertainty, the risk to a protected constitutional value is simply too great. That means no prohibition of abortion, but it also means no governmentally compelled support for abortion, financial or otherwise. That is just about the untidy legal compromise the Supreme Court has backed into after thirty-five years of agonizing effort.<sup>359</sup>

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355. See *Roe*, 410 U.S. at 118 & n.2.

356. Justice (then-judge) Ginsburg was among the first to understand the deep equality roots of *Roe*. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

357. See *id.* at 1199.

358. See *id.* at 1198-1200.

359. It borders on hubris to purport to summarize the law of abortion, but my reading of cases since *Roe*, including *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding ban on certain procedures in late term abortions as long as adequate alternatives are available); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (applying flexible “undue burden” standard permitting a state to regulate, but not unduly burden, the right to abortion; upholding parental notice requirement as long as adequate judicial bypass exists; upholding twenty-four hour waiting period, including compulsory disclosures

Compared to *Brown* and *Roe*, *Brandenburg* is an easy error-deflection case. Once again, the Court invoked an anodyne major premise: speech cannot be suppressed in the absence of a very significant harm-based justification.<sup>360</sup> Who could disagree with such a major premise? As with *Brown* and *Roe*, the heavy lifting in *Brandenburg* was done by imposing a degree of error deflection about harm in establishing the fact-based minor premise.<sup>361</sup> In *Brown*, an insuperable burden of factual justification was borne by the party who claimed that racial segregation caused no harm to the subordinate race. Under *Roe*, proponents of bans on, or assistance to, abortion face virtually insuperable burdens of persuasion on the question of when life begins.<sup>362</sup> Under *Brandenburg*, proponents of censorship face similar virtually insuperable burdens of proving that speech will actually cause—not merely threaten—extremely serious harm.<sup>363</sup> So, *Brandenburg* is good law, not because it correctly defines a Kantian right, or correctly decodes the constitutional text, but because it does what constitutional courts must—and should—do in hard cases. It imposes a level of error deflection at the level of the minor premise of the syllogism machine that effectively shields freedom of speech from erosion based on improper motive, or potentially erroneous (if plausible) assertions about the constitutional facts establishing the alleged need for, or the short- or long-term consequences of, government censorship.

## VII. CONCLUSION

I began this forced march with a question: Where does the extraordinary power of American constitutional judges come from? I have attempted to demonstrate that the usual *Marbury* defense of judicial review—the syllogism machine—provides a powerful explanation for a good deal of judicial activity, but that crucial areas exist, especially hard constitutional cases, that cannot be explained by such a model. In those

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designed to deter decision to abort fetus; upholding onerous recordkeeping and disclosure regulations as long as identity of patient protected; but invalidating spousal notice requirement as an undue burden); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding ban on abortion counseling by doctors receiving Title X funds); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding ban on government employees performing abortion or use of public facilities to perform abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on federal funds for most abortions); and *Maher v. Roe*, 432 U.S. 464 (1977) (upholding refusal to provide Medicaid benefits for medically unnecessary abortions), persuades me that the state may urge women to avoid abortion and may impose waiting periods and compulsory messaging rules designed to persuade women to change their minds about having an abortion, but may not adopt rules that impose an undue burden on the process. I also read the cases as shielding abortion opponents from having their taxes fund abortions, and as blocking the opponents from preventing others from funding or engaging in the process. In short, under appropriate error-deflection rules, the state cannot adopt a minor premise one way or the other on when life begins.

360. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

361. See *id.* at 447-49.

362. See *supra* notes 358-62 and accompanying text.

363. See *Brandenburg*, 395 U.S. at 447-49.

settings when American judges act beyond the syllogism machine, they often generate and enforce constitutional doctrine that is not intended to define a right, but is designed to deflect error on the motive for—and justification, effect, and consequence of—government regulation encroaching on important constitutional values.

In short, when core constitutional values are in play and an objective external democratic command is lacking, I believe that an American judge should treat the political majority like a gigantic jury and set its verdict aside when the underlying factual evidence in support of the verdict fails to satisfy a demanding burden of persuasion concerning the motive, need, effects, and consequences of a regulation in derogation of constitutional values.