THE CONSTITUTIONAL PROCEDURAL PRINCIPLE: A NORMATIVE MORPHOLOGY FOR GAUGING THREATS TO JUDICIAL INDEPENDENCE

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JUDICIAL INDEPENDENCE

Tara R. Price*

“[The concept of judicial review] has become so ingrained in American law and politics than no one has seriously sought to challenge it.”

“Dear Mr. Mullings: Didn't Newt Gingrich say if he were President he would ignore Supreme Court decisions with which he disagreed?”

“Yes, but you might have missed the word "seriously."”

INTRODUCTION

For more than two hundred years, judicial review has served as the foundation of the American judicial branch. And yet, more than two centuries later, scholars and political figures continue to debate its proper place in American government. Recently, Presidential candidate Newt Gingrich waded into this debate, calling for members of Congress and the President to take stronger actions to check and balance what he termed “judicial supremacy.” Despite Rich

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Galen’s characterizations of these attacks on the concept of judicial review as not being “serious[3],” cries for a weakened judicial branch and insistence on the importance of reining in activist judges are commonplace throughout American history.

As Gingrich and many before him have realized, the President and Congress have much latitude when it comes to influencing the American judicial branch, including the United States Supreme Court. American history has witnessed numerous examples of such efforts. These include both constitutionally impermissible actions—e.g., Nixon’s threat to ignore the Supreme Court’s decision over the release of the Watergate tapes unless the opinion was unanimous[5]—and actions that are constitutionally permissible but perhaps normatively objectionable—e.g., President Roosevelt’s infamous court-packing plan. Importantly, solely because an action is constitutionally permissible does not automatically render it normatively desirable as well. Yes, the American judiciary’s independence could be significantly weakened without violating the Constitution, but what would such a subservient judiciary mean for American government? And, more importantly, is that the America that the Framers designed or in which citizens would want to live?

Plainly, more is required. We must, then, analyze prospective Presidential and congressional actions against the judiciary along a normative spectrum, recognizing that concept of “judicial supremacy” will be discussed in depth in Part I.A.

3 See supra note 1 and accompanying text.

4 See infra note 41.


determining whether an action is constitutionally permissible does not end the inquiry. Rather, we need a basis upon which to determine whether a Presidential or congressional action against the Court is normatively acceptable as well.

In this Article, I propose a framework for determining whether an action by the President or a member of Congress that undermines federal judicial authority would comport with the normative values embodied by our system of government. Part I of this Article begins by examining Newt Gingrich’s position paper outlining his argument for a more modest role for the judicial branch. Then I will analyze others who—like Gingrich—have called for a significantly diminished role for the judiciary under the theory of “departmentalism.” In contrast to Gingrich and these former elected officials, Part II describes the traditional concept of judicial review, tracing its origin and the Framers’ perspectives on its place in American government. Having identified the constitutional boundaries for actions from the President and members of Congress, in Part III of this Article, I offer a spectrum of actions along a normative scale, from the constitutionally and normatively acceptable, to the constitutionally permissible but normatively undesirable, to the constitutionally and normatively objectionable. Part IV illustrates where Gingrich’s proposals and historical examples of Presidents, members of Congress, and other political figures, whose policies proposed to weaken the power of America’s judges, fall along the Constitutional Procedural Principle scale.

I. RECENT CALLS FOR A SUBORDINATE JUDICIARY

A. GINGRICH’S TWENTY-FIRST-CENTURY CONTRACT WITH AMERICA
As a part of his Twenty-First Century Contract with America,\(^7\) former Presidential candidate Newt Gingrich\(^8\) criticized the executive and legislative branches for displaying “passivity” to the judicial branch and allowing the Court to reach its current status of “judicial supremacy.”\(^9\) Gingrich dates his notion of judicial supremacy to 1958,\(^10\) when the Supreme Court decided *Cooper v. Aaron*.\(^11\) In *Cooper*, the Arkansas governor and legislature asserted that the State of Arkansas was not bound by the Supreme Court’s holding in *Brown v. Board of Education*,\(^12\) which had concluded that mandatory segregation of public schoolchildren on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment of the United

\(^7\) The “Twenty-First Century Contract for America” is the label given to a series of white papers by Newt Gingrich on a variety of topics available on his Presidential campaign web site at http://www.newt.org/solutions/.

\(^8\) Newt Gingrich was a candidate for the Republican nomination for President in 2012. See *Election 2012: Republican Delegate Tally*, N.Y. TIMES (Apr. 1, 2012, 12:18 PM), http://elections.nytimes.com/2012/primaries/delegates. Though by April 2012 he lagged behind Mitt Romney and Rick Santorum in total number of delegates, Gingrich did win outright two Southern states: South Carolina and Georgia. *Id.* Out of a former field of eleven candidates, he remained (in April) among the top three in the race for the Republican nomination. *Id.* at http://elections.nytimes.com/2012/primaries/candidates. As a former Speaker of the House of Representatives and a prominent member of one of the two major political parties, his advocacy of curtailing judicial independence and inhibiting judicial review has thrust this long-debated issue back into the spotlight again. Johnathan C. Adler, *Gingrich on Judicial Review*, THE VOLOKH CONSPIRACY (Dec. 18, 2011 8:08 pm), http://volokh.com/2011/12/18/gingrich-on-judicial-review/.

\(^9\) Gingrich, *supra* note 2, at 2. Gingrich defines judicial supremacy as the notion that “courts not only review and apply laws, but also actively seek to modify and create new constitutional law from the bench that the Supreme Court has asserted should be binding on the other two branches.” *Id.*

\(^10\) *Id.* at 4. Gingrich asserts that during the 1950s, the “lawyer class began a grand-scale power grab.” *Id.* at 8.


\(^12\) *Id.* at 4; *Brown v. Board of Education*, 347 U.S. 483 (1954).
States Constitution. In ruling that Arkansas’s governor and legislature were required to follow the Court’s order to desegregate the state’s public schools, the Supreme Court in Cooper declared that “the federal judiciary is supreme in the exposition of the law of the Constitution,” and that this principle has been a “permanent and indispensable feature of our constitutional system” since Marbury v. Madison.

Instead, Gingrich asserts that the Warren Court was rewriting history and that the Justices’ statements declaring the federal judiciary supreme in interpreting the Constitution were “just bluster and puff.” As Gingrich sees it, the Cooper Justices were “manufactur[ing]” facts; “judicial supremacy was not cheerfully embraced in the years after Marbury,” but after Cooper, “the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance.”

Gingrich bristles at the notion that the Supreme Court could issue a “constitutional interpretation [that] is final for all branches of government unless the Court reverses itself in the future or a constitutional amendment is passed.” Such a doctrine, he feels, gives the Court too much power and runs counter to the system of checks and balances constructed by the American

13 Brown, 347 U.S. at 495.

14 Cooper, 358 U.S. at 18 (stating that the Court’s interpretation of the Fourteenth Amendment in Brown was “the supreme law of the land”); see also United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text.”).

15 5 U.S. (1 Cranch) 137 (1803). I examine Marbury and the concept of judicial review in greater detail in Part II of this Article.

16 Gingrich, supra note 2, at 8 (quoting Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 221 (2004)).

17 Id. (quoting Kramer, supra note 15, at 221). I dispute this assertion fully in Part II.

18 Id. at 4.
Framers, who Gingrich asserts “believed that the Supreme Court was the weakest branch” and that the President and Congress “would have ample abilities to check a Supreme Court that exceeded its powers.”

In defining his problem with the current system of judicial review, Gingrich asks the following question: “If the Supreme Court ruled that 2+2=5, would the executive and legislative branches have to agree?” He answers that if such an occurrence were to happen, the “only recourse” to correcting this decision would be to pass a constitutional amendment, a view Gingrich considers “fatally flawed.” Instead, Gingrich posits that “[d]rawing together 290 House members, sixty-seven senators, and thirty-seven states to pass a constitutional amendment is a difficult and time-consuming task,” and not one required of the executive or legislative branches if they disagree with the Court.

In “bring[ing] the Courts back under the Constitution,” Gingrich asserts that waiting for a potential court reversal and passing a constitutional amendment are not the only tools in the executive and legislative branches’ toolbox. Instead, he argues that the executive and

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19 \textit{Id.}

20 \textit{Id.} at 4.

21 \textit{Id.} at 3.

22 \textit{Id.} As an example of the “long” and “difficult” process of amending the Constitution, Gingrich discusses his attempt to pass an amendment requiring a balanced budget for the federal government. \textit{Id.} at 5. He fell two votes short in the Senate, though he did receive a sufficient number of votes in the House of Representatives. \textit{Id.} If the Supreme Court were to issue a ruling saying that 2+2=5, however—aside from the fact that judicial opinions are never mathematically precise—is Gingrich seriously arguing that it would be difficult to persuade members of Congress to vote for a constitutional amendment stating that 2+2=4? Or the state legislatures?

23 \textit{Id.} at 3.
legislative branches can simply “use their own constitutional powers to check and balance what
they believe to be unconstitutional judicial rulings.”²⁴ According to Gingrich, these
constitutional powers fit within a three-pronged framework:

First, the executive and legislative branches can explicitly and emphatically reject the theory of judicial supremacy and undertake anew their obligation to assure themselves, separately and independently, of the constitutionality of all laws and judicial decisions.

Second, when appropriate, the executive and legislative branches can use their constitutional powers to take meaningful actions to check and balance any judgments rendered by the judicial branch that they believe to be unconstitutional. . . .

Third, the executive and legislative branches should employ an interpretive approach of originalism in their assessment of the constitutionality of federal laws and judicial decisions.²⁵

Under Gingrich’s theory, the oath to uphold the Constitution taken by the President and each member of Congress gives the political branches the power to take a number of actions against the judiciary, including each branch’s ability to determine for itself whether a particular action is constitutional.²⁶ In essence, Gingrich’s vision of American government changes the current system of separation of powers “into a playground game” where the vote of two out of three branches determines the winner.²⁷ Forget that more than two centuries of jurisprudence has determined a person’s rights and freedoms to be under the Bill of Rights; under Gingrich’s plan,

²⁴ Id. at 4.

²⁵ Id. at 6 (emphasis added).

²⁶ Id. at 19, 22.

if the President and Congress decide that person does not have certain rights, no court in the country would be able to offer her relief.\footnote{28}{See id. (“What Gingrich really is saying, under the guise of blasting ‘elitist’ judges, is that the Bill of Rights would no longer be used to protect individual rights because the judges who help ensure those (often unpopular) rights can be outvoted by the White House and the Congress.”).} Even if the Supreme Court has held that a law is unconstitutional, the President and Congress could “choose to ignore a Court decision.”\footnote{29}{Gingrich, supra note 2, at 22.}

Complicating Gingrich’s proposal further is his failure to provide precise standards for when such a radical policy—simply ignoring the Court—would be appropriate.\footnote{30}{Id.} He asserts that if Congress limited federal court jurisdiction over a statute on military commissions and the federal courts determined that such a statute was unconstitutional, the President could constitutionally ignore such a ruling because “the Congress that enacted the law presumptively believed it was constitutional.”\footnote{31}{Id.} But such an argument cannot hold water. Applying the same standards, it is still doubtful that Gingrich would agree that President Bill Clinton would have had the constitutional authority to ignore the Supreme Court’s decision in\textit{Bush v. Gore}\footnote{32}{531 U.S. 98 (2000).} and order the recount to continue in Florida.\footnote{33}{See Galen, supra note 1.} Or, to take a more recent Court decision, it is doubtful that Gingrich would agree that President Barack Obama would have the authority to ignore a decision from the Supreme Court holding the Patient Protection and Affordable Care Act\footnote{34}{Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119.}
unconstitutional. This example illustrates the danger of proposing such a radical policy without stringent standards. Congress certainly believed the Affordable Care Act was constitutional when it was passed—not to mention the President, who signed the legislation. In fact, under Gingrich’s theory—since we already have two of the branches in agreement—why would we even need the Supreme Court to render a decision in the first place? Any bill that passes Congress and earns the President’s signature automatically becomes untouchable.

Fundamentally, if the Supreme Court is to decide issues that the President and Congress can well decide for themselves, then what exactly is the purpose of the Court? It would seem to be quite a waste of federal tax dollars to create and maintain the federal judicial system to issue orders in cases when members of Congress and the President have already determined the proper outcome. Under Gingrich’s theory that two is greater than one, the Court is rendered little more

35 In an interview, Gingrich’s reply to this suggestion was that Congress could eliminate the President’s funding in an effort to force him to obey the Court’s ultimate decision. Trip Gabriel, Gingrich Looks to Make “Activist” Judges an Issue, THE CAUCUS: THE POLITICS & GOVERNMENT BLOG OF THE TIMES (Dec. 17, 2011 2:40 PM), http://thecaucus.blogs.nytimes.com/2011/12/17/gingrich-looks-to-make-activist-judges-an-issue/. This reply partially illustrates that Gingrich—in reality—is only looking to enforce the Court decisions with which he agrees. He dodges the real question by suggesting that Congress would be opposed if President Obama were to ignore the Court’s decision about the constitutionality of the Affordable Healthcare Act, while at the same time, Gingrich’s own proposal calls for ignoring Court decisions on issues such as abortion or foreign powers. Curiously, for Gingrich to suggest that Congress would oppose President Obama for ignoring the Court after Congress originally passed the Affordable Healthcare Act a few short years ago suggests that, under Gingrich’s theory, any of the branches of government could change its mind about which federal statutes are and are not constitutional with each new election. Such a system of government undoubtedly would lead to increased chaos and instability and only serve to heighten the current politicization of constitutional issues.

36 For that matter, for Congress to pass any law, it would follow that Congress presumptively believed it to be unconstitutional.

than an extraneous appendage of American government—important enough to make decisions independently only when the President or Congress are not concerned about the outcome. Further, Gingrich’s plan nonsensically allows the Court to go through the motions when the President and Congress are concerned with the outcome, but holds the individual Justices and the Court as an institution itself subject to punishment for deciding the case “the wrong way.” One need not spend much time envisioning Gingrich’s concept of a subservient judicial branch before realizing that such a model of American government would collapse on itself.

To be fair, Gingrich’s proposal has drawn criticism from both the Democratic and Republican Parties. 38 Michael B. Mukasey, the United States Attorney General under President George W. Bush, has criticized Gingrich’s plan as something that “would lead us to become a banana republic” because each new political regime would be able to re-staff the Court with its own appointees and ignore any previous decisions with which it disagreed. 39 Perhaps not surprisingly, at least two of Gingrich’s Republican opponents have attacked his proposal: former Massachusetts Governor Mitt Romney has countered that Congress should simply pass constitutional amendments if it wishes to “rein in excessive judges,” and former Congressman Ron Paul has criticized Gingrich’s proposal as “a real affront to the separation of the powers.” 40


40 Gardner & DeLong, supra note 37.
Gingrich in turn dismisses his critics—particularly the ones who are lawyers—as “behaving exactly like law schools, which have overly empowered lawyers to think that they can dictate to the rest of us.” As such, Gingrich’s assault on the judiciary appears to be as much an assault on the legal profession itself.

Despite the overwhelming criticism of many of the ideas within Gingrich’s white paper, his proposal is important for two reasons. First, he is hardly the first person in American history to articulate these theories and proposals, which this Article presents in more depth in Part I.B. Second, the examples he provides within his white paper of the constitutional actions that the President or Congress could take against the federal judiciary are helpful for our main objective: the creation of a framework to identify a normative value system within the separation of powers, which will be discussed more in Part IV.

B. OTHER DEPARTMENTALIST ARGUMENTS IN THE TWENTIETH CENTURY

Though some aspects of Gingrich’s proposal received criticism along the campaign trail, he is but one of many Americans who have called for a reduced judicial role in defining the Constitution. Gingrich’s proposal is built upon the idea of departmentalism, the concept that “‘each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties.’” Under the theory of departmentalism, each branch of government is “supreme within its own interpretive sphere.”

41 Gabriel, supra note 34.

On certain levels, departmentalism can co-exist and has co-existed with the concept of judicial review.\textsuperscript{45} For example, departmental discretion exists—and trumps the idea that the Court is the final arbiter of the Constitution—when the Court refuses to issue a decision because the case involves a political question.\textsuperscript{46}

Scholars differ in their analysis of the interplay between these two paradigms. Professor Herbert Wechsler argues that unless “the Constitution has committed the determination of the issue to another agency of government than the courts,” the courts may not abstain from hearing the case but have the obligation to render a decision.\textsuperscript{47} Professor Martin H. Redish asserts if we

\begin{flushleft}

44 Id.


46 See id. at 1491-92. The Court has previously held that a case raises the political question doctrine—and will abstain from issuing a decision on the merits—when it finds that one of six formulations is present:

\begin{quote}
[A] textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

\end{quote}

47 Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 7-8 (1959). Wechsler does not take issue with the Court’s discretion to grant jurisdiction, but rather
accept “that judicial review plays a legitimate role in a constitutional democracy, we must 
abandon the political question doctrine, in all of its manifestations.” 48 For Redish, “if the Court 
is to perform the essential function of protector against a lawless government, the Court must 
draw the final constitutional calculus.” 49

Other scholars, such as Professors Fritz W. Scharpf and Alexander M. Bickel, seem to 
tolerate this tension. Professor Scharpf recognizes that the concept of a broad political question 
doctrine is a threat to judicial review because it allows the Court to disregard its interpretive duty 
by labeling cases as too political. 50 Scharpf argues, however, that “[t]his difficulty would 
disappear . . . if it could be shown” that the Court’s “deference is itself compelled by the 
constitutional allocation of competence to decide.” 51 Professor Bickel, while also recognizing a 
conflict between the two doctrines, nonetheless asserts that the political question doctrine 
“simply resists being domesticated,” and gives the Court the ability to recognize that there “are 
discretionary functions of the political institutions, which are unprincipled on principle, because 
we think ‘that the job is better done without rules.’ ” 52

with the Court’s ability to abstain once accepting jurisdiction based on the “importunate[ness]” 
of the issue. Id. at 6, 8.

48 Martin H. Redish, Judicial Review and the ‘Political Question’, 79 NW. U. L. REV. 1031, 
1059-60 (1985) (objecting that the moral cost is too high for the executive or legislative branches to be allowed to behave unconstitutionally without judicial review).

49 Id. at 1060 (arguing that the Court’s occasional abdication of its responsibility of judicial review makes it “logically difficult” to determine when the political question doctrine should apply).

50 Fritz W. Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE 

51 Id.

52 Alexander M. Bickel, The Supreme Court 1960 Term Forward: The Passive Virtues, 75
Seizing in part on this tension between the political question doctrine and the concept of judicial review, Professor Mark Tushnet advocates that departmentalism should swallow up and replace the concept of judicial supremacy. For Tushnet, if members of Congress feels that the Court has “misinterpreted the Constitution, their oath allows them—indeed, it may require them—to disregard” Court decisions with which they disagree. Tushnet, unlike Gingrich, at least recognizes that Cooper is not a particularly persuasive example for opposing judicial review. The Governor of Arkansas was resisting desegregation efforts, and his resistance bred threats of violence and civil unrest from some Arkansas residents against anyone who tried to desegregate public schools (even against the children themselves). To counter this, Tushnet points to Dred Scott v. Sanford, where the Court held that Congress could not restrict the expansion of slavery or prevent slave owners from taking their slaves into newly acquired

Harv. L. Rev. 40, 46, 76 (1961). Bickel further defines the basis of the political question doctrine as:

[T]he court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum (“in a mature democracy”), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

Id. at 75.

53 TUSHNET, supra note 41, at 16.

54 Id. at 6.

55 Id. at 8 (stating that the governor had “provoked a real crisis in law and order”).

56 60 U.S. 393 (1856).
territories of the United States.\textsuperscript{57} He also highlights the comments of President Abraham Lincoln, who during his First Inaugural address stated that decisions such as \textit{Dred Scott} were only “binding \ldots upon the parties” and “limited to that particular case.”\textsuperscript{58} For Lincoln, if the Supreme Court were to have the power to “irrevocably fix[]” the law for all future cases, then “the people will have ceased to be their own rulers.”\textsuperscript{59}

But even Professor Tushnet admits that his philosophy of allowing the individual branches to determine the constitutionality of their own actions has limits. He recalls the remark that President Andrew Jackson allegedly made\textsuperscript{60} following the Court’s decision in \textit{Worcester v. Georgia}.\textsuperscript{61} After the Court held that a Georgia statute was unconstitutional,\textsuperscript{62} President Jackson allegedly stated that Chief Justice “John Marshall has made his decision; now let him enforce it.”\textsuperscript{63} Tushnet, however, asserts that President Jackson would have been wrong to defy such a

\textsuperscript{57} \textsc{Tushnet}, \textit{supra} note 41, at 8. Tushnet cannot logically ignore \textit{Cooper} while trying to assert that \textit{Dred Scott} proves that judicial review is flawed. To be fair, \textit{Dred Scott} must go down as the Court’s first disastrous attempt to settle a major policy issue” that improperly “struck at the fundamental principles of the nation,” such as “the equality of rights among men.” \textsc{Christopher Wolfe}, \textsc{The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law}, 70 (1986). However, without the concept of judicial review enunciated in \textit{Cooper}, a departmentalist theory would have allowed Arkansas to continue public school segregation, perhaps indefinitely.

\textsuperscript{58} \textit{Id.} at 9.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} There is some doubt about whether President Jackson stated this often-quoted remark. \textit{See}, \textit{e.g.}, \textsc{Paul F. Boller & John H. George, They Never Said It: A Book of Fake Quotes, Misquotes, and Misleading Attributions} 53 (1990).


\textsuperscript{62} \textit{Id.} at 595-96.

\textsuperscript{63} \textsc{Tushnet}, \textit{supra} note 41, at 14; \textit{see also} \textsc{David Loth, Chief Justice John Marshall and
judgment because to do so would have contradicted principles of liberty found within the Declaration of Independence.\textsuperscript{64} Tushnet suggests—though apparently Gingrich does not—that the President or Congress could not constitutionally defy a decision of the Court unless “the Declaration’s human rights principles are at stake” or if the proposed executive or legislative action itself would contradict those principles.\textsuperscript{65}

To help readers better understand when his proposed executive or legislative limitation is warranted and when it is not, Tushnet divides the Constitution into two categories: a “thin” and a “thick” Constitution.\textsuperscript{66} The thick Constitution includes the provisions about how to organize the American government, such as federalism and separations of power.\textsuperscript{67} The thin Constitution includes only the “fundamental guarantees of equality, freedom of expression, and liberty,” which do not include specific provisions such as the First Amendment or the Fourteenth Amendment’s Equal Protection Clause.\textsuperscript{68} Tushnet admits that he purposely excludes specific provisions of the Constitution and only focuses on generalities so that he can assert that his thin Constitution does not include any of the Court’s pronouncements about what these specific provisions mean.\textsuperscript{69} Tushnet argues that the President, Congress, and everyday Americans can decide for themselves what the thin Constitution really means and how ideas such as “free

\textsuperscript{64} Id.

\textsuperscript{65} Id. at 13.

\textsuperscript{66} Id. at 9.

\textsuperscript{67} Id. at 9-11.

\textsuperscript{68} Id. at 11.

\textsuperscript{69} Id.
expression or equality” should be interpreted. Because this thin Constitution is not “self-interpreting,” Tushnet submits that the idea of judicial supremacy should fail because public officials can advance their own understanding of what is constitutional, even if it provokes a constitutional crisis.

Other departmentalists take the theory even further, arguing that the executive branch, for example, has the authority to interpret the law on a co-equal level with the Supreme Court. Professor Michael Stokes Paulsen argues that the President, specifically, has the power of executive review: the independent ability to interpret treaties, federal statutes, and the Constitution, regardless of what the Court may decide. Paulsen recognizes that his theory makes the executive “the most dangerous branch,” in large part because the judicial branch relies upon the executive to “execute or decline to execute judgments rendered by courts.” However, Paulsen asserts that his theory should not be considered “executive supremacy,” because he does not advocate that the executive tell the other branches what they must do in their own departments.

70 Id.
71 Id. at 13.
72 See, e.g., Paulsen, supra note 41, at 221.
73 Id.
74 Id. at 223.
75 Id. at 302. Under Paulsen’s theory that the President and Congress can independently interpret the laws in their own departments—like under Gingrich’s proposal—one wonders exactly what the purpose of the Court is. The Court does not rule on the constitutionality of statutes for its own purposes, but rather to uphold the rights and privileges of the American citizens in private disputes and against executive or legislative encroachment. See supra text in Part I.A., at 8-9.
As evidence of his theory of executive review in action, Paulsen cites President Lincoln’s refusal to obey Chief Justice Taney’s order in *Ex Parte Merryman.* After the beginning of the Civil War, even though Congress was in recess, President Lincoln authorized his Union troops to suspend the writ of habeas corpus if they felt it necessary for public safety. In Baltimore, Union troops arrested Lieutenant John Merryman, who was a member of a cavalry unit responsible for burning bridges and tearing down telegraph wires. Through his legal counsel, Merryman petitioned for a writ of habeas corpus, which Chief Justice Taney issued on May 26, 1861, commanding the general of Fort McHenry to appear the following day. Neither the general nor Merryman appeared, and Taney issued a citation of contempt, which was refused by Union troops at the Fort’s gate. In the *Merryman* opinion, after holding that the President had no constitutional authority to suspend the writ of habeas corpus, Chief Justice Taney wrote: “I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.” Paulsen paints a picture of Chief Justice Taney as both a helpless member of the judiciary and a “martyr”; he suspected that President Lincoln would ignore his order and he reportedly expected to be arrested for it.

76 17 F. Cas. 144 (C.C.D. Md. 1861).

77 Paulsen, supra note 41, at 278. Lincoln was apparently concerned about the city of Baltimore, where mob violence had previously prevented Union troops from reaching the nation’s capital. *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Merryman,* 17 F. Cas. at 153.
President Lincoln refused to release Merryman and instead attempted to explain his actions to Congress in July, but by then the President’s actions were seen as an embarrassment.\footnote{83}{Paulsen, supra note 41, at 278. Paulsen, however, provides no citation for his assertion that Justice Taney expected to be arrested for suggesting that the President was required to execute the laws as decided by the judicial branch. \textit{Id}.}

Executive review, as Paulsen has advocated it, also collapses inward upon itself on further consideration. Analyzing President Lincoln’s actions in isolation—from the perspective of how his decision affected the executive branch and Union Army alone—perhaps Paulsen’s theory would survive scrutiny. The problem, however, is that the President’s decisions in \textit{Merryman} did not occur in isolation—just as the President’s decisions in many other areas of his administration affected people around the country. When President Lincoln defied Chief Justice Taney’s order, he was reaching beyond his executive branch sphere into the judicial branch’s sphere to interfere in the personal life of an American citizen. Further, as previously noted in criticism of Professor Tushnet, President Lincoln was not exercising any power that has textual support in the Constitution. While the President may have the responsibility to enforce the laws, that responsibility does not automatically bring with it the ability of a monarch to pick and choose which existing laws will be enforced. Such a notion would elevate the President’s authority above the Constitution and move American government closer to the English structure against which the Founding Fathers fought so strongly.

Additionally, even if these actions were constitutional, theories such as departmentalism and executive review would still leave us in a quandary. While their proponents attempt to articulate the constitutionality of their theories, we are left unsatisfied with a system of government where all the branches independently determine the constitutionality of their actions.
and the laws. As we have discussed, this would even further politicize the American Constitution, whose meaning would change each election cycle: potentially every two or four years. Consider Professor Alexander M. Bickel’s take on how the stability of the Court contrasts with the volatility of the executive branch:

The Court is seen as a continuum. It is never, like other institutions, renewed at a single stroke. No one or two changes on the Court, not even if they include the advent of a new Chief Justice, are apt to be as immediately momentous as a turnover in the presidency. To the extent that they are instruments of decisive change, Justices are time bombs, not warheads that explode on impact. . . . [O]n the whole, the movements of the Court are not sudden and not suddenly affected by new appointments. Continuity is a chief concern of the Court, as it is the main reason for the Court’s place in the hearts of its countrymen.84

While departmentalism may produce greater public debate and increased executive and legislative involvement in interpreting the Constitution, it certainly would not produce a stable American society where citizens and businesses could be certain of their rights. Such uncertainty could result in the chilling of important fundamental guarantees of liberty, as various Presidential and congressional administrations would no doubt disagree as to the proper scope and extent of individual rights.

II. JUDICIAL REVIEW

Conversely, judicial review provides the stability in constitutional interpretation that departmentalist theories lack. While departmentalists like Tushnet and Gingrich may bristle at the idea that the judicial branch is charged with interpreting the Constitution, this idea did not

originate in *Aaron v. Cooper*. In fact, a brief review of history demonstrates that it did not originate in *Marbury v. Madison*\(^85\) either.

From the outset, we should acknowledge that the Constitution does not explicitly grant the judicial branch the concept of judicial review. Neither, however, are many other concepts that since have been long recognized as inherent in our constitutional principles.\(^86\) Instructively, “Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained.”\(^87\) Chief Justice John Marshall’s summoning, shaping, and maintaining evidenced in *Marbury* arose from the American colonial experience.

Prior to the American colonial experiment, England, which did not have (and still lacks) a written constitution, had embraced the concept of legislative supremacy.\(^88\) Without a written constitution, the acts of Parliament were the supreme law of the land, and the English courts could not rule them contrary to any higher rule of law.\(^89\) The Revolutionary War era, however, led to American colonists desiring to appeal to a “higher law” by which to challenge the authority of acts of the British King or Parliament (or their American leaders, for that matter).\(^90\)

\(^85\) 5 U.S. (1 Cranch) 137 (1803).

\(^86\) One example is the concept of state sovereign immunity, which will be discussed further at *infra* notes 154-58 and accompanying text.

\(^87\) *BICKEL*, supra note 83, at 1.

\(^88\) *WOLFE*, supra note 56, at 74.

\(^89\) *Id*.

\(^90\) *Id*.
After the war, the separate state constitutions were seen as the “higher law” the colonists had sought.  

In early exercises of judicial review before *Marbury*, state judges were invoking their respective state constitutions when pronouncing acts of the state legislatures void.

During the constitutional convention, the majority of Founders who spoke on the subject of judicial review supported it. Despite isolated opposition, it remains “as clear as such matters can be that the Framers of the Constitution specifically . . . expected that the federal courts would assume a power . . . to pass on the constitutionality of actions of the Congress and the President, as well as of the several states.”

Scholars such as Raoul Berger, “who h[ave] studied the debates of the ratifying conventions with considerable care, h[ave] concluded that . . . no voice was raised in favor of legislative supremacy . . . [and] that judicial review . . . [was] regarded ‘as a necessary instrument of the new system [and] was taken for granted.’” For example, James Wilson stated in the constitutional debates that “[i]f a law should be made inconsistent with those powers vested by [the Constitution] in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to

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91 Id.


93 Id.

94 BICKEL, supra note 82, at 15 (stating that “not even a colorable showing of decisive historical evidence to the contrary can be made”). Bickel continues that “at worst it may be said that the intentions of the Framers” were vague and “that it will never be entirely clear just exactly where the collective judgment . . . came to rest.” Id. For Bickel, the fact that one cannot prove that the Framers opposed judicial review “is decisive.” Id.

95 HASKINS & JOHNSON, supra note 91, at 187-88, 188 n.26 (quoting RAOUl BERGER, CONGRESS V. THE SUPREME COURT 49 (1969)).
be null and void; for the power of the Constitution predominates.”

Future Chief Justice John Marshall, at the Virginia ratifying convention, declared that if Congress were to exceed its power to act under the Constitution, “it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void.”

Further, Patrick Henry, known as a radical and a leading anti-Federalist during colonial times, asserted at the Virginia Convention that the “highest encomium” of the United States would be for the judiciary to oppose unconstitutional acts of Congress.

Additionally, Alexander Hamilton offers a compelling argument for the power of judicial review (as well as the importance of the independence of the judiciary) in The Federalist No. 78. In his essay answering the complaints of the Anti-Federalists, Hamilton refers to judges as “faithful guardians of the Constitution,” perhaps an allusion to Plato’s philosopher kings whose role was to preserve justice in the Republic. Contrary to the later arguments from

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97 Id. (citing ELLIOT, supra note 94, at 553).

98 Id. (citing ELLIOT, supra note 94, at 325).

99 THE FEDERALIST NO. 78 (Alexander Hamilton). The Federalist Papers were a series of essays published in New York newspapers addressed “To the People of the State of New York” under the pseudonym Publius. Id. at viii-x (Clinton Rossiter ed., 2003). Hamilton, aided by James Madison and John Jay, wrote about the merits of the proposed Constitution and urged the people to celebrate and support its ratification. Id. at viii-ix. Nearly forty years after the essays were first published, President Thomas Jefferson “endorsed The Federalist as ‘an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its general meaning.’ ” Id. at ix.

100 Id. at 469.

departmentalists, Hamilton explicitly stated that the legislative branch should not be the “constitutional judges of their own powers.” Instead, Hamilton stated:

> It is far more rational to suppose[] that the courts were designed to be an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

For Hamilton, departmentalism runs completely counter to the American system of government; absent constitutional authority, legislators were simply not to judge the constitutionality of their own actions. Not only are judges supposed to determine the meaning of the Constitution, it is also their duty to determine the meaning of legislative acts as well. Such an important role, however, did not make the judicial branch superior to the legislative branch. Rather, it meant that “the power of the people is superior to both,” and that “where the

102 See supra Part I. A. & B.

103 Federalist, supra note 92, at 466 (providing that the Legislature’s opinion cannot be binding on the other branches without specific constitutional provisions expressly so stating).

104 Id.

105 See id.

106 Id.
will of the legislature . . . stands in opposition to that of the people . . . the judges ought to be governed by the latter rather than the former.”¹⁰⁷

But what about the concern that judges might substitute their own will and strike down constitutional legislative statutes? Hamilton counters that such a concern should “be of no weight” to the argument against judicial review for two reasons: first, because those judges would be acting wrongly; and second, because a judge could be faced with that temptation in deciding any lawsuit, even where a constitutional question is not presented.¹⁰⁸ Even if such an episode occasionally occurred, for Hamilton the logic of this argument pointed to having any judges at all.¹⁰⁹

Hamilton recognized that such a system “would require an uncommon portion of fortitude” for judges who guarded the Constitution—and thus, the people—against “legislative invasions . . . [that were] instigated by the major voice of the community.”¹¹⁰ For these reasons, judges would need lifetime appointments (provided good behavior) and fixed provisions to protect themselves from caving to the will of the majority against the binding law of the Constitution.¹¹¹ These provisions providing for the independence of the judiciary should not be feared but celebrated. Hamilton’s assertions make clear that courts are doing more than just

¹⁰⁷ Id.

¹⁰⁸ Id. at 467.

¹⁰⁹ Id.; see also WOLFE, supra note 56, at 75.

¹¹⁰ THE FEDERALIST, supra note 92, at 468-69.

¹¹¹ Id. at 470-71.
deciding individual cases; judges are providing an authoritative interpretation of the law that is binding on the political branches.\textsuperscript{112}

Even though state judges had already been exercising judicial review,\textsuperscript{113} federal judges first exercised judicial review in the 1790s in \textit{Hayburn's case}.\textsuperscript{114} In three separate circuits, Justices of the Supreme Court—sitting as circuit judges—refused to hear claims from disabled Veterans of the Revolutionary War under a congressional Act that subjected any court decision to executive and congressional review.\textsuperscript{115} This refusal to follow a congressional Act because it conflicted with the constitutional scheme of separation of powers\textsuperscript{116} can be seen as an early exercise of judicial review, albeit not at the Supreme Court itself. The Justices agreed to hear the case at the Supreme Court, and the Court decided to take the case under advisement and held it over until the next term.\textsuperscript{117} Before the next term of the Supreme Court had begun, Congress had amended its statute to provide another mechanism to compensation the veterans, and the Court’s decision had become moot.\textsuperscript{118}

By the time of \textit{Marbury}, the Supreme Court had also previously reviewed the constitutionality of state legislative acts. In \textit{Wilson v. Mason},\textsuperscript{119} the Supreme Court heard a land

\textsuperscript{112} WOLFE, \textit{supra} note 56, at 77-78.

\textsuperscript{113} See \textit{supra} note 89 and accompanying text.

\textsuperscript{114} Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792); WOLFE, \textit{supra} note 56, at 80.

\textsuperscript{115} REDISH, \textit{supra} note 47, at 189-90.

\textsuperscript{116} See Hayburn's Case, 2 U.S. at 410.

\textsuperscript{117} Hayburn's Case, 2 U.S. at 409.

\textsuperscript{118} See id. at 409-10.
dispute between two private citizens over the ownership of 8,400 acres formerly within Virginia (when the State used to include Kentucky).\(^{120}\) Mason prevailed in the district court and sought a writ of error to the Supreme Court,\(^{121}\) despite a Virginia law that prohibited such appellate review over state land caveat decisions.\(^{122}\) The Supreme Court ruled in favor of Wilson,\(^{123}\) but to reach a decision on the merits, it would have been required to conclude that the state law prohibiting the Court’s review was void.\(^{124}\)

The Court also reviewed the constitutionality of a congressional statute levying carriage taxes in *Hylton v. United States*,\(^{125}\) but ultimately found the statute constitutional. By undertaking the constitutional review of a statute in *Hylton*, the Justices were tacitly asserting that the principle of judicial review existed, for if the Court had determined that the tax was a direct tax, it would have been considered a congressional tax specifically prohibited by the Constitution.\(^{126}\)

*Marbury*’s uniqueness, then, is not that it was the first case to employ the principle of judicial review, but rather that it was the first case in which the Supreme Court held that a

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\(^{119}\) 5 U.S. (1 Cranch) 45 (1801).

\(^{120}\) *Id.* at 45.

\(^{121}\) *Id.* at 54.

\(^{122}\) *Id.* at 58.

\(^{123}\) *Id.* at 102.

\(^{124}\) *See id.* at 59.

\(^{125}\) 3 U.S. (3 Dall.) 171 (1796).

\(^{126}\) *See id.* at 172.
More than two hundred years later, the facts of \textit{Marbury} are well-known. After losing reelection as President of the United States, John Adams made a number of “midnight” appointments, appointing forty-two justices of the peace in an attempt to keep the Federalist Party potent in some part of American government. The appointees were confirmed one day before the national government turned over to the Anti-Federalists, who politically were known as Republicans, and Thomas Jefferson took office as the third President of the United States. John Marshall, who President Adams recently appointed Chief Justice of the Supreme Court, was finishing his last day as Adams’s Secretary of State and was responsible for making and delivering the commissions to the newly confirmed justices. By midnight of March 3, 1801, William Marbury (and at least three others) still had not received their commissions; President Jefferson instructed James Madison—the new Secretary of State—to refuse to deliver any remaining commissions. Marbury sought a writ of mandamus from the Supreme Court to require Madison to deliver his commission.

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\textsuperscript{127} See \textit{Wolfe}, \textit{supra} note 56, at 80; see also \textit{Haskins \& Johnson}, \textit{supra} note 91, at 190 (“[T]he idea of judicial review was hardly a new one when \textit{Marbury} was decided. What was new was that the Supreme Court asserted that power, and that it did so for the first time in 1803.”)


\textsuperscript{129} \textit{Redish}, \textit{supra} note 47, at 12 (citing Alstyne, \textit{supra} note 126).

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 137 (1803).}
President Jefferson, much like the departmentalist scholars previously discussed, did not believe that the Court could issue orders to executive branch officials. In fact, Madison even refused to show up at the Supreme Court to argue his side of the case. The Republicans simply believed there was no point in even paying attention to the case, since any order would require the executive branch’s assent to enforce, and President Jefferson was not about to enforce a Supreme Court order requiring his Secretary of State to deliver a commission to a Federalist appointee.

Chief Justice Marshall analyzed the case by answering three questions: 1) “Has the applicant a right to the commission he demands?”; 2) “If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”; and 3) “If they do afford him a remedy, is it a mandamus issuing from this court?” By framing the case in this manner, Chief Justice Marshall was able to resolve the case’s constitutional merits before disposing of the case through the jurisdictional issue. And by evaluating the constitutional merits of the case, Chief Justice Marshall is able to make clear the Court’s declaration that it has the power and the duty to rein in the political branches if they overstep their constitutional boundaries and infringe on individual liberties. At the time of Marbury, the United States was less than two decades old, and Chief Justice Marshall was concerned with more than just deciding the parties’ individual

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133 See WOLFE, supra note 56, at 80.

134 Id.

135 See id.

136 Marbury, 5 U.S. at 154.

137 See WOLFE, supra note 56, at 80-81, 84-85.
rights. Rather, he knew that the meaning of the Constitution was still being contested and debated, particularly when issues arose about the nation’s fundamental principles. Any opinion involving constitutional law would have “to be defended to the nation at large.” As Chief Justice Marshall would later write in McCulloch v. Maryland, “we must never forget that it is a constitution we are expounding.”

While analytically moving through the above three questions, Chief Justice Marshall was also weaving through his opinion his rationale for and defense of judicial review. He stated that “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” For Chief Justice Marshall, laws conferring legal rights must have legal remedies, and it was the Court’s role to protect individual rights by providing these legal remedies when they were warranted, even if the loss of those rights was the result of an action from one of the political branches.

After thoroughly detailing why President Jefferson was wrong to deny Marbury his commission, Chief Justice Marshall addressed whether the Supreme Court could provide him with his requested writ of mandamus. Marbury was suing in the Supreme Court because

138 Id. at 87.
139 Id.
140 Id.
141 17 U.S. 316 (1819).
142 Id. at 407.
143 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
144 Id. at 163-64.
Congress’s Judiciary Act of 1789 authorized the Supreme Court to issue writs of mandamus. While Marbury’s attorney argued that Congress could expand the Court’s original jurisdiction, Chief Justice Marshall disagreed. The Constitution specifically details the original jurisdiction of the Supreme Court and provides that the appellate jurisdiction of the Court can be altered as Congress determines. Because the Constitution must be the supreme law of the land, if a congressional act were to conflict with the Constitution by changing the Court’s original jurisdiction, it would be “the very essence of judicial duty” to hold that the Constitution “must govern the case.” Thus, Marbury did not receive a mandamus—not because he was not entitled to one but because the Judiciary Act of 1789, by expanding the original jurisdiction of the Supreme Court, was unconstitutional. Marbury had simply sued for his writ of mandamus in the wrong court.

Chief Justice Marshall’s several pages of criticism of President Jefferson’s refusal to deliver the commission did not go unnoticed: “President Jefferson was furious” that he was so

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145 WOLFE, supra note 56, at 81. Section 13 of the Judiciary Act was at least ambiguous, however, as to whether it conferred original jurisdiction on the Court in mandamus cases. It’s widely believed that Marshall pulled a fast one in setting up a collision between the Act and Article III by willfully construing the former in this way. See, e.g., Robert McCloskey, THE AMERICAN SUPREME COURT (1960).

146 Id. at 81-82.

147 See CONST., Art. III, § 2.

148 Marbury, 5 U.S. at 178. A judge could not “close one’s eyes to the Constitution while applying a law made by the Legislature,” for this “‘would subvert the very foundation of all written constitutions.’” HASKINS & JOHNSON, supra note 91, at 204 (quoting Marbury, 5 U.S. at 178). Indeed, Justice Frankfurter has stated that Chief Justice Marshall’s ruling in Marbury—providing the rationale for judicial review—“has been deemed by the great English speaking courts an indispensible, implied characteristic of a written constitution.” Felix Frankfurter, John Marshall and the Judicial Function, 69 HARV. L. REV. 217, 219 (1955).

149 Marbury, 5 U.S. at 180.
publicly disparaged. While some have criticized Chief Justice Marshall for providing an opinion on the merits of the case when *Marbury* could have been disposed of through a jurisdictional dismissal at the outset, Chief Justice Marshall wanted to “show that the judiciary would not cower before the political branches” and that President Jefferson was not above the law. Federalists, such as Chief Justice Marshall, were concerned that the recent Anti-Federalist takeover of government would lead President Jefferson to “assert that he was literally above the law because he had the mandate of the ‘people’ behind him.” A brief dismissal of the case on jurisdictional grounds would have been seen as “the act of a fearful judiciary bending before a triumphant and hostile party that was dominating the legislative and executive branches.” Instead, while avoiding a direct conflict with President Jefferson by denying Marbury his requested relief, Chief Justice Marshall was determined to establish a strong and independent judiciary, one that would not recoil in fear of the other branches.

Importantly, however, President Jefferson did not object to Chief Justice Marshall’s statutory interpretation of the Judiciary Act of 1789 and the Constitution, nor the Court’s

150 WOLFE, supra note 56, at 87.
151 *Id.* at 84-87.
152 *Id.* at 88.
153 HASKINS & JOHNSON, supra note 91, at 203.
154 *Id.*
155 WOLFE, supra note 56, at 87.
156 *See* HASKINS & JOHNSON, supra note 91, at 204. Chief Justice Marshall’s actions were necessary “to protect the judiciary and to re-emphasize the supremeacy of the rule of law in that difficult era when politics were threatening to engulf the judiciary.” *Id.*
establishment of judicial review. Not only could the President have objected at the time if he sharply disagreed with the notion of judicial review, but Congress could have passed a constitutional amendment explicitly stating that the Supreme Court had overstepped its authority and that the courts lacked the power of judicial review. In fact, it is quite telling that—ten years before Marbury—Congress quickly acted to pass a constitutional amendment after it disagreed with the Supreme Court’s ruling in Chisholm v. Georgia.

While the Constitution has been amended only twenty-seven times, a number of these amendments have resulted from Congress’s sharp disagreement with rulings from the Court. In 1793, the Supreme Court in Chisholm held that the Constitution “certainly contemplate[d] . . . the maintaining [of] jurisdiction [by a citizen] against a State, as Defendant.” In response to the Court’s decision that the Constitution permitted citizens of one State to sue another, Congress passed the Eleventh Amendment. While it has long been debated whether Congress was attempting to completely prohibit suits against States in federal courts, or simply under diversity jurisdiction, it is clear that Congress was reacting a decision of the Supreme Court with which it strongly disagreed. As such, Congress itself in the nation’s early founding has illustrated that not only can it propose and pass constitutional amendments when it disputes the Supreme

157 WOLFE, supra note 56, at 87.
158 2 U.S. (2 Dall.) 419 (1793).
159 Id. at 451 (opinion of Blair, J.). Prior to Chief Justice John Marshall’s tenure, the Supreme Court did not issue a majority opinion; rather, the justices wrote individual opinions and the Court’s holding would be determined by a majority of the individual opinions. REDISH, supra note 47, at 362 n.*.
160 REDISH, supra note 47, at 368.
161 See id. at 369-70, 373-78.
Court’s interpretation of constitutional provisions, but also that the proper response from the political branches was not to simply ignore decisions of which it did not approve.

Judicial review is not a declaration of judicial supremacy, nor is it applicable in all cases. The Court has stated, for example, that judicial review is not appropriate in cases involving the impeachment of federal judges, for “[j]udicial involvement in impeachment proceedings, even if only for the purposes of judicial review, is counterintuitive because it would eviscerate the ‘important constitutional check’ placed on the Judiciary by the Framers.” Further, even in *Marbury*, Chief Justice Marshall recognized that judicial review would not lie where the executive and legislative branches were exercising discretion or where the branches were exercising a power specifically provided them by the Constitution. Additionally, it is important to remember that the “federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution.” Instead, the courts are required to “‘refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so . . . when the question is raised by a party whose interests entitle him to raise it.’” The judicial branch cannot proactively strike down congressional legislation or Presidential actions;


163 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, 165-67 (1803).


only when those actions potentially infringe upon an individual’s rights or liberties will the courts have the authority to resolve any cases or controversies.

III. THE CONSTITUTIONAL PROCEDURAL PRINCIPLE

Having rebutted the flawed attacks from departmentalists and explained the need for judicial review in a country founded upon a written constitution, we can relatively easily determine which actions by the political branches against the judicial branch are unconstitutional. However, we still lack a normative morphology by which to determine whether certain actions by the President or Congress are normatively objectionable. In this section, I propose a framework for analyzing various types of actions of the political branches. I do not assert that this framework is all-encompassing, but it is my hope to begin a dialogue about what standard we should use to measure the executive and legislative branches’ interactions with the Judicial Branch.

As a start, I propose the Constitutional Procedural Principle, a normative analysis that is a three-prong inquiry into the political branches’ actions. Each prong of the analysis operates independently and much like a canal lock; an action needs to successfully pass through each prong in the order of the analysis to reach passage to the next prong. Upon successfully passing the third prong, the action can be deemed constitutionally and normatively permissible.

The first prong is that the executive and legislative branches can use whatever procedures are articulated within the Constitution as a check on the Court’s powers. This prong, in reality, provides an at-first seemingly simple test of the constitutionality of an action. Obviously, if the

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166 Of course, there will always be some dispute over unresolved issues, but for the most part, our country’s history over the last two hundred and twenty-five years has fleshed out the meaning and operation of much of the text of the Constitution.
Constitution expressly gives the President a power to use as a check on one of the other branches, it would be considered constitutional for the President to exercise that power.

Some commentators, however, have inaccurately asserted that since the Court is the final arbiter of the meaning of the Constitution, this means that the President and Congress could not take any actions within their powers to counter the Court’s decision, such as issuing pardons for crimes the Court determines are constitutional or vetoing legislation that the Court has previously considered constitutional. But this argument is flawed because it takes a principle—that the Court determines the meaning of the Constitution—to an illogical edge. Simply because the Court has determined its interpretation of a constitutional or statutory provision, it does not follow that the President is prevented from exercising powers conferred by Article II. As I will discuss with examples in Part IV, the President may use his or her expressly given powers—such as vetoes or pardons—regardless of the Court’s determination in a given area of law. Under the Constitutional Procedural Principle, these actions are constitutional and consistent with a healthy operation of separation of powers and checks and balances between the branches.

Under the second prong of the Constitutional Procedural Principle, any response by the President or Congress must be proportionate to the judicial action the political branch is attempting to check. For example, it would be constitutionally and normatively permissible for Congress to impeach a federal judge who was selling judicial verdicts to the highest bidder. Such behavior cannot be considered “good” under the requirements of Art. III, Sec. 2 of the Constitution, and impeachment would be a sufficiently proportionate response for a judge who was engaging in the criminal offense of bribery.

167 See supra Parts IV.A.1 & 2.
Conversely, and as I will further explore in Part IV, impeachment is not a proportional response for a Congress that has just changed political leadership and is looking to clean out judges appointed to the federal bench by its political opponents. While such behavior arguably flies in the face of the Constitution’s provision that federal judges will serve lifetime appointments providing good behavior, throughout history elected officials have questioned whether ruling the “wrong” way qualifies as bad behavior. If so, many, including Gingrich most recently, have argued that Congress may constitutionally impeach judges for being too “activist.” While these actions may be constitutionally permissible because the Constitution does expressly provide for Congress to have the impeachment power over federal judges, impeaching judges because congressional leadership disagrees with the outcome of a particular case is not a normative good for our country.

The third prong of the Constitutional Procedural Principle provides that the President and Congress should not take any actions against the Court to embarrass, harass, intimidate, or threaten the individual Justices or the integrity of the Supreme Court as an institution. While the political branches are used to fighting each other in the rough and tumble world of American politics, elected officials often do not put the politics aside when it comes to the Courts.

Past Presidents, such as Abraham Lincoln or Franklin Delano Roosevelt, have made threats upon the Court, but the Court is incapable of fighting back politically. The most the Court can do is fight with written words, which is why Hamilton considered it the weakest of the three branches.168 While words can be powerful, particularly in the fast-moving information age, the courts lack the much stronger tools of the other branches--namely Congress’s purse strings

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168 See The Federalist No. 78 (Alexander Hamilton).
and ability to restrict federal jurisdiction or the President’s army and ability to enforce the law and judicial decisions.

Importantly, I am not proposing that the President and Congress use only kid gloves with the Court or allow the judicial branch to control the rest of the American government. Rather where the political branches usurp power through coercion or intimidation to improperly determine the outcome of judicial decisions, the judiciary loses its status as an independent and co-equal branch of government. Because the judiciary is specifically charged with ensuring that individual Americans’ rights and freedoms are protected from the tyranny of the majority, coercion and threatening actions cannot be a normative good for our country.

IV. THE CONSTITUTIONAL PROCEDURAL PRINCIPLE IN ACTION

Having briefly introduced the Constitutional Procedural Principle, we can now examine its application to the review of historical actions by Presidents or members of Congress designed to limit the Court’s power. We will also examine some of Gingrich’s proposals under this normative morphology. Through this analysis, it is my hope to illustrate that actions are not normatively permissible solely because they may be constitutional. And if they are not even normatively permissible, they can hardly be considered beneficial. In fact, some of the biggest threats to our country may be “constitutional.”

A. PRONG ONE: IS THE PRESIDENT OR CONGRESS USING EXPRESS CONSTITUTIONAL PROCEDURES TO CHECK THE COURT’S POWERS?

As previously stated, the first prong of the Constitutional Procedural Principle asks whether the proposed action or response from the political branches is expressly authorized by the Constitution. If an action is expressly authorized by the Constitution, we can at least be certain that the President and Congress are acting within the scope of their constitutional
authority. But some scholars incorrectly assert—in their attempts to attack the principle of judicial review—that the Court’s decision in a particular case is final and thus must necessarily intrude on the political branches’ own constitutional authority, forcing the President or Congress to agree with the Court’s opinion in any decided matter.  

This argument must fail, particularly where the Constitution has expressly provided discretionary procedures to the political branches.

1. Presidential Vetoes

Gingrich and other departmentalists such as Tushnet have wrongly asserted that judicial review threatens the President’s ability to veto congressional legislation that the Court has formerly held was constitutional. They assert that if the Court has previously determined that given legislation is constitutional, the principle of judicial review demands that the President cannot exercise his authority to veto the legislation.

For example, in *McCulloch v. Maryland*, the Supreme Court considered whether it was constitutional for Congress to create a national bank. After Maryland had tried to tax the national bank branches within its boundaries, the Court ruled in 1819 that creating a national bank was within Congress’s powers. In 1832, Congress passed legislation to renew the bank’s charter and modify some of its provisions. President Andrew Jackson, who detested the idea

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169 See *supra* Parts I.A. & B.


171 17 U.S. 316 (1819).

172 *Id.* at 424. After affirming the legitimacy of the Bank of the United States, the Court subsequently held that Maryland’s tax was unconstitutional. *Id.*

of a national bank, vetoed the legislation.\textsuperscript{174} To his critics who argued that President Jackson could not decide for himself whether a national bank was constitutional, he replied:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.\textsuperscript{175}

As Gingrich has argued, President Jackson was keeping the Court within its place, because each branch was entitled to determine the constitutionality of laws on its own.\textsuperscript{176} Gingrich’s assertions, however, fail to recognize that President Jackson was exercising a discretionary power expressly given to him by the Constitution.

The Constitution provides the President with the power to veto legislation, stating that “[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it,

\begin{flushright}
\textsuperscript{174} Id.; President Jackson’s Veto Message Regarding the Bank of the United States, July 10, 1832, \textit{available at} http://avalon.law.yale.edu/19th_century/ajveto01.asp. \\
\textsuperscript{175} Id. \\
\textsuperscript{176} Gingrich, \textit{supra} note 2, at 17.
\end{flushright}
but if not he shall return it, with his Objections . . . .”\textsuperscript{177} Importantly, this discretionary power is not limited to cases where the President considers the law unconstitutional. The Constitution provides no limits to the President’s exercise of this power, and the President has the discretion to veto laws for any number of reasons, even reasons that the public may find distasteful.

Under the Constitutional Procedure Principle, the President may veto legislation that the Court has previously held constitutional because he or she is exercising discretionary authority explicitly granted by Congress. The President is not precluded from vetoing legislation with which he or she disagrees, whether the reason is that the President believes the law to be constitutional or whether he or she simply just disagrees with the policy that Congress has chosen to adopt. What the President cannot do, however, and as will be discussed in Part IV.A.3, is to continue to enforce laws that the Court has declared to be unconstitutional.\textsuperscript{178} Not only would the President be refusing to “take Care that the Laws be faithfully executed,”\textsuperscript{179} but there is no express provision in the Constitution allowing the President discretion over which court orders he or she decides to enforce.

\textit{2. Presidential Pardons}

Similarly, Tushnet asserts that the principle of judicial review precludes the President from pardoning convicted criminals based on the President’s own view of the constitutionality of

\textsuperscript{177} \textsc{Const.} Art. I, § 7, cl. 2.

\textsuperscript{178} Simply because the Court holds a given law is constitutional, it does not follow that said policy must always continue to be the law of the United States. The Court is only stating that \textit{if} the President and Congress may validly choose to enact the policy. This is quite different from the Court stating that a given policy is unconstitutional and the President or Congress continuing the policy despite the Court’s ruling.

\textsuperscript{179} \textsc{Const.} Art. II, § 3.
the criminal statute under which they are convicted.\textsuperscript{180} As an example, he cites to President Jefferson’s pardoning of several of his political allies who were convicted under the Alien and Sedition Act, which made it a crime to criticize the President.\textsuperscript{181} In his decision to issue the pardons, President Jefferson asserted that he believed the statute violated the First Amendment’s right of free speech.\textsuperscript{182} President Jefferson several years later elaborated that in his view:

\begin{quote}
nothing in the Constitution has given [judges] a right to decided for the Executive, any more than to the Executive to decide for them. . . . The judges . . . had a right to pass a sentence . . . because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.\textsuperscript{183}
\end{quote}

Tushnet uses President Jefferson’s actions to assert that the difference between a President who defies the Court by continuing to enforce a decision it has held unconstitutional and a President who pardons criminals convicted under an act the Court has upheld as constitutional, is the same: in both examples, the President is defying the Court.\textsuperscript{184} But Tushnet, in fact, is mistaken because the President pardoning criminals because he or she believes the law is unconstitutional is not defying the Court at all. Instead, the President is merely exercising his or her discretion over an area of executive authority explicitly granted to him or her by the Constitution.

\textsuperscript{180} Tushnet, supra note 41, at 15-16.

\textsuperscript{181} Id. at 15.

\textsuperscript{182} Id.

\textsuperscript{183} Id. However, while the courts did convict individuals under the Alien and Sedition Acts, Tushnet admits that the Supreme Court did not rule on the constitutionality of the law. Id. at 196 n.32.

\textsuperscript{184} Id. at 16.
Much like the above case in regard to vetoing congressional legislation, the President has explicit constitutional authority to issue pardons. The Constitution’s only limitation on the President’s authority is that pardons can be exercised “for Offenses against the United States, except in Cases of Impeachment.” Thus, the President has the discretion to determine when to exercise the power to pardon, and the President can exercise it for any reason, or no reason at all.

The President’s exercise of pardon power—for any reason—does not violate our normative morphology under the Constitutional Procedure Principle. Because the President is exercising power explicitly granted to him or her by the Constitution, his or her actions are normatively permissive. Counter to Tushnet’s claims, there is a difference between a President’s picking and choosing which laws he or she will faithfully execute and a President’s ability to exercise the express constitutional provision of presidential pardons.

3. Ignoring Judicial Decisions

Conversely, it necessarily fails the Constitutional Procedure Principle when the President and Congress choose to simply ignore judicial decisions with which they disagree. One prominent example is President Abraham Lincoln, who strongly believed that the President had the independent authority to determine the constitutionality of various actions and ignored Court decisions when he disagreed with its orders. In his First Inaugural Address, President Lincoln stated that Supreme Court decisions created no lasting precedent and were “limited to th[e] particular case, with the chance that it may be overruled and never become a precedent for other cases.” President Lincoln stated that if the President and Congress were “irrevocably fixed by

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185 See CONST. Art. II, § 2.
186 Id.
187 President Abraham Lincoln’s First Inaugural Address, March 4, 1861.
decisions of the Supreme Court, the instant [those decisions] are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.”

Even if we were to accept this executive usurpation of judicial authority—which this author does not—President Lincoln ignored even his own guideline when it suited him. In *Ex Parte Merryman,* he simply ignored Chief Justice Taney’s directive to release Merryman because of his concerns of mob violence around the city of Baltimore. Despite President Lincoln’s concession that decisions of the Court are binding for the parties involved, he refused to follow the Court’s directive in *Merryman.* But while President Lincoln’s concern for safety and the strength of the Union was a truly noble cause, any principle that allows the President to follow only the laws with which he or she agrees improperly places the President above the law.

Further, President Lincoln was not executing any power expressly granted to him by the Constitution. On the contrary, the Constitution specifically states that the privilege of habeas corpus may only be suspended “when in Cases of Rebellion or Invasion the public Safety may require it,” and houses this restriction within Article I, which specifies the legislative powers of the federal government. Congress had not suspended the writ of habeas corpus when President Lincoln acted because it was in recess. Additionally, the President is charged with ensuring that the “Laws are faithfully executed.” As such, the President’s actions were not

188 *Id.*

189 17 F. Cas. 144 (C.C.D. Md. 1861).

190 *See supra* notes 74-81 and accompanying text.


192 Paulsen, *supra* note 40, at 278.
only normatively flawed under the Constitutional Procedure Principle, but they were also technically unconstitutional.

Similarly, during the public firestorm following the break in of the Democratic National Committee offices in the Watergate complex, President Nixon was under extreme public pressure to release tapes recording his conversations with high-level staff in the White House.\(^\text{194}\) Attorney General Elliot Richardson appointed special prosecutor Archibald Cox, a Harvard Law School professor who persuaded Judge John Sirica to issue a grand jury subpoena to determine President Nixon’s and the White House’s potential involvement in the Watergate affair.\(^\text{195}\) President Nixon refused to release all the tapes, and at a press conference in August 1973, stated that it would take “a definitive order of the Supreme Court” before he would release the tapes.\(^\text{196}\) The President refused to further specify what he meant by “definitive,” but the speculation was that he required a unanimous opinion from the Court.\(^\text{197}\) President Nixon never had the opportunity to exercise his intimated refusal to release the tapes in the face of a divided Court opinion; in July 1974, the Supreme Court issued an 8-0 decision commanding President Nixon to release the Watergate tapes.\(^\text{198}\)

Like President Lincoln, Gingrich has asserted that the President has the authority to “command all executive branch agencies . . . to limit the application of a Supreme Court decision

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\(^{193}\) CONST. Art. II, § 3.

\(^{194}\) Schroeder, supra note 4, at 343-44.

\(^{195}\) Id. at 349-50.

\(^{196}\) Id. at 350-51.

\(^{197}\) Id. at 351-52.

\(^{198}\) Id. at 357.
to only the litigants involved and otherwise ignore it as a rule of general application.” 199 Further, like President Nixon, Gingrich has claimed that “[i]n very rare circumstances, the executive branch might choose to ignore a Court decision.” 200 Not surprisingly, Gingrich provides us with no standards by which to determine when it is appropriate for the President to ignore a Supreme Court decision or when it is appropriate to limit judicial rulings to only the parties in the case.

Any assertion that the President or Congress can simply ignore judicial decisions necessarily fails the first prong of the Constitutional Procedure Principle because no constitutional authority allows the executive branch the ability to determine when and which judicial decisions to enforce. Without a constitutional direction or standard for the President to follow in making these decisions, such a policy would put the President above the law, for no decision from the Court could ever reign in the President if he or she simply decided that it was appropriate to ignore the judicial branch.

Instead, the Constitution explicitly provides the President and Congress with great authority to use to check the Court’s powers in a constitutional and normatively permissive way, such as: the President’s power to personally nominate all federal judges 201; the Senate’s power to confirm all federal judges 202; the ability to remove judges who commit crimes or otherwise disgrace their judicial offices 203; the President’s power to pardon criminal convictions with

199 See Gingrich, supra note 2, at 22.

200 Id.

201 CONST. Art. II, § 2.

202 Id.

203 Id. at Art. I, § 3.
which he or she disagrees;\textsuperscript{204} and Congress’s power to create inferior Courts for the purposes of hearing particular types of cases (not to mention Congress’s authority to control the size of the entire federal court system),\textsuperscript{205} among others.

B. PRONG TWO: IS THE EXECUTIVE OR LEGISLATIVE RESPONSE PROPORTIONATE TO THE COURT’S RULING?

1. The Impeachment of Federal Judges

The second prong of the Constitutional Procedure Principle questions whether the political branch’s response is proportionate to the Court’s ruling. For example, Congress exercises a proportional response when it holds impeachment hearings for federal judges who have been convicted of violating criminal laws. In \textit{Nixon v. United States},\textsuperscript{206} a federal judge sought relief from the courts—in vain—after his impeachment and removal.\textsuperscript{207} Nixon was subject to a grand jury investigation after local authorities heard that he had “accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman’s son.”\textsuperscript{208} Following the investigation, Nixon was sentenced to prison after he was convicted of two counts of making false statements to a federal grand jury.\textsuperscript{209} Nixon’s actions certainly do not qualify as “good behavior” under the Constitution, and his

\textsuperscript{204} \textit{Id.} at Art. II, § 2.

\textsuperscript{205} \textit{Id.} at Art. III, § 1.

\textsuperscript{206} 506 U.S. 224 (1993).

\textsuperscript{207} \textit{Id.} at 225.

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} \textit{Id.}
impeachment by Congress was a proportionate response to his behavior and criminal convictions.

Some, however, have called for impeachment proceedings of federal judges whenever judicial decisions are rendered that Congress deems “unconstitutional” or to have “otherwise ignore[d] the Constitution [or] the legitimate powers of the two other co-equal branches of the federal government.” For example, President Gerald Ford, when he was the House minority leader in 1970, remarked during a failed attempt to impeach Supreme Court Justice William O. Douglas that “[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” Such a standard, while debatably constitutional, cannot be normatively beneficial for our country. Depending on a given situation, the impeachment of a federal judge may not always be a proportionate response to the behavior Congress is attempting to check, particularly if the impeachment is because members of Congress believe that the Justices got the case result “wrong.” The lack of proportionality in an impeachment for any or even no reason means the congressional action would fail the second prong of the Constitutional Procedure Principle.

210 See, e.g., Gingrich, supra note 2, at 21.


212 The Constitution provides that federal judges “shall hold their Officers during good Behavior.” Const. Art. III, § 1. While Congress does have the power to impeach federal judges, Article III, Section 1 would appear to limit Congress’s power to impeach judges who have not committed crimes or otherwise raised questions about their moral competence or fitness for judicial office.
Importantly, the Founders conceived of impeachment as “the sole means to promote accountability without unduly compromising independence.”\(^{213}\) But what, exactly, qualifies as an impeachable offense? Over the course of our nation’s history, Congress has investigated the conduct of at least seventy-eight judges.\(^{214}\) Four of the seventy-eight judges faced unknown accusations; the seventy-four judges with known charges faced a total of 148 accusations of judicial misconduct.\(^{215}\) Only thirteen were officially impeached, with only seven of the thirteen actually being removed by the impeachment itself.\(^{216}\) Of the thirteen impeached judges, only four—Judge John Pickering, Justice Samuel Chase, Judge James Peck, and Judge Charles Swayne—were charged with making the wrong decision in their judicial cases.\(^{217}\) And of those four, only one—Judge Pickering—was actually removed from the bench.\(^{218}\)

Frustrated by the out-going Federalists’ creation of sixteen new federal judgeships filled with members of the Federalist Party, the newly victorious Jeffersonian Republicans repealed the judgeships.\(^{219}\) But this office abolishment was not enough; Senator William Giles publicly


\(^{214}\) Id. at 119-124 (detailing ten different categories of behavior that led to impeachment investigations).

\(^{215}\) Id. at 119.

\(^{216}\) Id. at 125.

\(^{217}\) Id.

\(^{218}\) Id. at 125-26 (stating that Judge Pickering was removed due to his “Federalist Party affiliation and his insanity” following “the Jeffersonian Republicans’ ascension to power in 1802”). It is also noteworthy that this kind of removal has not happened in more than a century.

\(^{219}\) Id. at 126.
declared: “We want your offices for the purpose of giving them to men who will fill them
better.” Judge Pickering’s removal was the Republicans’ first successful impeachment of a
federal judge who harbored loyal intentions to the Federal Party, but the idea of removing a
judge for having the wrong political viewpoint was overshadowed by Pickering’s insanity.221

The Republican plan to replace Federalist judges—including Chief Justice John
Marshall—was in reality tested with the impeachment of Justice Samuel Chase.222 However,
Jefferson did not attain the precedential value for which he had hoped; rather, he incurred the
oppositeresult. Justice Chase’s counsel fought the impeachment effort vigilantly, stating that “an
error in judgment has never of itself been considered evidence of corruption in a judge” or an
impeachable offense.223 In the end, even Republicans broke ranks in the Senate to vote against
Justice Chase’s impeachment.224

Impeaching federal judges for deciding cases in a different manner from what the
controlling political party in Congress wishes cannot survive the Constitutional Procedure
Principle’s proportionality prong. In the words of Federalist attorney Joseph Hopkinson, such a
tactic “is indeed employing an elephant to remove an atom too minute for the grasp of an
insect.”225 Justice Chase’s failed impeachment made clear—early in America’s history—that

220 Id. (quoting ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL
IMPEACHMENT TRIALS 59 (1992)).

221 Id. at 131.

222 Id.

223 Id. at 140 (quoting I TRIAL OF SAMUEL CHASE at 102 (statement of Chase, J.).

224 Id. at 140-41.

225 JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE
EPIC STRUGGLE TO CREATE A UNITED STATES 213 (2002).
impeachment is not a proper weapon for Congress . . . to employ in these confrontations. No matter how angry or frustrated either of the other branches may be by the action of the Supreme Court, removal of individual members of the Court because of their judicial philosophy is not permissible.\textsuperscript{226}

2. Abolishing Federal Judgeships or De-Funding the Court

Further, and despite the assertions of recent departmentalists like Gingrich,\textsuperscript{227} the Founders also never spoke of abolishing federal judicial offices as a means of curtailing the judiciary.\textsuperscript{228} The Jeffersonian Republicans’ actions in repealing sixteen federal judicial offices may be praised by some as an exercise of congressional authority to check the Court’s power. In reality, however, the Republicans were doing nothing more than engaging in political party feuds with the Federalists at the judiciary’s expense.

While the Federalists had been attacked for nominating their party loyalists to new federal judicial seats,\textsuperscript{229} the Federalists’ main goals were “the elimination of circuit riding for the Supreme Court judges and the creation of new circuit courts.”\textsuperscript{230} The Federalists wanted to bring

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\textsuperscript{226} Geyh, supra note 211, at 142 (quoting William H. Rehnquist, Grand Inquests 60-61 (1992)).

\textsuperscript{227} Gingrich, supra note 2, at 16. Gingrich proclaims that “Congress even has the power” to do as Congressman Steve King “frequently notes, to ‘reduce the Supreme Court to nothing more than Chief Justice John Roberts sitting at a card table with a candle.’ ” Id. at 21. Even if we were to agree with Gingrich’s assertions that such actions would be constitutional, his logic demonstrates that even constitutional actions could be normatively devastating for our nation.

\textsuperscript{228} Geyh, supra note 211, at 113-14.

\textsuperscript{229} See, e.g., Haskins & Johnson, supra note 91, at 208 (stating that President Jefferson wrote that Federalists, through “fraudulent use of the constitution which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx”).

\textsuperscript{230} Id. at 133. However, the Federalists cannot be excused for reducing the number of Supreme Court Justices from six to five to prevent President Jefferson from naming a replacement for an ailing Justice. See Solomon, supra note 5, at 14. Such legislation does not survive the
courthouses closer to the populace, to expand federal jurisdiction to allow more citizens access to
the federal courts, to “enhance the prestige of a diminished prestige of a judiciary, appointed
rather than elected . . . [and] to dignify the courts through the abilities and reputations of the
[newly appointed] judges.” President Jefferson’s and Congress’s efforts would fail the
Constitutional Procedure Principle’s proportionality prong, however, because their driving goal
was to rid the government of Federalist judges and create opportunities to appoint new
Republican-leaning judges. There was no action from the federal judiciary that President
Jefferson was attempting to check; he just wanted his party, and not the Federalists, to resolve
cases brought to the courts. Such political motivation compromises the judiciary’s independence
and is normatively problematic for our country.

Finally, Gingrich also asserts that Congress has the ability to “reduce or eliminate
funding of Courts to carry out specific decisions or a class of decisions.” He provides no
elaboration on this point, and no guidance for when Congress would decide to exercise such a
nuclear-level power. Importantly, the Founders never spoke about Congress curtailing the
judiciary through its use of the power of the purse. For reasons similar to impeaching judges
or abolishing entire judicial offices, if Congress were to defund the judiciary in an effort to
control or prevent certain judicial outcomes, its response is not proportional to the Court’s

proportionality prong of the Constitutional Procedure Principle.

231 HASKINS & JOHNSON, supra note 91, at 134.

232 Id. at 147-48.

233 Gingrich, supra note 2, at 22.

234 GEYH, supra note 211, at 113-14.
resolution of an individual’s case. As we shall see in infra Part IV.C., it also would likely violate
the third prong of the Constitutional Procedure Principle.

C. PRONG THREE: IS THE PROPOSED RESPONSE BEING USED
TO EMBARRASS, HARASS, THREATEN, OR INTIMIDATE
THE COURT OR THE INDIVIDUAL JUSTICES?

The third prong of the Constitutional Procedure Principle asks whether the political
branches are attempting to curtail the power of the judiciary through threats, intimidation,
harassment, or embarrassment. Several historical examples and proposed suggestions exist
which illustrate how this prong of our normative morphology works.

President Franklin Delano Roosevelt’s infamous court-packing plan is clearly an example
of a presidential action taken to threaten the Supreme Court Justices. For two years, the Supreme
Court Justices were routinely striking down pieces of President Roosevelt’s proposed New Deal
legislation.\textsuperscript{235} Unsatisfied that he would be able to secure passage of a constitutional amendment
to sustain his legislation,\textsuperscript{236} the President unveiled his proposed solution: “for any judge on a
federal court who had spent ten years on the bench and failed to retire by the age of seventy and
a half, the President could name another one.”\textsuperscript{237} President Roosevelt was proposing to expand
the Supreme Court by an additional six Justices.\textsuperscript{238}

\textsuperscript{235} SOLOMON, supra note 5, at 11.

\textsuperscript{236} Id. at 13 (President Roosevelt stated: “Give me ten million dollars . . . and I can prevent any
amendment to the Constitution from being ratified by the necessary number of states.”)

\textsuperscript{237} Id. at 13-14.

\textsuperscript{238} Id. at 14.
President Roosevelt’s proposal was a threat to intimidate the Justices into deciding cases his way or he’d wrestle control of the Court on his own terms. And it worked. On “White Monday,” the Court announced five opinions upholding pieces of President Roosevelt’s New Deal legislation. But despite its success, and the constitutionality of his proposal, it is normatively dire to allow such threats to infringe on the Court’s independence.

For one thing, the possibility of packing the Supreme Court will always exist, no matter the issue. Perhaps, given the success of the New Deal and Americans’ general acceptance of some form of government regulation of businesses, President Roosevelt’s threat does not look as bad today as it might have several decades ago. But how would we view court-packing if a President were attempting to require all adults to work for the government for three years or if Congress, wanting to improve the American automotive industry, passed a law that all Americans were required to purchase at least one American-made car?

Much like the operation of free speech principles, any Court-packing principles we evaluate should have neutral operation, applicable alike to both the actions we approve and those we disapprove equally. We cannot adopt a content-based principle that views Court-packing as a necessary evil when the President is attempting to accomplish some good, and cast it away when the President is attempting to enact a policy with which we disagree. Threats to judicial independence, even when cloaked in good intentions, do not provide a normative benefit for our country.

Importantly, an action need not rise to the level of Court-packing for it to be considered an effort to embarrass or intimidate the Court or its individual Justices. During his second State of the Union Address, President Barack Obama criticized members of the Supreme Court—who

\(^{239}\) \textit{Id.} at 160.
were sitting right in front of him—for their decision in *Citizens United v. Federal Election Commission*. President Obama told a live televised audience that “the Supreme Court reversed a century of law to open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.” The Justices felt personally attacked, and Justice Samuel Alito mouthed quietly: “Not true.” Chief Justice John Roberts subsequently called it “very troubling” and described the moment as “one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the Court—according to the requirements of protocol—has to sit there expressionless.”

Several Presidents have criticized the Court publicly, but none have done so during the State of the Union, or to the Justices’ faces on live television. In 2008, President George W. Bush criticized a Court decision giving rights to prisoners held at Guantanamo Bay. President Bush, however, made his comments at a press conference—in Rome, Italy. President Nixon, however, made his comments at a press conference—in Rome, Italy.  

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243 Shesol, *supra* note 240.

244 Liptak, *supra* note 238.

245 Id. President Bush did, however, publicly deride the Justices of the Massachusetts Supreme
as previously discussed, was upset that the Court ordered him to turn over the Watergate tapes, but his critical statements were read by his attorney and not to the Justices’ faces.\textsuperscript{246}

Two years later, President Obama had some strong words about the importance of the Court upholding his Affordable Care Act.\textsuperscript{247} This time, though, he delivered his comments in a public press conference, and the Justices were not in attendance.\textsuperscript{248} The President commented that the Supreme should uphold the Affordable Care Act, because it would be “unprecedented” and “extraordinary” to overturn congressional legislation that had the support of a “strong majority of a democratically elected Congress.”\textsuperscript{249} President Obama added that he was “pretty confident” that the Justices would recognize that “the biggest problem on the bench was judicial activism or the lack of judicial restraint, [where] an unelected group of people would somehow overturn a duly constituted and passed law.”\textsuperscript{250}

While still harsh in nature, President Obama’s message to the Justices delivered at a press conference lacked the intimidation, embarrassment, and harassment that his comments about \textit{Citizens United} had at the State of the Union two years earlier. His intent may have been the same—to garner public support in favor of a particular policy or course of action—but the effects are quite different. To target Supreme Court Justices individually and personally, where

\begin{footnotesize}
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\item \footnotetext[246]{\textit{Id.}}
\item \footnotetext[248]{\textit{Id.}}
\item \footnotetext[249]{\textit{Id.}}
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they are unable to respond chips away at the Court’s independence and unnecessarily brings the Court into a political arena of which it should not be a part. While President Obama’s comments did not violate the Constitution, it is not normatively desirable for the Justices to be publicly harassed or intimidated for doing their jobs to the best of their abilities.

Far worse than President Obama’s comments during his 2010 State of the Union address, however, is Gingrich’s suggestion that Congress could and should hold “Judicial Accountability Hearings,” where the Justices are hauled before congressional committees against their will.\(^{251}\) Gingrich asserts that federal judges should be summoned before committees so that the members of Congress can “express their displeasure with certain judicial decisions.”\(^{252}\) Not only would the judges be required to “explain their constitutional reasoning” to Congress, but the judges would be required to “hear a proper Congressional Constitutional interpretation.”\(^{253}\)

Gingrich’s suggestion that federal judges should be forced to prostrate themselves in front of another branch of government is beyond dangerous; it’s simply preposterous. First, federal judges explain their constitutional reasoning within their judicial opinions, which are available publicly for anyone to read the moment the case is decided. Second, Congress has the ability to—and often does—offer federal judges its interpretation of the Constitution when it passes legislation, through either statements of intent or in the congressional debates about the effect of the legislation themselves. Any desire of Gingrich to require federal judges to explain themselves before a hostile congressional panel is only done for the purpose of intimidation, smacks of arrogance, and has no place in our American tradition of co-equal branches and the

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\(^{251}\) Gingrich, *supra* note 2, at 21.

\(^{252}\) *Id.*

\(^{253}\) *Id.*
separation of powers. Not only is his suggestion likely unconstitutional, it is reckless and has no normative value. As such, it fails the third prong of the Constitutional Procedure Principle.

V. CONCLUSION

As we have seen through several historical examples of actions from the political branches taken to check the Court’s power, a constitutional framework alone will not suffice to determine whether the action is beneficial for our country. Rather, to prevent a deviation from a healthy balance in the separation of powers, we should seek to analyze potential actions along a normative morphology. Some actions, such as an overuse of the impeachment power or abolishing federal judgeships based on the political philosophy of the judge, while potentially constitutional, may prove to be normatively destructive.

I have offered the Constitutional Procedure Principle as a potential framework within which to analyze actions of the political branches toward the Supreme Court and federal judges. In reviewing whether the Constitution has provided express authority for the action, whether the action is proportionate to the judicial action it is attempting to counter, and whether the action was intended to harass, embarrass, threaten, or intimidate, it becomes clear that Presidential and congressional motive play a role in our analysis. Actions can comply with the formal commands of the Constitution and yet erode the equilibrium among the three branches of the federal government envisioned by the Framers. The success of the American experiment rests on our ability to distinguish between what political actors may and should do.