THE *MARBURY* OF 1803 AND THE MODERN *MARBURY*

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Of all the commentary on *Marbury v. Madison*, my favorite is that of Alexander Bickel likening the case to a tourist attraction:

> It is . . . a great historic event, a famous victory. . . . It is hallowed. It is revered. If it had a physical presence, like the Alamo or Gettysburg, it would be a tourist attraction; and the truth is that it very nearly does have and very nearly is.[1]

Marbury's famous victory is easy to identify—it is the authority of courts to overturn legislation held to be unconstitutional. And Bickel's likening of this victory to a military one is particularly appropriate. *Marbury* partakes of that characteristic of military victories that they have no necessary association with a claim of right. Judicial authority over unconstitutional legislation is accepted despite the claims made in *Marbury* not because of them. The chief, and fatal, defect in *Marbury's* defense of judicial review is its failure to ask, let alone to answer, why judicial determinations of unconstitutionality are to be the authoritative ones. *Marbury* is coherent only by assuming what has to be proven.[2]

Although its victory is indisputable, it is nevertheless overstatement to call *Marbury* hallowed or revered. This victory is circumscribed—judicial authority over legislation occupies a place somewhere between acceptance and celebration. I have joined the discussion of judicial review and its problems with the claim that there are two distinct *Marbury*s, that of 1803, and the

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 74 (1962).

2. For leading statements of the defects in *Marbury*'s defense of judicial review, see William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 16-29 and BICKEL, *supra* note 1, at 1-14.

modern one that developed over the course of the nineteenth century.[3] The *Marbury* of 1803 is as internally coherent as the modern one is defective. The deepest difference between the two is that the former understood the Constitution, or fundamental law, to be different in kind as well as degree from ordinary law, whereas the latter understands it to be supreme, ordinary law. The *Marbury* of 1803, accordingly, defended a judicial authority different in essential properties from the one we have long known.

I will here give an abridged and I hope improved version of the argument, incorporating responses to commentary on it. As will become evident, some of the criticism is justified and some reflects misreading. Retrieving the *Marbury* of 1803 and the fundamental law on which it rested is not aimed at reinstituting either. That *Marbury* addressed problems that disappeared very early in American public life and has long been irrelevant to any public concern. The status of fundamental law is more complicated. It is not clear that a return to the original distinctions is desirable, and even if it were, it is now probably impossible. What is more important is that differences in kind between fundamental law and ordinary law persist within the modern *Marbury* and the constitutional law associated with it. The attempt to restrain sovereign power is and must be different in kind from restraint on individual behavior or even delegated power. These differences have not gone unrecognized, but they are seen through the distorting lens of supreme ordinary law. Loss of access to the original distinctions is reflected in the blind alleys that populate constitutional theory. Retrieval will not solve the problems addressed by that theory, but it is a necessary preliminary to better theory. Without it we are not likely to get beyond the ad hoc political adjustments we have always relied upon to keep constitutional law a viable institution.

The *Marbury* of 1803, to continue Bickel's language, marked a relatively uninteresting and minor victory, made so by the fact that its opponents were then not particularly powerful. It was a victory over legislative willfulness and the doctrine of legislative omnipotence. Legislative willfulness had been briefly threatening in the aftermath of American independence but was substantially defeated about the same time as adoption of the Constitution of 1789. Legislative omnipotence was universally

3. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

considered inapplicable in the American states but at independence had not been expressly or formally rejected. Its inapplicability rested in the principles of limited, republican government upon which government was reconstituted after the break from England, and in the extraordinary consensus on these principles. American republicanism, in contrast to English circumstances, located sovereignty in the people, not the legislature, and that sovereign was capable of limiting all branches of government including the legislature. The substance of limited government inhered in rights and limits established in some combination of common and natural law, and written constitutions. With the routinization of extraordinarily adopted written constitutions limited government was understood to be connected to such constitutions. Initially, however, it was the explicitness of American fundamental law, not its commitment to writing that imparted to it its status as supreme, binding law. The significance of its commitment to writing was as testimony to its explicitness.[4]

The *Marbury* of 1803 echoed the successful defense of judicial authority over legislation that had been made in the 1790s. This defense sought to enlist the judiciary in support of existing principles of limited government widely feared to be in danger from the excesses of the newly independent, wholly republican, state legislatures. Although there was significant receptivity to a judicial check on unconstitutional legislation, refusal to enforce duly enacted legislation was still an irregular action, outside conventional judicial authority, and explicitly rejected by Blackstone, the leading legal authority in the American states. The 1790s defense met and effectively silenced objection to such refusal. The successful argument was first made by James Iredell in 1786[5] and repeated in a letter to William Spaight, a delegate to the Constitutional Convention, dated August 26, 1787,[6] while the Convention was still sitting. Iredell's argument was repeated by Alexander Hamilton in *Federalist 78*,[7] James Wilson in *Lectures on the Law*,[8] Spencer Roane and St. George Tucker in *Kamper*

4. For fuller discussion of the status of the written Constitution and the relationship between the natural, common, and positive law sources of operative limits see *id.* at 23-30 and 65-89. *See also* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 16-33 (2001) (discussing the customary constitution).

5. *To the Public*, *in* 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-49 (1949).

6. *Id.* at 172-76.

7. THE FEDERALIST NO. 78, at 53 (Alexander Hamilton) (Edward Mead Earle ed., 1937).

8. 1 THE WORKS OF JAMES WILSON 329-30 (Robert G. McCloskey, ed., 1967).

v. Hawkins,[9] and William Paterson in *Van Horne's Lessee v. Dorrance*,[10] among others. Each formulation, including that in *Marbury*, made the argument somewhat differently, but these differences were of no importance with respect to the central issue. Judicial authority was defended in a two-part argument that started with the American rejection of legislative omnipotence. In *Marbury*, this was the insistence that an unconstitutional act was void. Today we read this part of the opinion as one of its defects, either begging the real question of judicial review or as trivial. Originally it was a statement of essentially uncontested but important new ground—enunciation of the American form of limited government in which the legislature was explicitly and literally bound. It was a statement registering the possibility of an unconstitutional act—a possibility incompatible with legislative omnipotence—and the consequence that such an act was void.

This uniquely American form of limited government was the basis for resolution of the second and more contested question of whether judges could refuse to enforce any duly enacted legislation, specifically the unconstitutional act whose existence and invalidity had just been established. Continuing its reliance on the 1790s argument, the *Marbury* of 1803 drew from the invalidity of unconstitutional acts, judicial authority to refuse to enforce them. The assigned judicial responsibility to say what the ordinary law is precluded a court from enforcing an act that in its conceded unconstitutionality was void or not law.

The *Marbury* of 1803 did not defend, and did not purport to defend, judicial authority to determine unconstitutionality in the first place. Its referent was not so much the hypothetical examples of concededly unconstitutional acts given in *Marbury*, but the real ones associated with the excesses of the state legislatures at independence. *Marbury*'s examples, in their irrelevance to the politics and practice we know, are another of its supposed defects. In the aftermath of independence the concededly unconstitutional act was thought to pose a problem of sufficient magnitude to threaten the viability of republican government.

The most important aspect of the *Marbury* of 1803 was its foundation in the differences in kind between fundamental and ordinary law. *Marbury*'s assertion that it is "emphatically the province and duty of the judicial department to say what the law

9. 3 Va. (1 Va. Cas.) 20, 35-40, 77-81 (1793).
10. 2 U.S. (2 Dall.) 304, 308-09 (1795).

is" was limited to ordinary law, just as an assertion that the province and duty of the legislative department is to make the law would not be thought to include the law of the constitution or to require articulation of that distinction. "To say what the law is" is the judicial responsibility for finality in the application and interpretation of common and statutory law under conventional separation of powers. Finality carries with it significant authority, including a law-making component that blurs the boundaries of separation of powers, but it does not convey judicial supremacy as that problem presents itself in constitutional law. The judiciary, as Judge John Gibson rightly noted in *Eakin v. Raub*, although formally equal to the other branches, is effectively subordinate to the legislature, in that the power to make the law is inherently superior to the power to apply it.[11] Even the finality of interpretation that is inseparable from application of ordinary law is subject to revision by prospectively operating legislation. In the *Marbury* of 1803 this judicial responsibility for finality with respect to ordinary law, to repeat its key contention, authorized and even required judges to refuse to enforce an act that, in its conceded unconstitutionality, was void or not law.

The clearest formulation of this 1790s argument was that of St. George Tucker in *Kamper v. Hawkins*.[12] Tucker started by stating the position of those who denied judicial authority over unconstitutional acts: "the constitution . . . [it is said] is a rule to the *legislature only* . . .: the legislature being bound not to transgress it; but that neither the executive nor judiciary can resort to it to enquire whether they do transgress it, or not." Tucker replied:

> This sophism could never have obtained a moment's credit with the world, had such a thing as a written Constitution existed before the American revolution. . . . [W]ith us, the constitution is not an "ideal thing, but a real existence: it can be produced in a visible form:" its principles can be ascertained from the living letter, not from obscure reasoning or deductions only. The government, therefore, and all its branches must be governed by the constitution. Hence it becomes the first law of the land, and as such must be resorted to on every occasion, where it becomes necessary to expound *what the law is*. This exposition it is the duty and office of the judiciary to make; our constitution expressly declaring that the legislative, executive, and judiciary, shall be separate and distinct . . . .

11. 12 Serg. & Rawle 330, 350-51 (Pa. 1825) (dissenting opinion).
12. 3 Va. (1 Va. Cas.) 20, 77-81 (1793).

> Now since it is the province of the legislature to make, and of the executive to enforce obedience to the laws, the duty of expounding must be exclusively vested in the judiciary. But how can any just exposition be made, *if that which is the supreme law of the land be withheld from their view*?

Tucker then conjured up hypothetical examples of unambiguous violation of constitutional provisions protecting trial by jury and free exercise of religion and concluded: "From all these instances . . . this deduction clearly follows, viz., that the *judiciary* are *bound* to take notice of the constitution, *as the first law of the land*; and that whatsoever is contradictory thereto, is *not* the law of the land."[13]

Tucker's formulation indicates, first, that the binding quality of American fundamental law came from its explicitness, and that the significance of its commitment to writing was as evidence of its explicit content. Second, it articulates the key distinction of the *Marbury* of 1803, that between the judicial responsibility to expound what the ordinary law is but only to "resort to," and "take notice" of the Constitution. Judicial authority to expound what the law is, is the authority to provide finality. It was grounded in conventional separation of powers and limited to ordinary law, just as the legislative and executive authority Tucker invoked was so grounded and limited. The judiciary must resort to or take notice of the constitution in order to fulfill its assigned responsibility to expound ordinary law: to make a "just exposition" of that law and to preclude enforcement of an act that in its conceded violation of the constitution "is not the law of the land." This was the standard 1790s response to the argument of Blackstone and his American followers that judges could not resort to or take notice of the constitution but could see only the statute even when confronted with a conceded violation of fundamental law.[14]

Marbury's restatement of 1790s sources drew most significantly on Tucker and the conflict of laws analogy in *Federalist 78*.[15] Both of these sources drew on Iredell who used the conflict of laws analogy in his letter to Spaight but not in his original de-

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13. *Id.* at 77-79 (emphasis in original).

14. Blackstone illustrated his rejection of all judicial authority over legislation, that followed from English legislative omnipotence, with an example of a concededly unreasonable act, one that made a man judge of his own cause. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91.

15. For discussion of Marshall's barely noticeable modifications of the 1790s argument see SNOWISS, *supra* note 3, at 111-13.

fense of judicial authority over unconstitutional acts. In its original form the analogy served only as precedent for judicial refusal to enforce some duly enacted legislation, a refusal made necessary in both contexts by the judicial responsibility to say, with finality, what the ordinary law is.

Exclusion of fundamental law from that law for which it is the province and duty of the judicial department to say what the law is did not mean that judges could not expound or interpret fundamental law. I recognize that language in my original formulation can be read as so arguing.[16] My argument, then and now, is that judges could not expound fundamental law authoritatively—they had no authority to provide finality among contending legitimate interpretations of the Constitution, as they do routinely for ordinary law. My initial statement of the argument indicated that judges could not expound the Constitution authoritatively[17] and I repeated this point in summaries,[18] but I also said more frequently than I should have that in the initial understanding judges could not expound fundamental law, without repeating "authoritatively." I also did not stress as sharply as I should have the most important consequence of the distinction between exposition and authoritative exposition, namely that judges could not rest the invalidity of legislation on their interpretation of the Constitution over a contending legitimate one embodied in that legislation. It was this understanding that was manifested in the confinement of judicial review, in theory and practice, to the concededly unconstitutional act and reflected in the repeated insistence that judges could not overturn legislation unless its unconstitutionality was beyond doubt.

I trust this makes clear that examples of judicial exposition of the Constitution in the early decades following its adoption do not undermine my argument. Once written constitutions came into operation they were universally expounded, by judges, members of other branches, and participants in public debates. Examples of judicial exposition offered by Dean Alfange as evidence of internal contradiction in my argument are all cases upholding legislation under the doubtful case rule,[19] and are thus cases in which judges declined to provide authoritative exposi-

16. Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 337-42 and Kramer, *supra* note 4, at 33 n.114 have so read my argument.

17. SNOWISS, *supra* note 3, at 49 and 51.

18. *Id.* at 125 and 173.

19. *See* Alfange, *supra* note 16, at 342-44.

tion over a contending legitimate one embodied in the legislation. As *Judicial Review and the Law of the Constitution* showed in great detail, through John Marshall's tenure on the Supreme Court his were the only opinions to rest invalidity of legislation in an authoritative but arguable exposition of the Constitution. The others, in a reflection of an existing consensus that Marshall undermined without challenging directly, invoked first principles or the substance of the common law of contracts.[20] The only legislation whose invalidity was determined by authoritative exposition of the Constitution was that dealing with judicial organization or powers. This will be discussed below in connection with departmental or concurrent review.[21]

One reason we have failed to recognize the argument of the *Marbury* of 1803 was the speed with which it ended the controversy to which it was addressed. It did so because the opposing position was exceedingly weak. As Tucker's formulation indicates, the inapplicability of legislative omnipotence and its most important consequence, the possibility of unconstitutional acts, was common ground, accepted by those who resisted a judicial check on legislation. Iredell's insistence that such acts were void, or not law, and that judges, consistent with their obligation to say what the ordinary law is, were not obliged to enforce them proved to be unanswerable. His argument was repeated by leading judges and lawyers and it never was challenged.[22]

Some of the opposition to judicial authority over legislation was not to the existence of the power per se but to the possibility of abuse. Iredell and Hamilton acknowledged this possibility and dismissed it on the ground that many legitimate powers were subject to abuse, including the judicial authority to interpret ordinary law. In fact during the 1790s and 1800s, the distinct and confined power over legislation then claimed was not abused, and this was a second factor that contributed to the historical eclipse of the *Marbury* of 1803. Judges in federal and state courts

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20. *See* SNOWISS, *supra* note 3, at 66-70 and 126-72 and Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of* Marbury *and* McCulloch, 33 J. MARSHALL L. REV. 973, 985-1003 (2000).

21. I leave this clarification and this restatement of the entire argument as my reply to Professor Kramer's assessment that my reading of the 1790s defenses of judicial authority over legislation is "strained and unpersuasive." Kramer, *supra* note 4, at 33 n.114. For my reply to Professor Alfange's misreading of other components of my argument see Snowiss, *supra* note 20, at 977 n.21; 982 n.37; 987 n.58.

22. In the debate over repeal of the Judiciary Act of 1801, in the wake of the Federalist-Republican conflict of the 1790s, some Republicans denied judicial authority over unconstitutional acts. This was a minority position even in the Republican Party and it never moved beyond this status.

routinely linked affirmation of this power with its limitation to acts whose invalidity was beyond doubt, and this limit was faithfully observed. The United States Supreme Court and state courts upheld practically all the legislation challenged on constitutional grounds, amid widespread invocation of the doubtful case rule.[23] The handful of laws held invalid during these twenty years dealt with judicial powers or organization, or interference with trial by jury.[24] The former was an exercise of concurrent review and the latter was closely related to it as well as the defense of first principle.

Concurrent review was an expression of widely held expectations that each branch of government would defend its own constitutional sphere and interpret the Constitution authoritatively with respect to its own operation. Concurrent review was, first, a manifestation of the difference in kind between fundamental and ordinary law. It presumed that the Constitution lacked an authoritative interpreter, and it achieved constitutional maintenance, or enforcement, through a balance of power mechanism, not conventional law enforcement. Second, there was no agreement on the precise forms through which concurrent review would operate. One of the most important consequences of the successful 1790s defense of judicial authority over legislation was its regularization of concurrent review, achieved by channeling this review into and legitimating judicial refusal to enforce legislation courts decided violated constitutional provisions on judicial organization. The leading cases were *Kamper v. Hawkins*, decided in Virginia in 1793, and *Marbury*.[25] Both in-

23. *See* Hylton v. United States; 3 U.S. (3 Dall.) 171 (1796); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800); State v. ____, 2 N.C. 28 (1794); Respublica v. Duquet, 2 Yeates 493 (Pa. 1799); State v. Parkhurst, 9 N.J.L. 427 (1802); Whittington v. Polk, 1 Harr. & J. 236 (Md. 1802); Emerich v. Harris, 1 Binn. 416 (Pa. 1808); Grimball v. Ross, 1 Ga. Reports 175 (1808); Jackson v. Griswold, 5 Johns 139 (NY 1809).

24. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (judicial powers); VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795) (jury trial); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (judicial organization); Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793) (judicial organization); Stidger v. Rogers, 2 Ky. 52 (1801) (jury trial); White v. Kendrick, 1 Brev. 469 (S.C. 1805) (jury trial). The Supreme Court also held a state statute to be in conflict with a treaty and thereby invalid under the Supremacy Clause. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). The only act invalidated on grounds other than judicial organization or interference with trial by jury in a state court during this period, of which I am aware, was a North Carolina statute that repealed a previous act designating certain funds for support of the university. Repeal was held to be a deprivation of property in violation of the "law of the land" clause of the North Carolina constitution. North Carolina v. Foy, 5 N.C. 58 (1805).

25. *See* SNOWISS, *supra* note 3, at 83-85 (discussing how Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793), regularized concurrent review).

terpreted constitutional provisions on judicial organization and both were part of ongoing conflict between the legislature and the courts. Concurrent review, lastly, required judicial finality on the meaning of constitutional provisions on judicial power and the doubtful case rule was thereby inapplicable. *Marbury*'s exercise of concurrent review and its ignoring of the rule did not contravene existing expectations and these aspects of the case did not draw criticism at the time it was decided.

A third and critical reason we have failed to recognize the *Marbury* of 1803 was the speed with which the conditions that had given rise to it disappeared. Fidelity to the doubtful case rule is testimony to the disappearance of legislative irresponsibility and with it, waning of the fear that popular government would not respect established limits. The speed with which this fear disappeared is evident from the rapid emergence in the 1790s of a new and opposite one, that of autocratic national government too far removed from popular control. This fear, in turn, ebbed with the Republican Party victory in 1800. The speed with which both disappeared is evidence that both were exaggerated, and revealed the breadth and depth of American commitment to limited, republican government. This commitment does not mean it would have been impossible to lose or perfect both. But it does mean that the occasion and main motive to use this new judicial power disappeared at precisely the same time that questions about its legitimacy were removed. This status was captured in Justice Chase's opinion in *Cooper v. Telfair*, decided in the Supreme Court in 1800.[26] In the course of declining to invalidate anti-loyalist legislation that partook of willful violation of established principle Chase noted the "material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts," he indicated, "would stand the rigorous test now applied." Chase then turned to the power of courts over unconstitutional acts, following the standard two parts through which the question was considered: "and although it is alleged that all acts of the legislature, in direct opposition to the prohibitions of the constitution, would be void; yet, it remains a question, where the power resides to declare it void?" Chase's formulation betrays a hesitancy about the answer, but it nevertheless gave the standard one: "it is . . . a general opinion, it is expressly admitted by all this bar, and some of

26. 4 U.S. (4 Dall.) 14.

the Judges have, individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional, and therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point."[27] Chase's comments captured the crucial elements of the *Marbury* of 1803: they reaffirmed the initial seriousness of concededly unconstitutional acts, testified to the demise of such acts, and recorded the support achieved for judicial authority over unconstitutional acts.

This authority now had a peculiar status. By 1800 it had achieved a life of its own, separated from the circumstances that had brought it into being. As Chase's comments indicated those circumstances were now reduced from a potentially chronic problem to a self-contained historical episode. With that, the dominant inclination in federal and state courts in the first twenty years under the new Constitution was not to use what, despite its legitimacy, was still an irregular judicial power. At the same time, non-use was accompanied by repeated, emphatic reassertion of this legitimacy, a pattern particularly striking in the state courts.[28] The invalidation of legislation in *Marbury* did not disturb the general disinclination to invalidate legislation, as it was part of concurrent review.

It is conventionally said that the Court in *Marbury* deliberately invalidated trivial legislation to set a precedent for judicial review, and thereby to bolster the power of the judiciary in its confrontation with the Republican Congress and President. This assertion of power, the argument continues, was especially important in light of the Supreme Court's decision not to invalidate the more important and more constitutionally vulnerable legislation that repealed the Judiciary Act of 1801.[29] A lot of the argument about the strategic value of *Marbury* is from the perspective of modern judicial review, and I urge caution in drawing conclusions. The evidence is exceedingly strong that the Court went out of its way, in its statutory and constitutional interpretations in *Marbury*, to declare Section 13 unconstitutional. But I am more persuaded by James O'Fallon's explanation for this behavior than by the conventional one. O'Fallon argued that the Court was seeking to forestall a potential future congressional attack in the form of an increase in original jurisdiction "de-

27. *Id.* at 19.

28. *See* Respublica v. Duquet, 2 Yeates 493 (Pa. 1799), State v. Parkhurst, 9 N.J.L. 427 (1802), Whittington v. Polk, 1 Harr. & J. 236 (Md. 1802), Emerich v. Harris, 1 Binn. 416 (Pa. 1808), Gimball v. Ross, 1 Ga. Reports 175 (1808).

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

signed to overwhelm the Court with trivial cases," and to ease Federalist justices off the Court. O'Fallon noted that *Kamper v. Hawkins*, which also dealt with a conflict between the legislature and the judiciary, and explicitly with judicial workload, was then fresh in Marshall's mind.[30] I do not dismiss the possibility that the Court was also seeking to set a precedent for judicial invalidation of legislation. But it is significant that neither the invalidation of Section 13 nor the defense of this power in *Marbury* was subject to contemporary criticism. This reflected the widespread acceptance of this defense, especially as applied in concurrent review.

In thinking about the meaning of *Marbury* it is instructive to consider how it would have been possible for so many leading legal figures to have repeated as patently defective an argument as is the modern *Marbury*; how such a defective argument could have muted controversy over judicial power over legislation; how it escaped the obvious criticism for thirty-five years; and why that criticism emerged when it did.[31] We have grown so comfortable with the defects and anomalies of *Marbury* that we do not ask these questions. The answer to all of them is that the 1790s formulations, including that in *Marbury*, did not make the argument we assume it to have made.

The *Marbury* of 1803 did have one major problem, but it was not one of internal logic. Its problem was whether any court could in fact prevent the dominant social and political forces from unambiguous violation of constitutional principle. The 1790s defenses did not address this problem directly. But they did understand, with an immediacy lost to us by two centuries of stable politics and the legalization of fundamental law, that the attempt to limit sovereign power under fundamental law is an enterprise different in kind from the control of individual behavior under ordinary law. Accordingly, they understood that the judicial check on legislation operated as a substitute for revolu-

30. James M. O'Fallon, Marbury, 44 STAN. L. REV. 255 (1992).

31. I am referring, of course, to Judge Gibson's critique of *Marbury* in Eakin v. Raub, 1 Serg. & Rawle 330, 343 (Pa. 1825) (dissenting opinion). Gibson identified what remains the central defect of the modern *Marbury*, failure to say why the judicial interpretation of the Constitution should be the authoritative one: "if [the constitution] were to come into collision with an act of the legislature, that latter would have to give way; this is conceded. But it is a fallacy, to suppose, that they can come into collision *before the judiciary*." *Id.* at 346-47 (emphasis in original). By 1825 key features of modern practice, particularly invalidation of legislation whose unconstitutionality was arguable, were already visible in the contract clause cases. For discussion of the extent to which Gibson's reading of *Marbury* was largely, but not completely, the modern one, see SNOWISS, *supra* note 3, at 177-83.

tion rather than conventional law enforcement. The fullest (and most florid) statement to this effect that I have found was in an 1808 case decided in Georgia, in which the Court strongly reaffirmed judicial authority over unconstitutional acts, while upholding the challenged legislation under the doubtful case rule:

> From passion, from unprinciple[d] ambition, from the illusions of ignorance, from the ebullitions of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What then is the remedy? A recourse to the people's vengeance? Must the people be called upon to defend in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematical anarchy. . . . Is the remedy found in a patient endurance of the evil, until succeeding legislatures think proper to repeal the unconstitutional edict? This would be worse than an appeal to popular insurrection . . . . [I]t preupposes an acquiescence in an outrage upon the constitutional rights, longer than ought to be borne by American citizens. The remedy can only be found . . . in the wisdom and independency of the judicial department.[32]

This is the same thought expressed by Hamilton in *Federalist 78* when he argued 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." However, neither of these formulations, nor those of other participants in this discussion, considered Madison's observation that in a wholly republican regime the greatest threat to constitutional limits was not from an unfaithful legislature but from "acts in which the government is the mere instrument of the major number of the constituents."[33] As the threat posed to established rights by popular politics lapsed over the 1790s, defenders of a judicial check were not forced to confront the implications of this observation.

It is hard to read *Marbury* today as a substitute for revolution. But the basic relationships have not changed. Courts can always enforce ordinary law against individual violation because in so doing they function as the agent of societal force. In fundamental law they are the agent of principle the community once

32. Grimball v. Ross, 1 Ga. Reports 175, 176-77 (1808).

33. James Madison to Thomas Jefferson, (October 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON, 272 (Gaillard Hunt ed., 1904).

accepted but was now willing to violate. Enforcement depends on the capacity to rally the community to return to first principles. In any given case a court may succeed. But it cannot succeed routinely as it does in ordinary law. We have only to reflect that when tested by unambiguous violation courts have, in fact, not been able to enforce the Constitution. They failed African-Americans for over a half-century after enactment of the Fourteenth and Fifteenth Amendments and Japanese-Americans in World War II. And for all the talk about constitutional law's role as a limit on majority will, we know from the history of constitutional law that courts can impose no limit on majority will the majority is not willing to accept.

The victory Bickel invoked in *Least Dangerous Branch* is that of the modern *Marbury*. In it the Constitution is presumed to be supreme ordinary law, different from that law only in degree, and included within that law for which it is the province and duty of the judicial department to say what the law is. The modern *Marbury*, and the Constitution's status as supreme, ordinary law, are the products of an evolutionary process whose most significant dimension is that it took place in the absence of discussion and conscious recognition of the transformations taking place. In *Judicial Review and the Law of the Constitution* I attributed legalization of fundamental law solely to Chief Justice Marshall's unacknowledged actions, particularly application of the rules for statutory interpretation to the Constitution in the contract clause cases. Gordon Wood and Larry Kramer have argued that the unacknowledged actions of a single individual could not have effectuated a transformation of this magnitude.[34] They are right. I have since indicated some of the other factors and conditions that contributed to legalization,[35] and I am still working on a more complete account. But I have not changed my position that legalization was achieved through an unrecognized evolutionary process in which Marshall's deliberate but unacknowledged efforts were of major significance.

Although I cannot here defend this claim properly, I can call attention to several aspects of American constitutional development, inadequately explained by conventional accounts,

34. Gordon S. Wood, *Judicial Review in the Era of the Founding*, *in* ROBERT A. LICHT, IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION 164 (1993); Kramer, *supra* note 4, at 90 n.375.

35. Snowiss, *supra* note 20, at 1003-07; Sylvia Snowiss, *The Constitution as Law: Problems and Paradox*, *in* LE DROIT DANS LA CULTURE AMÉRICAINE, 84-93 (Philippe Raynaud and Elisabeth Zoller eds., Editions Panthéon-Assas 2001).

but consistent with an unrecognized transformation of *Marbury* and fundamental law. First, the judicial review that actually took place in the Supreme Court in the first half of the nineteenth century did not need *Marbury*. The laws overturned were exclusively state legislation and this jurisdiction was authorized by Article VI of the Constitution and Section 25 of the Judiciary Act of 1789. Second, *Marbury* was rarely cited in the Supreme Court during the nineteenth century and even more rarely as a precedent for invalidation of legislation.[36] Lastly, judicial review in the state courts in the first half of the nineteenth century was defense of the principle of vested rights, not the practice associated with the modern *Marbury*.[37] *Marbury* was not cited on the Supreme Court as a precedent for judicial invalidation of legislation until 1887[38] and was not regularly linked to this authority in legal and political commentary until roughly the same time.[39] By this time access to the *Marbury* of 1803 had long been totally lost, while the case had been largely invisible.[40] At the same time, from 1810 in the Supreme Court and a little later in the state courts invalidation of legislation had become a fairly regular practice, one that very early lost key properties associated with the original judicial check on legislation. When *Marbury* reemerged it did so with substantially the meaning we now give it, one that reflected and rationalized nineteenth century practice. The modern *Marbury* and the presumptions on which it was based were read back into an obliging text, albeit at the cost of its well known defects. In the process, the relatively uncomplicated finality associated with the judicial responsibility in ordinary law became the judicial supremacy that is the contentious core of modern constitutional law.

It is tempting to say that the modern *Marbury* and the legalization of fundamental law were the products of evolutionary processes familiar in common law, and that however it achieved its current status the Constitution is now supreme, ordinary law. On one level this is obviously the case. A conclusion of this sort

36. *See* ROBERT L. CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 117-21 (1989).

37. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

38. Mugler v. Kansas, 123 U.S. 623, 661.

39. CLINTON, *supra* note 36, chap. 10.

40. I cannot fix a precise date for loss of access to the *Marbury* of 1803. Chase's opinion in *Cooper v. Telfair*, in 1800, reflected such access. Gibson's critique of *Marbury* in *Eakin v. Raub*, in 1825, revealed loss of access to its most important dimensions but not assumption of all the presumptions of the modern *Marbury*. *See supra* note 31.

is implicit in Bickel's celebration of *Marbury*'s victory, and in constitutional theory's embrace of *Marbury* on these terms. Contemporary constitutional theory accepts the two components of *Marbury*'s victory—judicial authority to determine unconstitutionality in doubtful cases and the Constitution's status as supreme, ordinary law. It acknowledges the tension generated by constitutional law for democratic responsibility and separation of powers but regards these problems as not essentially different from unresolved problems considered in legal theory generally.

I would have no quarrel with this conclusion if constitutional theory were not at the impasse at which it now stands, and if retrieving the original distinctions could not give us valuable insight into this impasse. The lesson I draw from retrieval is that constitutional theory needs to separate itself in crucial ways from legal theory. Alternatively stated, constitutional theory needs to separate the two parts of *Marbury*'s victory. Judicial determinations of unconstitutionality in doubtful cases is now a given, sanctioned by the unwritten constitution. It can always lose this sanction through the forms of the written or unwritten constitution, but there is no indication it will do so in the foreseeable future. The Constitution, however, does not function as does ordinary law and it cannot be made to do so by acceptance, however pervasive. Ineradicable differences in kind between fundamental and ordinary law, independent of any historical account of the legalization of fundamental law, necessarily remain within contemporary practice. Constitutional law has easily adopted the means and methods of ordinary law but these are not at the service of ordinary law's purpose or function. Here I will concentrate on constitutional law's unreflective adoption of ordinary law's enforcement function and the distortions produced by its inappropriate application to fundamental law.

The starting point is that any law or restraint on sovereign power is and must be different in kind from that addressed to individuals, or even delegated power. Restraints directed at sovereign power are necessarily made in contemplation of obedience, whereas those directed at individuals are made in contemplation of violation. The former is a single actor, the legislature.[41] If it were to violate the Constitution with the regularity with which

41. I will limit this discussion to the central relationship of judicial review, that between the Constitution and legislation. Many of the same considerations apply to the exercise of presidential power. I defer to another time discussion of the Fourth Amendment which speaks directly to police officers, who are not a single actor, and of constitutional restraints on delegated power.

some individuals violate ordinary law, the regime would collapse. Real constitutional violations must be rare, too rare to sustain any regular practice of enforcement. In addition, as noted above, the judiciary can always enforce ordinary law because it functions as the agent of societal force directed at individual lawbreakers. In attempting to enforce fundamental law against the real constitutional violation the judiciary is the agent of a restraint the dominant forces of society once accepted but have shown themselves willing to violate. Among the consequences of constitutional law's unreflective adoption of ordinary law's enforcement function has been identification of enforcement with legislation invalidated in court, at the same time that we ignore the necessarily rare unambiguous violations courts proved too weak to counter. These were, again, the denial of elementary due process, literal protection of the laws, and voting rights to African-Americans for more than half a century following adoption of the Civil War amendments, and of due process to Japanese-Americans in World War II.

At risk of overstatement I will say that a constitution is a kind of law that in its nature is either self-enforcing or unenforceable. That ordinary law is, in fact, overwhelmingly self-enforcing does not undermine the difference between it and fundamental law. For the judiciary exists for, and its work is shaped by, the repeated, ongoing circumstances in which ordinary law is not self-enforcing and in which authoritative resolution of conflict among individuals is indispensable for societal functioning. Constitutional self-enforcement, furthermore, is not an afterthought but a powerful and meaningful political force. It is what we call political stability, and its operation explains why societies with and without written constitutions and judicial review, such as the United States and Great Britain, can produce roughly the same results, namely regimes of effective and limited government, civil liberties, and institutional stability. The American Constitution has been from the beginning supreme binding law. But for all of *Marbury*'s stress on the written constitution, with its implicit contrast to the unwritten English constitution that does not bind literally, and for which the concept of enforcement is presumably irrelevant, a written constitution remains closer to an unwritten constitution than to a statute.[42] Both are either self-enforcing or unenforceable.

42. In this connection see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) and David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

We have also been diverted from appreciating the dynamics of constitutional enforcement by the fact that appellate courts function the same way in ordinary law and in constitutional law. In each they deal with new, close, or doubtful cases and choose among contending legitimate interpretations of the relevant law. However, the work of appellate courts in ordinary law, particularly the making of new law in hard cases, is part of a process of enforcing existing law and providing peaceful resolution of conflict in easy cases. It is, accordingly, meaningful to call this enforcement of existing law, however forward looking and innovative it may be in practice, and however problematic it remains in legal theory. For a self-enforcing constitution, however, no comparable purpose is served by the ongoing judicial choice among competing legitimate interpretations. It is simply judicial law-making. It is, furthermore, judicial law-making in which the constraints that narrow and discipline the inevitable law-making of ordinary law, such as text, intent, and reasoned, neutral, principled decision-making, do not bring comparable results in constitutional law. It would not have surprised the founding generation that these legal means conceived for ordinary law, and not inapplicable to the Constitution, cannot bring to authoritative and ongoing judicial interpretation of the latter the kind of legal identity their use imparts to application of ordinary law.

Constitutional scholarship is familiar with the failed attempts to bring constitutional law into conformity with conventional legal norms through fidelity to these ordinary law means. Although there is more to be said on this subject, the prior question is that of constitutional law's end or function. A constitution must serve society's twin needs of preservation, or enforcement, of its basic commitments and their adaptation to meet ongoing public needs. Under the conception of the Constitution as supreme ordinary law constitutional theory has assigned enforcement to the judiciary and adaptation to the legislature. This division appears overtly in some theories, but operates in different ways and at different levels, even in theories that assign to the judiciary an adaptationist operation. My argument is that this adoption of ordinary law's enforcement function is unworkable for an ongoing practice under a self-enforcing Constitution.

One way to cut into the problem is to see how different theories have sought constitutional enforcement by drawing selectively on one of the two main components of ordinary law's enforcement process, either that law's relatively uncomplicated application against unambiguous violation in easy cases or its

more open ended interpretation in new and close hard cases. I am not suggesting that these are two mutually exclusive and clear-cut components in ordinary law. The point, for present purposes, is that ordinary law is regularly and repeatedly violated in a way that the Constitution could not bear, and that such acts are roughly divisible into easy and hard cases. Resolution of the latter remains part of a single, coherent if still problematic process in ordinary law. Constitutional theories, more or less self-consciously, have divided ordinary law's enforcement process into these components and applied them selectively to a self-enforcing constitution. As the following review indicates, rather than imparting to judicial review a legal identity, reliance on ordinary law's enforcement model has culminated either in theories that require the abandonment of judicial review or that exacerbate constitutional law's political attributes.

James Bradley Thayer's reasonableness rule is the prototype of a theory that sought to legalize constitutional law by making it conform to that part of ordinary law's enforcement model directed to unambiguous violation in easy cases.[43] This is the burden of Thayer's insistence that judges should defer systematically to any reasonable or legitimate interpretation of the Constitution embodied in challenged legislation and reserve invalidation for the "clear mistake." Fidelity to such a requirement can only culminate in the end of judicial review. Constitutional violations, for one thing, are not "mistakes," or legal errors. They are high-stakes, self-conscious, political actions as in the willful denial of rights to African-Americans, or in Lincoln's subordination of the claims of individual liberty to the military needs of the union. Secondly, and decisively, no regime that produced enough instances of unambiguous violation to sustain an ongoing practice could survive in recognizable form. As we know, it was Thayer's reasonableness rule that atrophied, not judicial review. The rule did not disappear because of a demonstrated weakness in Thayer's argument. On the contrary, his position gained the support of leading scholars and judges and until Justice Frankfurter's retirement from the Court it monopolized opposition to active judicial review. Atrophy of systematic deference is another way to express *Marbury*'s victory.

The ultimate atrophy of the reasonableness rule is less interesting than what its widespread acceptance for over fifty years

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

tells us about the legalization of fundamental law. Neither Thayer nor his supporters, it is important to note, called for the end of judicial review. For them, systematic deference was a way of practicing it, not ending it. We need to ask a variant of the question Laurence Tribe posed to process theorists in 1980: why did thoughtful judges and scholars from Thayer to Frankfurter not see the impossibility of a practice devoted to enforcement of the Constitution against unambiguous violation? The answer lies in the process of legalization through which the Constitution absorbed ordinary law attributes in the absence of recognition or critical reflection.

Alexander Bickel's work illustrates in another way the hold and the unworkability for constitutional law of ordinary law's enforcement model as manifested in easy cases. By 1962, when Bickel wrote, practice had forced recognition that constitutional provisions were more intelligible as general principle than standard legal text. Bickel was among the first to make this point and this reconceptualization of text has been widely accepted. The contentious aspect of Bickel's position was his further argument that judicial defense of principle involved its adaptation in terms of contemporary values. Bickel, however, soon shrank back from active judicial implementation of contemporary values in discomfort with its legislative attributes. This response plus the centrality of *Brown v. Board of Education* in Bickel's initial statement indicates that he was comfortable with judicial implementation of principle in terms of contemporary values only against its unambiguous violation. *Brown* was such a case, addressing the willful and blatant denial of racial equality that remains this country's most serious constitutional violation. But there can no more be a regular practice devoted to the flouting of principle of this clarity than there can be for Thayer's clear mistake. As Bickel's life's work indicates, to reserve judicial review for the unambiguous violation, however conceived, is not to legalize judicial review but to end it.

Originalism's failure to provide viable guidance for the practice of judicial review is another variation on the same theme. As a product of the 1970s and 1980s, originalism accepts the conception of constitutional provisions as general principle. In a straightforward application of ordinary law means and ends it assigns adaptation of principle in terms of contemporary val-

ues to the legislature and enforcement of original values to the judiciary.[44]

As did Thayer, originalism presents itself as a way to practice judicial review, not to end it. And like Thayer's reasonableness rule, fidelity to its requirements can lead only to atrophy of the practice. To meet its professed aim of avoiding personal judicial value choices, originalism must restrict invalidation of legislation to the defense of original values against their unambiguous violation, comparable to the hypothetical examples given in *Marbury*. Otherwise, the self-enforcing constitution makes originalism the judicial rejection of social and political reform embodied in new legislation in the name of values once widely held but not constitutionalized.

Originalism has not formally capitulated but it has demonstrably failed to provide effective guidance for an ongoing judicial review. It is a coherent doctrine in the context which brought it into being—as a critique of the law-making connected with the invalidation of old governmental practices as violations of newly reinterpreted constitutional principles. But so applied originalism supports sustaining, not invalidating legislation. At some level, originalist justices understand the theory's inability to support invalidation of legislation as they have not relied on its principles in overturning important new legislation.[45]

Ronald Dworkin's constitutional law is the most highly developed theory to draw on that component of ordinary law's enforcement process in which courts resolve the new, close, and doubtful case. Dworkin accepted and generalized Bickel's understanding that constitutional provisions are principles whose "enforcement" required adaptation in terms of contemporary values.[46] Dworkin also characterized constitutional limits as moral restraints and acknowledged that judicial defense of such restraints rested in historic acceptance of judicial review, not these provisions' status as law.[47] In so doing, he acknowledged

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44. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

45. The clearest example is Justice Scalia's concurring opinion in Richmond v. Croson, 488 U.S. 469, 520 (1989), holding unconstitutional an affirmative action plan for local business with no attempt to link this holding to original values. The Rehnquist Court's federalism jurisprudence is originalist in the sense that its invalidation of legislation rests on older practices and values. But even here opinions qualify originalist claims. See, for example, Justice Scalia in Printz v. United States, 521 U.S. 898, 918 and 925 (1997) and Justice Thomas in Federal Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753-55 (2002).

46. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 132-37 (1977).

47. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE

differences in kind between fundamental and ordinary law. But this acknowledgment did not disturb Dworkin's assimilation of judicial defense of moral principle to the enforcement of ordinary law. Constitutional rights are understood as an extension of ordinary legal rights to be enforced through the same means and with the same regularity with which courts enforce the latter.[48]

Dworkin's critics argue that his constitutional law is legislative in character and they are correct. As we have seen, however we understand the inevitable law-making connected to judicial defense of ordinary legal rights, it remains enforcement of existing law serving agreed-upon societal ends. For a self-enforcing constitution judicial finality in the new, close, and hard case is simply law-making. Dworkin's constitutional law- making is also of much greater consequence than that attending implementation of ordinary legal rights. The latter are numerous, with relatively minor public policy consequences or innovation following from implementation in particular cases. Constitutional rights are few and portentous, and their implementation in new contexts carries with it the most important commitments of collective life. Enforcement of constitutional rights on the model of ordinary legal rights also contains a predetermined result. It precommits the Constitution to an individualist reading beyond that fairly contained within it as a statement of common purpose. In its most recent implementation, enforcement of constitutional rights was also a precommitment to policies of social reform. Overturning long-standing governmental practices in the name of contemporary values is the inverse of the judicial rejection of reform built into originalism. These predetermined results undermine the legal identity of both.

Bruce Ackerman's dualist democracy[49] is another constitutional theory that draws on that part of ordinary law's enforcement model as it operates in the new and close case. Dualist democracy contains an elaborate reconstruction of democratic and constitutional theory and an innovative rereading of American history. One central conclusion from this reconstruction is that popular and institutional acceptance of the expansion of national power in the New Deal is to be understood as a constitutional amendment. This amendment, as all major ones, Ackerman continued, necessitates an intergenerational synthesis of the com-

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AMERICAN CONSTITUTION, 32-35 (1996).

48. RONALD DWORKIN, LAW'S EMPIRE, chaps. 8-10 (1986).

49. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

mitments contained in the newly amended Constitution. Ackerman's synthesis culminates in a reading of the Supreme Court's defense of racial equality in *Brown v. Board of Education*, and of personal privacy in *Griswold v. Connecticut*, as "preservationist" decisions.[50] Here again is the unquestioned reliance on ordinary law's enforcement model and its assumption that courts in constitutional law can and can only enforce existing law.

Ackerman has been no more persuasive than Dworkin in turning the judicial adaptation of principle into the enforcement of existing law. Ackerman's problem would persist in identical form even if the New Deal innovations had included an amendment explicitly augmenting congressional power over the economy. His problem is not whether or not we accept the "possibility of interpretation"[51] but the different ends served by authoritative interpretation in ordinary and fundamental law. Again, the former serves the intelligible, indispensable, and agreed upon one of literal law enforcement. Constitutional law and constitutional theory have yet even to ask exactly what end is served by ongoing, authoritative judicial interpretation of the Constitution.

Ackerman's work is creative and provocative, and more than that of any other theorist captures essential differences in kind between fundamental and ordinary law. His discussions of the Constitution's extra-legal attributes and of intergenerational synthesis reflect ways in which a written constitution is closer to an unwritten one than to a statute, and capture the breadth of adaptation to which, in its nature, it is properly subject. Yet in ultimately subordinating these attributes to ordinary law's enforcement end it culminated in another failed theory.

I said at the beginning that retrieval of the original distinctions is a necessary preliminary to better constitutional theory. That preliminary inheres in recognizing what fundamental law is not. This is Larry Kramer's phrase,[52] used in arguing that my discussion of the original distinctions had addressed only this question and failed to give an account of what fundamental law was. As indicated above, I believe I did answer that question with respect to the founding era, although perhaps not yet as fully as necessary. But I have not here given any account of what fundamental law is today, and this is the central question for mod-

50. *Id.* at 140.
51. *Id.* chap. 6.
52. Kramer, *supra* note 4, at 33 n.114.

ern constitutional law. Elsewhere I suggested that this law is better understood as part of a new institutional form or a new form of law, rather than as an extension of common and statutory law. In its evolutionary development the Constitution lost key properties of fundamental law as inherently constituted without being able to take on those of supreme ordinary law. As a new form of law its ends and means need to be consciously constructed and defended. I also indicated what the ends and means of such a new form of law might look like.[53] I regard these as tentative formulations, offered to stimulate thinking about constitutional law as a new form of law. To assess its soundness, or that of any other conception of fundamental law, it is necessary to appreciate, more fully than is yet the case, what fundamental law is not.

53. Snowiss, *supra* note 20, at 1016-20.