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Toward a Revisionist History of the Supreme Court

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The bicentennial year provoked a reconsideration of not only the era of the framing but of constitutional history as a whole. At one point I thought that I might participate in that effort by writing a history of the Supreme Court, updating Robert McCloskey's classic book in light of recent scholarship. It turned out that that project was too daunting for me. There was too much material to assimilate before I could feel comfortable in trying to present or even develop a history of the Supreme Court. This essay is, therefore, only a sketch of a revisionist history of the Supreme Court. It is extremely abstract, eliminates a lot of detail and

* Part of this essay was prepared for a roundtable on the historiography of the Supreme Court, at the meeting of the OAH, April 4, 1987, in Philadelphia. Additionally, the text of this Article, with minor changes, was presented as the Thirty-Ninth Cleveland-Marshall Fund Lecture, Cleveland-Marshall College of Law, Cleveland, Ohio, April 9, 1987.

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qualifications, and avoids dealing with problems and materials that do not fit the basic pattern I will identify. I must add that the pattern needs so much more elaboration and qualification that I am not entirely comfortable in presenting it in even this sketchy form.

II. Histories of the Supreme Court

To explain what a revisionist history of the Supreme Court would be like, and therefore, to explain what my project would be, I must describe what it is revising. It may be useful to begin by examining two programmatic statements about constitutional history. Twenty-five years ago Paul Murphy published Time to Reclaim: The Current Challenge of American Constitutional History. In it he decried the historical profession's neglect of constitutional history, which he found particularly serious because some members of the Supreme Court were then, as they are now, relying on history (bad history, to be sure) to justify their opinions. Murphy argued that this jurisprudence provided historians with "the opportunity to play a coordinate role through the furnishing of new historical materials."

Since the publication of Murphy's article, the so-called jurisprudence of original intent has become perhaps more prominent. Many have criticized it as a jurisprudence, and others have criticized its proponents for relying on bad history. As Murphy noted, much of the history on which these proponents rely has not been produced by trained historians. For example, Justice Rehnquist's originalist opinion in Wallace v. Jaffree, the moment-of-silence case, relied on the analysis developed by political scientists Robert Cord and Michael Malbin. It may be worth explaining briefly why trained historians have not played the role that Murphy foresaw—or at least hoped they would play.

Recent controversies about original intent have focused on the fourteenth amendment in general, the application to the states of the

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3 69 AM. Hist. REV. 64 (1963).
5 Murphy, supra note 3, at 78-79.
8 Murphy, supra note 3, at 77.
10 See R. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982); M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978).
11 See also R. Morgan, Disabled America: The "Rights Industry" in Our Time 22-32 (1984).
provisions of the Bill of Rights in particular, and the topic I will address, the establishment clause of the first amendment. Cord and Malbin developed an earlier, minority view of the establishment clause, according to which Congress, acting pursuant to any of its enumerated powers, could provide what has variously been called nondiscriminatory or nonpreferential aid, or aid to religion in general. Recent works by Leonard Levy and Thomas Curry show why historians probably cannot play the role Murphy described, even if, like Levy and Curry, they intend to participate in the originalist discussion.

Historians face two difficulties that lawyers and political scientists can overlook. For inquiries into original intent to be useful in constitutional law, they have to yield relatively firm answers: Judges want to be able to say, "The framers meant thus-and-so." But the training and disciplinary orientation of historians leads them to be attuned to the complexities of any real historical event or set of intentions which makes their conclusions less useful to judges.

Second, and perhaps more important, historians are trained to be acutely sensitive to the broader context of events and intentions. Particularly important to my point here are the lessons historians have learned about intellectual history from Quentin Skinner and J.G.A. Pocock. One context of constitutional language is the general rhetoric of political discourse. Skinner and Pocock have shown that we cannot reconstruct the meaning of terms like "establishment of religion" without also reconstructing the entire intellectual universe in which those terms were set. Perhaps the clearest message of Levy's and Curry's books is that the

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14 See L. LEVY, supra note 13, at xiii.

15 One can imagine, though only a few have propounded, a jurisprudence that says that, unless the original intent to prohibit a practice is clear, it is not prohibited. Few have even offered this jurisprudence, because it has difficulty handling problems such as are posed by wiretapping and kindred technological developments. And those who have proposed it uniformly overlook the problem posed by the fact that the ordinary operations of government have expanded so substantially that it is only fictionally consistent with the intentions of the framers to allow government to operate on such an expanded scale subject only to those precise limitations, on a much smaller government, that the framers had in mind. This is not to say that this jurisprudence cannot be defended; it is just to say that the defense must go beyond originalism.
universe of discourse about religion in 1789 is quite unlike the universe of discourse about religion today. The terms were in flux; concepts of religious liberty and nonestablishment ran into each other in ways that are quite difficult to understand today. Most important, in 1789 the United States was a Christian and a Protestant nation in both a statistical and an unproblematically normative sense. Today it remains statistically a Christian nation, but no longer can it be said that the equivalent normative statement is unproblematic. Further, given the intensity felt by the framers about denominational differences among Protestant sects, as Madison called them, it seems unlikely in the extreme that they would have found the concept of "religion in general" at all intelligible. This means that the framers' normative understanding of the religion clauses cannot be translated directly into contemporary constitutional law without a substantial shift in our current intellectual universe.16

To summarize, historians make their distinctive contribution to knowledge in this field precisely by distancing us from the framers, showing us the degree to which their intellectual, and therefore, constitutional world is different from ours.17 That may be precisely why historians cannot assist originalist judges in the way that Murphy suggested.

In 1981, Harry Scheiber discussed "what many practitioners of constitutional history consider to be a genuine crisis in their field"—a crisis that apparently had persisted despite Murphy's urgings.18 Like Murphy, though, Scheiber was optimistic. He argued that the "new" legal history provided the basis for revitalizing constitutional history. The new legal history completed the integration of law into the Progressive paradigm by stressing the "interaction of change in law with socioeconomic developments," just as Progressive historiography stressed the interaction of politics with those developments.19 Scheiber argued that the new constitutional history would show how judges shaped the law with

16 Proponents of the nonpreferentialist theories frequently augment their arguments by invoking nonoriginalist ideas, such as that the pluralism of contemporary American politics, on the issue of religion, makes it unlikely that legislatures will enact statutes that pose serious threats to religious liberty. Again, these augmented arguments may be persuasive, but they, too, are no longer originalist, and it is the added material that contributes the persuasive force.


19 Id. at 337.
"consequences for economic institutions and allocations of income and power." 20

Scheiber's essay is striking for two reasons. First, the new constitutional history apparently would have little to say about the traditional topics of constitutional history. It would examine the social, economic, and political role of the idea of constitutionalism, but not, it seems, the parallel roles of particular constitutional doctrines. 21 It would examine the effects of the general structures of constitutional law, of which Scheiber stressed federalism, but not those of the Supreme Court's changing formulations of the scope of Congress' power to regulate interstate commerce. Indeed, Scheiber argued that attention to developments at the state level would show how little articulated constitutional doctrine had to do with the operation and regulation of the economy.

This leads to the second notable point about Scheiber's essay. Contemporaneous with its publication, the Progressive integration of law into socioeconomic history came under sustained attack, at least with regard to the usual formulations of the claimed interaction between law and socioeconomic developments. Under these circumstances, constitutional historians interested in doctrine might well become cautious about joining an enterprise under siege.

Scheiber's discussion of states' divergence from stated Supreme Court law suggests one aspect of the challenge. The litigation process is costly, and people disadvantaged by legal rules often find it sensible to use their money in other ways including using it to support their own relocation to another jurisdiction. They may withdraw from the regulated activity and invest elsewhere in states more hospitable to their activities; they may support political rather than judicial efforts to alter the law; or, in some situations, they can develop alternative contractual arrangements to accomplish their goals without coming under the rules they dislike. 22 These factors make it quite difficult to persuasively link legal doctrine to socioeconomic effects, 23 thus supporting Scheiber's implicit argument.

20 Id. at 341.

21 To use an example that Scheiber does not mention, one might want to examine the rhetoric of constitutionalism in social movements.


23 For example, it appears to be a staple of Progressive legal history to claim that the fellow servant rule promoted investment in railroads by shifting the cost of accidents from the railroads to workers. Among the difficulties with this thesis are: the "rule" was riddled with so many exceptions, almost from the beginning, that it could not possibly have had much impact on investment decisions; workers might have extracted higher wages from employers to compensate for the risk of injury; worker mobility was substantial enough during this period that it is difficult to see exactly why employers would have been in a position to resist workers' efforts to contract around the fellow servant rule.
about looking at structure, but further distancing the history of the Supreme Court from social, political, and economic history.

In addition, sometimes there appear to be links across doctrinal areas that are not easily accounted for by direct reference to social, economic, or political events or trends. Consider some examples: Around the turn of the century, the Supreme Court developed the rule that Congress could not directly regulate intrastate commerce, and the rule that states could not directly regulate interstate commerce. The distinctions between direct and indirect regulation were so unclear that we cannot even describe a pattern that links results to politics. Rather, what seems important is the very concept of directness. The relevant question is not how was the concept used in the service of political or other ends identified in Progressive historiography, but rather, why did the idea of directness have the force that it did in the society as it was then constituted. This is particularly interesting because the idea lost its force in the 1920's and 1930's when it was replaced by balancing tests. One wants to say that “directness” was an idea congenial to a robust, relatively laissez faire capitalism, while “balancing” is congenial to welfare state capitalism. Yet, the resources of Progressive historiography seem ill-suited to justify that conclusion. I will return to this example in Section II of this essay.

A similar puzzle is posed by the celebrated “footnote 4” analysis by Harlan Fiske Stone in United States v. Carolene Products. The analysis was intended to, and did, justify judicial intervention on behalf of important elements in the New Deal coalition; this observation is readily compatible with the Progressive synthesis. But, what are we to make of the fact that Stone applied the same analysis to questions about the constitutionality of state regulation of interstate commerce? Of course, one is entitled to say that the Progressive synthesis explains the attraction of “footnote 4” analysis in its core applications, and the merits of the analysis explains its attractions elsewhere. That seems uncomfortably ad hoc. Alternatively, “footnote 4” analysis provided a method by which the Court could justify its continuing effort to supervise state economic regulation while simultaneously repudiating the direct supervision it had exercised by means of the due process clause. More speculatively, one might say that “footnote 4” relies on ideas of “insider v. outsider” that were somehow compatible with the politics, or more

25 This question is explored in the celebrated unpublished work of Duncan Kennedy on classical legal thought.
26 304 U.S. 144, 152 n.4 (1938).
likely, the culture of the 1930's and 1940's. Here the Progressive synthesis seems to work best on the level of particular decisions, but is at least underdeveloped when we think about larger doctrinal structures.

Finally, contemporary constitutional law has endorsed the relevance of an intent-based analysis in areas ranging from equal protection to state regulation of commerce to establishment of religion.\textsuperscript{28} The Progressive synthesis would explain these doctrines as efforts by a conservative Supreme Court to limit the reach of the Constitution or the courts, in comparison with the more broad ranging results that would be reached if an "impact" based test were applied. Here the Progressive synthesis seems too blunt, missing the nuances. The purportedly conservative approach has been applied fairly aggressively to overturn state regulations of commerce, which is consistent with one sense of conservatism, but not with another. Even if the Progressive synthesis says only that the Court used its analysis to promote the narrowly political goals of contemporary conservatives, it would fail to grapple with the fact that the Court did so by using an "intent" test, and would not explain why conservatism took that particular form. Again, a more fruitful analysis might examine how notions of individual responsibility, such as are captured by ideas of intent, fit into a general conservative world view.

With these remarks as background, I turn to an examination of recent works of constitutional history. These works share several characteristics. First, most histories of constitutional law are just that and are not histories of the Supreme Court. They deal with many things other than what the Supreme Court has done. For example, the histories of the Constitution contain extensive discussions of the development of the bureaucracy of administrative agencies and of the expanding scope of presidential power which has occurred essentially without significant judicial supervision until recently. Indeed, in these histories of the Constitution the history of the administrative agencies is a long term development interrupted at random by the Supreme Court. In contrast, a revisionist history of the Supreme Court would be a history of the Supreme Court.

A revisionist history of the Supreme Court would deal with what might be called the institution of the Supreme Court, as one might have a history of the Congress or the President. For example, it is an important part of a history of the Supreme Court that in the twentieth century the Court has become more bureaucratized: there are law clerks when there were none before, and the office of the Clerk of Court has become a better supervisor of the flow of paper in the Supreme Court.

For reasons that are not worth going into, I have done a short article on a change in the Court's behavior that people have not noticed. In the late 1930's and early 1940's the Supreme Court frequently granted rehearings of cases that it had already decided. This does not happen any more. I argue that this change is attributable to the increasing bureaucratization of the Supreme Court as there are now more checks on mistakes. In the past, rehearings were granted when there was some sort of mistake. Given the development of more law clerks and the bureaucracy of the Clerk of the Court, the chance of an error is lower.

In addition, a history of the Supreme Court would be a history of constitutional doctrine. For example, a history of the Supreme Court would not talk about how administrative agencies themselves developed and became an important fourth branch of the government, but would talk about how the Court rationalized that development in those few cases that it has decided. In that way, the discussion of the Court's work would not be intrusive but would rather be the focus of the development.

Before we examine some historians' works, it is worth noting that law professors continue to produce relatively standard doctrinal histories. The most dramatic recent work in this genre is, of course, David Currie's curious effort to grade Supreme Court opinions as if they were answers to questions he posed on a law school examination. Even here the power of the Progressive synthesis is shown by the fact that when Currie finds it worthwhile to look outside the cases, he offhandedly invokes political considerations as if their relevance went without argument.

The recent volumes of the Holmes Devise history of the Supreme Court are not so narrow. The Bickel-Schmidt volume is straight-forwardly Whiggish in its effort to demonstrate that the White Court was not as bad as it could have been on issues of race. George Haskins and Herbert Johnson strive to show that the early Marshall Court succeeded in separating law from politics, thus conforming to the vision of a law that needs no explanation from outside itself. Their Whiggish intentions are clear, but their argument can be placed in a broader framework suggested by their own evidence. Haskins and Johnson show, I believe, that

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31 *Id. at xii, xiii.*


the separation of law from politics was a political achievement of the highest order, preserving from direct political control some rather well-defined interests that were otherwise at serious risk. Seen in this way, their work both contributes to the Progressive synthesis by offering a political explanation for constitutional law in the large, and advances the inquiry, by refraining from such explanations of particular doctrines or decisions.

These works share one characteristic with historians’ surveys. Like the lawyers, the historians are unable to refrain from evaluating the Court’s work. The grounds for evaluation range from Paul Murphy’s civil libertarianism to Forrest McDonald’s idiosyncratic blend of libertarianism and constitutionalism. From my perspective as a constitutional lawyer, the evaluative emphasis is curious. Murphy rightly criticized judges for doing amateurish history, but the point applies in reverse as well. Developing appropriate grounds for evaluating constitutional decisions is quite difficult, and historians are likely to be amateurish at the task. For example, McDonald summarizes New Deal constitutional developments by saying that “[t]he only remaining restraints upon Congress and the President were democracy and bureaucracy—neither of which is to be found in the Constitution.” What “found in the Constitution” means is hardly transparent, and a constitutional lawyer’s confidence is hardly bolstered by McDonald’s supporting claims that the Court in the Jones & Laughlin case “stretched the commerce clause beyond recognition” as if the prior law had been clear on the issue, and that Helvering v. Davis, rather than United States v. Butler, first adopted the Hamiltonian theory that the general welfare clause was a positive grant of power to Congress.

A related, but more subtle, difficulty is suggested by Herman Belz’s statement about the rise of presidential government that “many Americans” found it “at variance with the soundest traditions of the American constitutional system.” I will discuss the equivocation implicit in “many Americans” later. Here what is interesting is Belz’s apparent identification of the “soundest” constitutional tradition with a particular distribution of power between President and Congress. That identification takes a position on a controversial matter of constitutional theory. There is an alternative view, grounded in Madison’s discussion of federalism and the

34 F. McDonald, A Constitutional History of the United States (1982).
35 Id. at 199.
36 301 U.S. 619 (1937).
37 297 U.S. 1 (1936).
38 Id. at 198.
separation of powers in *The Federalist*. Juxtapose "ambition must be made to counteract ambition" with

If... the people should in [the] future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due

and we have a different view: The Constitution does not specify an allocation of authority, but endorses whatever distribution results from the competition among the institutions of American government.

It should be clear that I do not want to criticize historians' evaluative perspectives because they are treading on unfamiliar turf. Of course anyone can make mistakes, and the ordinary academic division of labor should suggest nothing more than caution to historians as it should to academic lawyers. But, why should historians, *qua* historians, be interested in offering evaluations of the Supreme Court's behavior? Haskins and Johnson's work suggests one answer. Evaluations of constitutional law are built into the self-understandings of judges and citizens. For example, to the extent that people believe that it is important to separate law from politics, the flow of events will be affected by their beliefs about the extent to which the Court has successfully separated those domains. Evaluation thus plays an explanatory role, at least to the extent that the evaluations are those made by historical actors. I find it relatively easy to read Haskins and Johnson in this way. Similarly, Belz's preface to his revision of Kelly and Harbison notes that the original version was "written from the perspective of Progressive historiography and the liberal nationalist reform tradition." That evaluative tradition was causally important throughout the late nineteenth century and became dominant in the twentieth, and so Kelly and Harbison's evaluations pointed to, as they were symptomatic of, important social forces. It is too early to tell whether the skepticism shared by Belz and McDonald will have similarly explanatory force. It does seem to me, though, that to the extent that "the liberal nationalist reform tradition" was an important social force, evaluations like McDonald's are bound to seem anachronistic until the account reaches the 1950's or so.

In addition, these evaluative points are ways of identifying what the

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43 Obviously, historians are interested in evaluative questions as citizens.
44 KELLY, HARBISON, & BELZ, supra note 39, at xiii.
justices' own theories of judicial review were. Over the past generation a
pretty good map of possible constitutional theories has developed, and
this map can help us understand how Chief Justice Taney and Justice
Stephen Field approached their jobs. Consider two examples: In Marbury
v. Madison,46 the most important element in Chief Justice Marshall's
justification for judicial review is a theory of the sort we have become
used to. Marshall's theory was closely tied to the text of the Constitution.
At the crucial point in the argument Marshall wrote, "The constitution
declares 'that no bill of attainder . . . shall be passed.' If, however, such a
bill should be passed, and a person should be prosecuted under it; must
the court condemn to death those victims when the constitution endeav-
ors to preserve."47 That is a classic textualist argument, and it is useful
to have seen in the past generation the development of arguments about
the coherence of textualism to understand exactly what Marshall was
doing. I have already mentioned the second example, Harlan Fiske
Stone's theory that we now know as representation reinforcing review.
There too we see a theoretical perspective being deployed by one of the
Justices, and again I think it useful to have the theoretical discussions of
the past generation to illuminate what was going on. Note, however, that
the theoretical underpinnings I have discussed were held and articulated
by the Justices themselves. It is not clear to me that it would be so
directly useful to evaluate the work of Justices who were not self-
consciously theoretical.

One final point about the evaluative emphasis will assist in making the
transition to my discussion of the next characteristic of constitutional
histories. The level of attention has shifted from outcomes to theory. Yet,
the past generation's discussion of theories like textualism and represen-
tation reinforcement has led to conclusions that as theories they give
insufficient guidance to prescribe outcomes in particular cases.48 We will
ultimately need some account of such outcomes. That returns us to the
Progressive historiographical tradition, which supplies the explanatory
framework for some works, and the vision to which others react. To that
extent, Scheiber's call for the integration of constitutional and socioeco-

46 5 U.S. (1 Cranch) 137 (1803).
47 Id. at 179.
48 See generally M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW
(1988).
criticized what they call the presidential synthesis in the writing of the political history of the United States. There is a similar Chief Justice synthesis in histories of constitutional law. For example, we talk about the Marshall Court, the Taney Court, and the Warren Court. In the Progressive synthesis the names of the Chief Justices operate as surrogates for political orientation. There are several points to make about this. First, we are comfortable with giving the names of Chief Justices to these periods when the Chief Justices served long enough. Rather than speaking of a Stone Court or a Vinson Court, we talk instead about a New Deal Court or a Roosevelt Court depending on how strongly we want to emphasize the political element. We do not talk about a White Court and a Taft Court but a Lochner-era Court. This indicates that the name of the Chief Justice really is just a surrogate for the underlying political analysis.

Second, the Chief Justice label as surrogate can be misleading. A contemporary example is that talk about the Warren Court, the Burger Court, and now the Rehnquist Court is almost certainly wrong. Since the mid-1950's it has been the Brennan Court. Calling it the Brennan Court gives a different view of what has been going on in the Supreme Court than calling it a Warren or Burger-Rehnquist Court.

Another dimension of the inaccuracy may be suggested by the Brennan Court observation but can be brought out more clearly by referring back to the Marshall Court and the Taney Court. Doing so inserts a discontinuity that may not be there or may not be as important as the labeling might suggest. The final section of this essay argues that there are important elements of continuity during the entire nineteenth century, which the Chief Justice synthesis obscures.

The primary strength of the Progressive synthesis is its insistence on connecting the Supreme Court to politics, and it does so in the right way. By this I mean that the connection is historically accurate and consistent with the general conception of the role of the Supreme Court in the constitutional scheme held by the framers' generation. According to that conception, the Constitution was designed to give the American people what they wanted, whatever that happened to be, as long as the American people wanted it over a long enough period. If there was a sustained consensus, the Constitution was designed to allow that consensus to be achieved. For example, even if the framers would have voted against particular developments, they believed that if they had been outvoted over a long enough period the views of the majority ought to prevail. The best examples of this are the staggered terms at the House

of Representatives, the Senate, and the Presidency. A coalition can get what it wants if it holds together long enough to gain control over the two houses of Congress and the Presidency. The Progressive synthesis shows how the Court fits into this scheme. If the coalition holds together over a long enough period, enough Justices will be appointed to allow this sustained consensus among the citizenry to accomplish what it wants through all three branches.

A second strength of the Progressive reduction of outcomes to politics is that it allows us to identify two types of periods in Supreme Court activity. The first is the period of sustained consensus, during which a long-run coalition does hold together. Thus, the following list makes sense in terms of the Progressive synthesis: the nationalism of the Marshall Court; the Taney Court's participation in Southern domination of the national political system; the era of Reconstruction, during which moderate Republicans controlled all of the government; and the New Deal period after 1937, during which the New Deal coalition had control of all three branches of the government.  

The Progressive synthesis allows us to identify a second type of Supreme Court activity: periods of transition in the political coalition. Here there may be only one good example and one weaker example. The first is the constitutional process of the New Deal when there was a sharp discontinuity between the extrajudicial political system and judicial politics. The New Deal coalition was not able to appoint enough Justices fast enough for the courts to participate in the emerging coalition. The weaker example is the Civil War period. There was a discontinuity there but the Court did not provoke a crisis. Although Taney argued that Lincoln's acts were completely unconstitutional, he had no effect in politics at all.  

I would like to illustrate these general points by returning to the histories I have already discussed. Loren Beth's contribution to the New American Nation series is explicit: "We may assume that social and economic development, and social, economic, and political theories, are the forcing beds for constitutional change, and that in the main such change is a response to the environment." Beth's book does have a curiously old-fashioned tone. In it, constitutional development occurs because of undifferentiated "needs" and generalized "demands" to resolve obvious "problems," although Beth's discussion of Progressive reforms

50 Are there other such periods? It seems to me an open question is whether the New Deal coalition continues to be politically dominant. If it is, we will have to think about the current Supreme Court somewhat differently from the way we have become accustomed to.  
51 Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).  
53 See, e.g., id. at 15 (noting "desire for, indeed the necessity of, government which could respond to, but in addition control and even shape, the economic and social conditions which
in politics is a useful, albeit preliminary, attempt to take account of then-recent revisionist studies of elections. Similarly, Forrest McDonald attributes constitutional change to economic change: "The American system of divided sovereignty simply could not keep pace with the times . . . [and the Court] adjust[ed] the Constitution to fit the new circumstances. . . ."55

Paul Murphy's conceptualization stresses politics a bit more. He focuses on persistent twentieth century crises as the underlying cause and resulting recurrent concerns for change as the immediate cause of constitutional change. But politics comes into its own in Belz's account of constitutional development, which could almost be retitled "American Politics: Their Origins and Development." Belz occasionally writes that the Court adapted constitutional law "to changing social and economic circumstances," but his basic view is that the Court's "new outlook . . . was shaped by political events and changes in the Court's membership that reflected changes in American society."56 Belz offers a dominant and a subordinate theme. The dominant theme is that the main developments in American politics, and therefore, in constitutional law, were supported by "broad segments of middle-class" society.57 This consensus explains why the Court endorsed "release of energy" principles in the Jacksonian era, and progressivism in the early twentieth century.

Belz's approach leads to at least three problems. Two are distinctive to Belz. His emphasis on politics and consensus leaves him unable to offer a cogent account of why the Court occasionally invalidates statutes. In the early twentieth century, he says, the Court's invalidations "expressed the reluctance of the society as a whole to move too rapidly toward positive government and the regulatory state."59 This may be completely vacuous. But if it is not, one needs to ask why it was the Court that expressed that reluctance rather than, for example, legislatures, which after all did not adopt Bismarckian social welfare programs. The real issue, it seems, is

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54 Id. at 125-29.
55 F. McDonald, supra note 34, at 149. See also id. at 158-59 ("decisions proved to be out of touch with the economic changes that were taking place . . . . As a result, the Court began to alter its positions").
56 Kelly, Harrison, & Belz, supra note 39, at 403-04. See also id. at 413-14 (income tax decision explained by individual views of particular justices).
57 Id. at 419.
58 Id. at 545-55.
59 Id. at 458.
about *differential* reluctance to move too rapidly, or about what was too rapid a pace, and Belz's approach cannot help on those issues.

In addition, Belz has difficulty in accommodating his normative disapproval of more recent developments to his conceptualization, which is, basically, that the Court gives the American people what they want. This difficulty emerges more in Belz's phrasings than in explicit arguments. Thus, he describes Roosevelt's destroyer deal: "The country at large was prepared to accede to the law of necessity rather than to cogent constitutional analysis."60 He writes of "the libertarian outlook of a majority of the Supreme Court," rather than "of a large segment of the middle class," and attributes to the "media" and "academic circles" the view that the Court's libertarianism after 1960 was evidence of public maturity, rather than saying, as his consensualist approach would suggest he should, that their view was correct.61

The third problem with Belz's approach is common to the Progressive historiographical program. That program washes out too much detail, in particular by focusing almost exclusively on results and patterns of results rather than on doctrines. When constitutional law is reduced directly to politics and economics, too many puzzles remain, which can be overlooked only by looking solely at results and not at doctrine. If constitutional law is reduced to politics, we need to know how the political influences on the Court and legislatures differed so greatly that judicial review ever took place. If it is reduced to economics, we need to know why, out of all the ways in which the Constitution could have adapted to economic change, American society pursued the particular path that it did. Of course, I have been examining rather large-scale overviews of constitutional history, and it is unfair to expect that they have as much texture as would monographic studies. Nonetheless, the Progressive synthesis seems a bit bland.

It also seems unlikely to help in examining the reverse direction of the causal arrow. That is, if politics and economics drive constitutional development, it will be fairly difficult to discover important areas in which constitutional developments affect politics and economics. Apart from biographical matters, this may explain Scheiber's focus on federalism, for it seems fairly straightforward to claim that the economic consequences of having a federal system differ from those of having a centralized one. Most obviously, federalism provides the opportunity for capital to move in response to changes in local laws—characterized, depending on one's political views, as the race to the bottom or voting with one's feet. Similarly, it seems obvious that having a system of separated powers affects the political process.

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60 *Id.* at 553.
61 *Id.* at 536, 599.
The Progressive synthesis obviously gets at something important. It is clear that when we talk about a conservative decision we are talking about something real in the Court's behavior. The Progressive synthesis does identify and explain the Taney Court's greater sensitivity to states' rights than the Marshall Court's. With all that, there are weaknesses in the Progressive synthesis. Once again, I will move back to more general points to identify two weaknesses. The second will lead me to development of the revisionist view.

The first weakness is that the Progressive synthesis has problems with the transitional eras I have mentioned. Sometimes such eras can last too long to be comfortably accommodated into the view that outcomes are responsive to politics. The present situation may be one example. The politics of the country have changed since 1968 and the Court has changed as well, but the changes do not seem to be quite the same. And it has been a long enough period for this lack of congruence to pose a problem for the Progressive synthesis. Perhaps a new coalition has emerged, one more complex than we can presently discern. A better example is the *Lochner* era, which poses a severe problem for the Progressive synthesis. For *Lochner* is an atypical decision of the era to which it gives its name. The courts sustained more Progressive legislation supported by people then called progressive than the label suggests. 62 Consider the commerce clause cases of that period, in which the Supreme Court developed obviously inconsistent doctrine. It upheld Progressive legislation in the Shreveport rate cases and in *Champion v. Ames* and struck it down or interpreted the statutes in a way in light of the Constitution so as to severely limit its scope in the *E.C. Knight* case. 63

What is the proper characterization of that set of decisions? The pattern that historians have identified ranks what the Court was willing to uphold. 64 It was most willing to uphold state legislation invoking traditional state police powers, such as health and safety regulations. It was somewhat less receptive to less traditional police power regulations, and even less receptive to state labor laws as such. 65 The Court was least receptive to federal labor laws. Having identified that pattern, we can see that it is difficult to figure out politically what it means. As we have seen, historians tend to invoke the Progressive synthesis by saying that the politics of the era were confused, yet it is not clear how enlightening that is. For, if the public was not willing to move in the direction of the

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64 *See* J. *Semonche*, supranote 62.

65 *See* *Lochner v. New York*, 198 U.S. 45 (1905) (examining skeptically a claim that hours limitation promotes health, and rejecting the limitation when defended as labor law "as such").
regulatory state too fast, why, according to the Progressive synthesis, should the Court have made the public move more slowly than it wanted to, as indicated by the legislation it had adopted?

III. Long-Term Continuities in Constitutional Doctrine: A Sketch of a Revisionist View

One way to elaborate the Progressive synthesis would allow us to explore the interaction between constitutional law and the political and economic system in some non-tautologous way and at a level less general than that of the overall structures of federalism and the separation of powers. Like Scheiber, I am interested in federalism, and particularly, in the question of when state laws are unconstitutional because they interfere with interstate commerce. Belz, McDonald, and Murphy devote essentially no space to that question in the modern post-New Deal era. From the perspective of a constitutional lawyer, that is striking for two reasons. The Supreme Court has regularly considered cases raising that question; indeed, in recent years such cases constitute one of the larger substantive categories of the Court's work. In addition, as mentioned earlier, what the Court has to say about these cases seems linked, on the level of animating metaphors, to what it says in other apparently quite different areas.

Neglect of these dormant commerce clause issues is understandable within the Progressive synthesis. According to that synthesis, the Court enforced limitations on state power to regulate interstate commerce in order to promote national economic integration. That integration having been achieved in the twentieth century, the Court has to be dealing with only the most trivial sorts of cases—as Justice Rehnquist once said, cases about elk and minnows, which are hardly at the heart of today's economy. So, according to the Progressive synthesis, there is no need to discuss these cases in surveys of constitutional development, no matter how interesting they are to lawyers.

As I have suggested, the utilization of animating metaphors across substantive areas is itself interesting. Until the late nineteenth century, the metaphor of direct/indirect made sense to the Supreme Court in a way that is almost completely unintelligible today. Since then, the metaphor of balancing interests has taken hold. Belz describes the transitional period, saying that the Court shifted from examining whether legislation was inside or outside the bounds of the police power—a geometric version of the direct/indirect metaphor—to examining whether it was a reason-

able exercise of governmental power—a version of the balancing metaphor.\textsuperscript{68} Given his conceptualization, he finds it difficult to do more than express normative disapproval of this shift.

Consider, however, the hypothesis that political and economic developments account for the shift in animating metaphors. If that hypothesis is correct, some of the tautologies of the Progressive synthesis would disappear. It would be less important—or it would be a phenomenon to be explained on some other level—that the Supreme Court inconsistently upheld or invalidated statutes in the \textit{Lochner} era in ways explicable solely by the personal preferences of the Justices. What would be interesting, and explained by this hypothesis, is that the invalidations and the upholdings invoked standards of reasonableness rather than “inside/outside” metaphors. Another consequence might be a reperiodization of constitutional history. The animating force of metaphors appears to have persisted over long periods; indeed, I would suggest, at least as a preliminary, that there have been only two periods since the framing, one—the “direct/indirect” period—lasting until the late nineteenth or early twentieth century, and the other—the “balancing” period—since the early twentieth century. I will conclude this essay by examining the first of these periods, exploring, in an admittedly speculative way, the connections between slavery and the structure of constitutional doctrine regarding the domains of national and state power.

I begin by examining the Progressive account of that doctrine in which political contention over slavery shaped the Supreme Court’s approach to questions of states’ rights. A relatively direct reduction of doctrine to politics, while illuminating, leaves important elements of the doctrine unexplained, and indeed, quite anomalous. I then attempt to offer a more satisfying account by developing the implications of the argument, adopted by the Marshall Court and adhered to under Taney, that questions of national authority to act were questions of discretion, not of power.\textsuperscript{69} That position created serious political difficulties as the years went on. The political difficulties were compounded by a set of doctrinal problems that emerged when a second argument was added to the doctrinal structure. That argument took the powers of government to be divided between states and nation into spheres that were both exclusive. If a power was lodged in one government, it could not be concurrently lodged in another. All governmental powers were lodged somewhere.\textsuperscript{70} Here, too, doctrinal problems arose. In the end, the doctrinal structure of antebellum constitutional law was fundamentally flawed by the effort to

\textsuperscript{68} \textit{Kelly, Harbison, & Belz, supra} note 39, at 415-16.
\textsuperscript{69} The formulation is Justice Sutherland’s, in \textit{Carter v. Carter Coal Co.}, 298 U.S. 238, 291 (1936).
\textsuperscript{70} A further elaboration would define the subject as “powers of action,” and would include citizens as occupying their own sphere of power.
incorporate both the "discretion" and "exclusive spheres" arguments. These doctrinal analyses lead to the conclusion that the effort to incorporate both arguments derived from the economic and cultural situation of the nation, in which the contradictory cultures of slavery and capitalism were joined in a political union.

A. The Progressive Synthesis: States' Rights and the Politics of Slavery

The usual interpretation of antebellum constitutional law accepts as a central fact that, with minor exceptions explicable in short-run political terms, states' rights theories of the Constitution were asserted by Southerners. The usual explanation is that expansive interpretations of national power would have authorized Congress to take actions that could impair the vitality of slavery. For example, if Congress' power to regulate interstate commerce was broadly defined, Congress could prohibit the interstate trade in slaves. States' rights constitutional theories, it is argued, provided a general framework into which the specific concern about slavery could be inserted.

In opposition to these states' rights theories, nationalist theories of the Constitution arose. In its Whig version, the account treats those who propounded nationalist theories as far-sighted statesmen who envisioned an expanding American economy whose growth was encouraged by sensible exercises of national power. The plausibility of the Whig account is enhanced by the fact that the nationalists cannot be so readily identified as sectionalists, as can the states' rights theorists.

The protagonists in this account in the Supreme Court are, of course, John Marshall and Roger Taney. Marshall's accomplishment is two-fold. He established the principle that the Supreme Court had authority to determine whether or not actions taken elsewhere in the government—national as well as state—were consistent with the Constitution. He used that principle to endorse broad, nationalist interpretations of national power in the familiar classics of *McCulloch v. Maryland* and *Gibbons v. Ogden*. His successor, rather more closed-minded about slavery and, perhaps more important, holding office during a period of sustained

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72 That is, theories in which a central role is played by limitations on national power in order to preserve an important domain of action for state governments.

73 Such theories explained opposition to congressional support of internal improvements. In addition, it may be that Southern states' rights theorists were concerned that a Congress accustomed to exercising power in an area not implicating slavery might find it easier to do so even when slavery was involved.

74 17 U.S. (4 Wheat.) 316 (1819).

75 22 U.S. (9 Wheat.) 1 (1824).
political challenges to slavery, attempted to restrain the nationalist theory of the Constitution that Marshall established. Fortunately for the Whigs, Taney was unable to do so, and constitutional doctrine after the Civil War took up where Marshall left off, strengthened of course, by the nationalizing of civil rights in the Reconstruction Amendments.

The account just sketched obviously says something about the structure of antebellum constitutional doctrine, at least in identifying the conflict between states' rights and nationalist theories and in treating the latter as the dominant theories during the period. Yet, closer examination of the structure exposes some anomalies. Let us consider a few that provide the background for the alternative interpretation offered in the rest of this essay.

First, there is some tension between the usual interpretation of constitutional doctrine and the equally ordinary sense we have that over the medium run patterns of behavior in the national legislature and in the national courts are likely to be roughly similar. But, national politics up to the start of the Civil War were dominated by the South, the locus of states' rights constitutional theories. One would expect such theories to come to prevail on the Supreme Court, particularly in light of the Court's putative responsiveness to the interests of slavery in *Dred Scott v. Sandford*. Of course, the Court had few direct opportunities to articulate states' rights theories precisely because of Southern dominance in national politics: If Congress never enacts statutes testing the limits of its power, the Court will never have a chance to discuss what those limits are. The most we can expect are opinions upholding state regulations in the face of claims that some federal statute or constitutional provision preempted the regulation. The Taney Court's retreat from Marshall's nationalism occurred in just that way. Still, the asserted retrenchment seems a little weaker than one would expect from examining national politics as a guide to constitutional doctrine.

Second, the usual interpretation has to be modified to take account of a number of fairly important cases. In *Prigg v. Pennsylvania*, the Taney Court upheld the constitutionality of the Fugitive Slave Act of 1793, in the face of the fact that the fugitive slave clause appeared in article IV, not article I, and did not explicitly confer power on Congress to act. Perhaps the Taney Court could be seen as merely

76 60 U.S. (19 How.) 393 (1857).
77 See The Passenger Cases, 48 U.S. (7 How.) 283 (1849); The License Cases, 46 U.S. (5 How.) 504 (1847).
78 41 U.S. (16 Pet.) 539 (1842).
79 Id.
opportunistic rather than guided by theories of the constitutional structure: a fervid defender of national authority when national power was exercised in the interest of slavery, states' rights otherwise.\textsuperscript{81} I offer a different explanation later in this essay.

Third, however, some sort of theory does seem to have been at work, although here the evidence is rather indirect. For reasons explored later in this essay, Justice Story regarded his opinion for the Court in \textit{Prigg} as a strong antislavery statement because, in addition to affirming national power, it authorized states to withhold their aid from those pursuing fugitives. After the Civil War, the Supreme Court adopted the view the Taney Court took in the Wisconsin case, quoting extensively from Taney's opinion with no apparent sense of embarrassment or irony.\textsuperscript{82} Finally, there is \textit{Kentucky v. Dennison},\textsuperscript{83} where a free black was charged with assisting a slave to escape from the slave's owner. The Taney Court held that the rendition clause of article IV placed only a moral, but not a legal, obligation on state officials to comply with a request to extradite persons charged with crime.\textsuperscript{84} The best the usual interpretation can do is treat \textit{Dennison} as a case arising so close to the outbreak of the Civil War that Taney simply resigned himself, and his Court, to their inability to assist the slave interest any longer.\textsuperscript{85}

So far I have only pointed out in the most general terms some anomalies with which the Progressive synthesis must deal, and have suggested that it cannot do so very effectively. The remainder of the essay examines both the assertedly dominant themes and the anomalies in greater detail, in an effort to develop a more adequate account of the development of the structure of antebellum constitutional doctrine.

\textbf{B. Discretion and Power in the Theory of National Authority}

The antebellum Court's defense of broad national power was simple. In each leading case, the Court held that Congress' power was not subject to limitations that courts would enforce, but rather that the remedy for abuses of power was political. This theory raised two related difficulties as time passed. Southerners eventually lost confidence that the national political process would protect them against the particular kinds of abuses of national power they most feared, and the tension between \textit{Marbury v. Madison} and the Court's theory of national power, which did not present serious difficulties when the political climate was not too unfavorable, became dramatic as sectional politics became heated. This

\textsuperscript{81} But see \textit{supra} note 6 on the use of states' rights theories in political debates.
\textsuperscript{82} Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).
\textsuperscript{83} 65 U.S. (24 How.) 66 (1860).
\textsuperscript{84} See id. which was overruled in Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987).
\textsuperscript{85} See 2 C. \textsc{Warren}, \textit{The Supreme Court in United States History} 367 (1926).
section explains these conclusions by examining three classic cases in which the Court adopted the "political checks" theory, and then by discussing the ways in which that theory became difficult to sustain.

Although it was chronologically the third of the classic cases, Gibbons v. Ogden86 most clearly presented the Court's theory of national power.87 The New York legislature had granted a monopoly of steamboat use in New York waters to Robert Fulton and Robert Livingston. They assigned their rights to Ogden, who subsequently sought an injunction against a competitor. New York's highest court agreed that an injunction should issue. The Supreme Court reversed, on the ground that a federal law granting licenses to ships preempted state regulation.

The first part of Marshall's opinion discussed the scope of national power.88 It analyzed the three parts of the commerce clause, and gave to each an expansive reading. Congress' power to "regulate" interstate commerce was not limited to a power to displace state regulations which interfered with the free flow of trade across state lines.89 However, as Justice Johnson's concurring opinion pointed out, such a limited power would have been sufficient both to allay the framers' primary concern about the impediments states were placing in the way of commerce, and to dispose of the case at hand.90 Rather, the power was the power to "prescribe the rule by which commerce is to be governed." Further, "commerce" was not limited to transactions involving goods used in production or consumption.91

Finally, and most important for the future and for this essay, "among the several States" was given a broad definition, the scope of which is best defined by Marshall. Marshall suggested that Congress could not regulate matters that satisfied three conditions, stated in the conjunctive: The commerce must be between "man and man in a [single] state," it must not "affect other states," and, most important for the present theme, regulation must not be necessary.92 Yet, subject to qualifications discussed below, the issue would arise only after Congress, by enacting some statute, had determined that regulation was necessary. Marshall acknowledged that it was unlikely that the courts would override Congress' decision. He concluded this portion of his opinion with a classic formulation of the "political checks" theory:

87 Id.
88 Under current law, this discussion would be relevant to the question of whether Congress had power to adopt the licensing law. Section C, below, describes the rather different way in which the issue was relevant to Marshall's analysis.
89 22 U.S. (9 Wheat.) at 196-97.
90 Id. at 224-27 (Johnson, J., concurring).
91 Id. at 192-94.
92 Id. at 194-96.
If . . . the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . is vested in Congress as absolutely as it would be in a single government. . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.93

That theory had appeared in a slightly different guise in McCulloch v. Maryland.94 Maryland had defended the tax it imposed on the operation of the Bank of the United States on the ground that the power to tax was an essential attribute of sovereignty. It pointed out that the national government had the power to impose taxes on activities important to Maryland, a result that flowed from the fact that the national government was indeed a sovereign. To this Marshall offered the “political checks” theory in response. When Congress imposed a tax on residents of Maryland, or when the Maryland legislature did so, it “act[ed] upon its constituents.”95 Under those circumstances, the ordinary operations of politics—the responsiveness of legislators to the wishes of their constituents—assured that the power to tax would not be abused. It was unnecessary to interpose the courts as a further guarantee against abuse, especially since, if judicial review was authorized in these circumstances, society ran the risk of courts improvidently overturning perfectly proper exercises of power. Further, in Congress “all [are] represented”96 so that its decisions could be taken to express the national interest. In contrast, Maryland’s legislators did not represent people out of the state who would be affected by the tax imposed on the Bank. Because of this failure of representation, some branch of the national government had to be in a position to block the implementation of Maryland’s plan.97 Thus, in McCulloch, the propriety of judicial review was tied to an evaluation of the operation of the political process. On the national level, all were represented in that process, and national power was therefore not subject to limitations the courts would enforce.

Perhaps the earliest major case treating the scope of national power as

93 Id. at 197.
95 Id. at 428.
96 Id. at 431.
97 The branch could be either Congress, by enacting an express exemption for the Bank from state taxation, or the courts, by construing the applicable statutes to contain an implicit exemption (the modern approach) or by developing some sort of intergovernmental immunity rooted in the Constitution.
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a question of discretion subject to political checks alone rather than one of power subject to judicial review was Martin v. Hunter’s Lessee.\(^\text{98}\) There the Court upheld the constitutionality of section 25 of the Judiciary Act of 1789, which authorized the Supreme Court to review decisions of state courts in which questions of national law were implicated.\(^\text{99}\) The Virginia court had agreed that its members as individuals were bound by the supremacy clause and their oaths of office to apply and carefully interpret national law. The judges insisted that their court, as an institution, could not be integrated into the national court system. If Congress thought that the Virginia judges’ position would lead to a lack of uniformity in the interpretation of national law, it could create a system of national courts to which every case implicating national law could be routed.

The Virginia judges understood that their proposal raised serious practical difficulties. Wholly apart from the expense of maintaining a comprehensive system of national courts, there was an obvious problem. It arose in a case filed by a plaintiff whose complaint raised only issues of local law, against a defendant who wished to raise an issue of national law in defense or as a counterclaim. Because the complaint did not implicate national law, it could not have been filed in a national court, even under the Virginia judges’ proposal. They, therefore, acknowledged that Congress could provide a mechanism by which cases initially filed in state courts could be removed to the national courts. This concession proved fatal to their argument. If removal was permissible according to the Virginia judges’ theory, it was possible to treat direct review by the Supreme Court of state court judgments as a form of post-decision removal. The issue then became one of determining the limits on Congress’ power to structure a system of removal. Justice Story wrote that the timing and method of removal were “subject to [Congress’] absolute legislative control.”\(^\text{100}\)

By 1830 then, the Supreme Court had in controversial cases repeatedly adopted a theory of national power that placed the authority to enforce limitations on national power not in the courts, but in the electorate. The political and doctrinal difficulties with this theory emerged in the next decades. From a states’ rights point of view, the Court’s theory, while imperfect, was satisfactory so long as opponents of national power were confident that the national electorate shared their view. In those circumstances, the electoral checks would operate to assure that national power was not abused. In fact, confidence in states’ rights was entirely justified by Congress’ actions, or more precisely, its inaction. It did not enact, nor did any President sign, legislation that pressed the limits of even

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\(^\text{98}\) 14 U.S. (1 Wheat.) 304 (1816).

\(^\text{99}\) This formulation is designed to finesse the issue of the scope of the statutory provision. See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

\(^\text{100}\) 14 U.S. (1 Wheat.) at 319.
moderate theories of national power. Yet, as the period wore on, Southern politicians became increasingly nervous that their political control over the national government would not last much longer. When such doubts arose, the “political checks” theory of national power could not suffice.

In a different guise, uncertainty about continued political control exacerbated an important doctrinal tension between the “political checks” theory and the underlying theory of *Marbury v. Madison*. Marshall justified judicial review in *Marbury* by insisting that the Constitution was a legal document like a contract or a statute. Of course by its own terms the Constitution was supreme, but the courts’ role in constitutional disputes was identical to their role in contractual ones: They were to interpret the relevant documents and enforce the proper interpretation as they saw it. If one believed that federalism, the preservation of a significant governmental role for the states, was embedded in the Constitution, it would seem to follow from *Marbury* that the courts should enforce federalism-based limitations on national power. Yet, that is just what the “political checks” theory denied.

There were two ways to resolve the tension between *Marbury* and the “political checks” theory. One was built into *Marbury* itself. In discussing whether mandamus was a proper remedy for Madison’s failure to deliver Marbury’s commission, Marshall invoked the traditional distinction between a public officer’s mandatory and discretionary duties: “The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution ... submitted to the executive, can never be made in this court.”

This thought might be generalized so as to treat federalism issues as “political,” or ones in which the other branches “had[ ] a discretion.” The generalization might be supported by the observation that federalism issues do not directly implicate “the rights of individuals.”

There is nothing that makes this resolution of the tension between *Marbury*’s underlying theory and the “political checks” theory impossible. The resolution would divide constitutional provisions into two groups, those directly protecting individual rights, which the courts will enforce, and those protecting federalism, which the courts will not enforce. In its early formulations, however, this resolution was unsatisfactory. Marshall did not offer an explanation for the division. Presumably, it would have taken the form of affirming the effectiveness of

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101 This restriction would be located in the tenth amendment, or as a structural assumption pervading the entire document.
political checks in protecting individual rights. It is unlikely that an argument cast in that form would have been persuasive at the time.

A second resolution would have been persuasive, but only so long as a broad political consensus existed. Marshall’s defense of judicial review required that the courts be able to interpret the Constitution in a relatively uncontroversial way. Obviously, no interpretation could be completely uncontroversial; if it were, the legislation at issue could not have been enacted in the first place. Secure reliance on interpretation required that there be acknowledged bounds on the meanings of words. If the accepted construction of Madison’s political vision, as expressed in Federalist 10, explained the “political checks” theory, then an alternative vision of politics can be drawn from the tradition of civic republicanism to explain Marshall’s confidence in the viability of interpretation. Interpretation could resolve disputes over the meaning of the Constitution when everyone was assumed to be acting to promote the public good, conceived of as something more than the aggregation of private interests.

That assumption is exactly what could no longer be made as the political consensus that insulated the slave system from attack began to break down. It was not merely symptomatic that antislavery publicists began to develop arguments supporting their conclusion that slavery was unconstitutional. Under canons of interpretation that Marshall and his generation accepted, those arguments were quite simply bizarre. The Constitution, by implications that were clear under those canons, plainly recognized the existence of slavery, and the framers certainly understood, as “understanding” was itself understood under the same canons, that they were not disturbing slavery by adopting the Constitution. Still, the antislavery publicists rejected those canons of interpretation and offered their own as replacements. Once that occurred, the possibility of interpretation as a method of resolving constitutional disputes simply disappeared.

The crisis of the political system was thus a constitutional crisis in at least two senses. It was a conflict over what the Constitution meant; it was also a conflict over what people meant when they spoke of what the Constitution meant. The directly political disputes and the cognate doctrinal difficulties made the dominant “political checks” theory unstable. As I argue next, the instability was not merely the result of political conflict, but was inherent in the theory itself.

103 That is, the interpretation offered by R. DAHL, A Preface to Democratic Theory (1956).
C. The Spheres of Governmental Authority

If it arose today, one would not expect Gibbons v. Ogden\textsuperscript{107} to provoke deep discussions of constitutional theory. The only issue would be the preemptive effect of a national law; Congress' power to enact the licensing law would get a passing mention. Needless to say, Marshall and his contemporaries had a different view of the problem. Marshall discussed the scope of congressional power in Gibbons because that issue was raised by an argument that Marshall agreed had "great force."\textsuperscript{108} The argument was indeed the concealed or open premise of much antebellum constitutional theory: It was that governmental authority was unitary and exclusive. That is, a particular governmental power could be lodged in only one government, and if the power rested with one, no other government could exercise that power. For example, if New York's grant of a monopoly to Fulton and Livingston was a regulation of interstate commerce, it was unconstitutional without regard to the national licensing law because only Congress had the power to regulate interstate commerce.

I will examine in a moment the depth to which the theory of unitary and exclusive powers penetrated antebellum constitutional thought. It is worth noting at the outset the obvious problems the theory raised. If Congress' powers were broadly construed, large areas of social life would go effectively unregulated. Congress lacked both the resources and the inclination to regulate broadly, and the states, under this theory, lacked the power to do so. Justice Johnson, in Gibbons, offered a narrow construction of congressional power just to avoid that result: He would have limited Congress' power to one allowing it to override impediments the states placed in the way of the free flow of commerce. The Court, having rejected that construction, was led to a doctrinal tangle from which it emerged, if at all, only after civil war. The doctrinal hook was to distinguish, for example, between exercises of a power to regulate interstate commerce, committed to Congress, and exercises of other powers—the police powers—retained by the states. Because the state, in exercising its police powers, could control some subject matter that Congress could also control in exercising its commerce power, this distinction rapidly became rather strained. The difficulties that lay ahead may have led Marshall to avoid committing the Court in Gibbons to the theory of unitary and exclusive powers. For reasons taken up later in this essay, the Court nonetheless became committed to that theory anyway.

The obvious doctrinal difficulties the theory created make it important to describe in greater detail what the antebellum Court actually did. Four significant cases show how deeply the Court held the theory despite both

\textsuperscript{107} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{108} Id. at 209.
doctrinal and political problems. The first is *Cooley v. Board of Wardens*, in which the Court rejected a challenge to the constitutionality of Philadelphia's system of regulating entry into its harbor. Although *Cooley* is generally taken to express the settled law even today, two points in its analysis, which are puzzling to contemporary thought, deserve mention here. The first is its exact formulation of the relevant doctrine.

The power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some . . . as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

This divides matters into two exclusive categories, one imperatively requiring uniform national regulation and the other as imperatively requiring varying local regulation. This formulation ignores two possibilities. Some subjects might, as a matter of judgment, be placed under national regulation, and Congress might place other subjects under a regime of regulation that varied according to local conditions. In ignoring those possibilities, the formulation reflected a cast of mind that insisted on dividing subjects between national and local authority, each exclusive in its own sphere.

The Court ignored the second possibility just mentioned (that of nationally-promulgated varying regulations) in a particularly dramatic way. It had before it, in *Cooley*, a statute that apparently did just that. A national law, enacted in 1789, declared that pilotage in local ports would be regulated according to local laws, until Congress declared otherwise. On its face, this statute resolved the issue in *Cooley*. The Court refused to treat the statute as dispositive, however, because to do so would mean that Congress had delegated "its" power to regulate interstate commerce to a state or local government, something the theory of unitary and exclusive powers could not tolerate. Instead, the Court treated this (now legally-ineffective) statute as evidence supporting the Court's own judgment that pilotage was an "imperatively local" subject.

The second case, *Prigg v. Pennsylvania*, was mentioned earlier. *Prigg*, upholding the constitutionality of the Fugitive Slave Act of 1793,

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110 *Id.* at 302-04.
111 *Id.* at 319.
113 *See supra* notes 78-79 and accompanying text.
can be seen as a strongly nationalist and proslavery decision. Its nationalism lay in its affirmation of congressional power even though no specific grant of power in article I encompassed the Fugitive Slave Act. In that aspect, one is not surprised that Justice Joseph Story wrote the Court's opinion. Modern commentators have been puzzled at Story's statement to his son that *Prigg* was also an antislavery decision, not a proslavery one.  

Story's interpretation was based on a part of the opinion which asserted that states need not assist national officials in enforcing national law. Assuming that Congress would be reluctant to create what would amount to a substantial national police force, Story believed that his opinion would seriously impair the effective enforcement of the Fugitive Slave Act. Notably, the opinion in *Prigg* presumed the validity of the theory of unitary and exclusive powers: The states, having absolute power over the activities of their own officers, could ignore national law if they wanted to.

*Ableman v. Booth* involved another aspect of the controversy over the recapture of fugitive slaves. Not content to leave enforcement entirely to officials of the national government, Wisconsin's judges sought affirmatively to obstruct enforcement by directing the national officials to release a person convicted of aiding a fugitive slave to escape from federal custody. The Supreme Court, in a unanimous opinion in 1859, would have none of this. Taney's opinion for the Court contains some of the most powerful statements about the supremacy of national law in the antebellum reports. It acknowledged Wisconsin's sovereignty, but insisted that it was "limited" by the constitutional scheme:

> [T]he powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by

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116 Doctrinally, this might have been evaded by treating the national law as designating state officers as federal ones for enforcement purposes. That, however, is in tension with some of the positions taken in the correspondence of the Justices dealing with the controversy in 1791-92 over whether they could serve as commissioners to decide the validity of pension claims. Some of the Justices believed that it was incompatible with their role as judges to serve as commissioners at Congress' designation, particularly where the statute named the Justices in their official, rather than in their personal, capacities. See *Hayburn's Case*, 2 *Encycl. of Am. Cont.* 908 (1986).


118 Id.
a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.\textsuperscript{119}

The national government, according to Taney, was supreme "in the sphere of action assigned to it." Conflicts between the states and the nation would be resolved in the national, not the state courts. Once again, national power and state autonomy, each within its proper sphere, were affirmed in an opinion advancing the interests of slaveowners.

The theory of unitary and exclusive powers turned against the South, however, in \textit{Kentucky v. Dennison}.\textsuperscript{120} The State of Kentucky invoked the original jurisdiction of the Supreme Court, seeking an order that would compel the Governor of Ohio to "deliver[.] up" a fugitive from justice. As we have seen, the case involved a person charged with assisting a slave to escape from her master. The Court denied relief, holding that the applicable provision of article IV imposed only a moral obligation on the Governor, not a legally enforceable one. Taken in its broadest implications, the idea that constitutional provisions impose only moral obligations threatens the basis of \textit{Marbury v. Madison}, for one might then say that the Constitution's provisions defining the original and appellate jurisdiction of the Supreme Court imposed moral, not legally enforceable, duties on Congress. The Court forestalled these implications by invoking the theory of unitary and exclusive powers. It was with respect to states and their governors that the Constitution imposed only moral duties. "[T]he Federal government, under the Constitution, has no power to impose on a State Officer, as such, any duty whatever, and compel him to perform it. . . ."\textsuperscript{121}

However, at this point the theory came into acute tension with expansive views of congressional power. For what was to distinguish the states' merely moral duty to deliver up fugitives from justice, from their legally enforceable duty not to interfere with interstate commerce? Presumably, only that Congress had within its sphere broad authority to regulate commerce. Yet, that implies that Congress' power within its sphere affects the states' authority within their spheres by creating legally enforceable obligations. Once again, it would seem that Marshall was correct to refrain from accepting the theory of unitary and exclusive powers, and that the Court could not follow his lead wholeheartedly.

One is tempted to write off \textit{Dennison} as an aberration, the Court there resigning itself to its inability in 1860 to advance proslavery theories of the Constitution. That temptation should be resisted. \textit{Dennison} applied a theory of governmental authority to which the antebellum Court had

\textsuperscript{119} Id. at 516.
\textsuperscript{120} 65 U.S. (24 How.) 66 (1860).
\textsuperscript{121} Id. at 107.
been repeatedly drawn, doctrinal and political difficulties notwithstanding. The next section sketches an explanation for this state of affairs.

D. The Spheres of Authority in the Legal Ideology of Slave and Bourgeois Societies

Antebellum constitutional theory had two components: a theory of expansive national power constrained by political forces, and a theory of the allocation of authority between state and nation according to which powers were exclusively exercised by the body that had them. These theories created doctrinal and political difficulties, as we have seen, and were in some tension with each other. The structure of constitutional theory attempted to accommodate both.

I suggest that the reason for this lies in fundamentals of ideology and politics rather than in the particular details of political contention at any one time. The legal ideologies associated with slave and bourgeois social relations shared enough in common to make it possible for the courts to begin to develop constitutional theories that were consistent with both. The legacy of the political and economic struggle that had formed bourgeois society, and the political and economic conflict between slave and bourgeois society, introduced internal conflict into the structure of constitutional theory. Until one or the other achieved a complete victory, a unified structure of theory could not be developed.

The legal ideologies of slave and bourgeois social relations agreed that property ownership entailed exclusive rights to use the property. They disagreed only in that slave law acknowledged the ability to own, and so to have exclusive rights over, everything, while bourgeois law allowed owners to acquire another person's labor power but not another person tout court. Taking their fundamental areas of agreement, both ideologies could generalize the vision of appropriate social relations from an owner's absolute and exclusive authority over property, to a government's absolute and exclusive authority over subjects committed to it. In this way, the theory of unitary and exclusive governmental powers mirrored the shared vision of property in slave and bourgeois law.

That vision posed problems for bourgeois law, however. First, the evident conflict between slave and bourgeois society, more apparent as time went on, made it difficult to sustain a legal ideology on which slave

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122 The underlying argument with respect to slavery is developed in M. Tushnet, The American Law of Slavery, 1810-1860 (1980).

123 Neither of these outcomes is completely stable. As to bourgeois law, there is the inevitable difficulty that the system cannot allow property rights to be acquired through force and fraud, and yet there are no straight-forward definitions of force and fraud available to bourgeois law. As to slave law, problems arose in connection with the question of whether a slave could own another slave and, in the United States, whether a free black could own a slave. For an introduction, see id. at 49-53.
and bourgeois visions of appropriate social relations converged. Bourgeois ideologies could not be comfortable with a structure of thought entirely congenial to the legal ideology of slavery. As against the image of spheres of authority insulated from each other, the theory of expansive national power, checked by political forces, offered an image of spheres of authority that interpenetrated: National authority could reach into the states’ domain, but the political checks allowed the states to act within the national government.

Second, and more important, bourgeois legal ideology had been shaped by two forces, not one. It strove to establish the property owner’s absolute and exclusive right to use property. It had to do so, however, in a context in which the bourgeoisie was faced with an entrenched landed aristocracy. Merely to establish absolute property rights would preserve rather than displace the aristocracy. Under some circumstances, a class alliance was worked out. In the Anglo-American system, the bourgeoisie overcame the aristocracy by capturing control of governmental power and using that power to destabilize the settled positions of their opponents. In justifying those uses of governmental power, bourgeois legal ideologists had to reject the argument that the present owners of property had absolute rights. At least for the duration of the struggle, the law had to recognize interpenetrating power, if only in the hope of later recognizing absolute spheres of power.

The ideology of slavery was different. Masters confront their slaves and the slaves confront their masters in the totality of their lives. That kind of totalistic relationship promotes a metaphor of interdependence of the master and slave. The translation of that metaphor into ideology is balancing. In contrast, employers confront workers only in part of their lives. And it is that partial confrontation that produces the metaphor of categories of boundedness: The master-slave relationship is unbounded, while the employer-worker relationship is bounded by the economic market.

The culture of the slave owners was striving to articulate a balancing interdependence metaphor, as in the proslavery literature’s effort to characterize the relationship between the master and slave as a familial relationship, to criticize capitalism as heartless, and the like. Though the South was striving to develop this culture, it never succeeded because the South lost the war. Yet, there is a problem here. Before 1860, the Court was Southern dominated, and yet on my analysis, adopted a categorical approach. What is the explanation for that? First, the picture must be qualified, for there was some balancing. The more important point is that the Court used the categorical approach in the 1860’s because that was

the best that could be done to alleviate the political dilemma of the South. Balancing in the political circumstances of the time would have authorized federal intrusion on slave society. It would have authorized, for example, federal control of the interstate slave trade, which for political and ideological reasons, the South could not tolerate. The dilemma meant that the conflict between categorical approaches and balancing approaches was unresolved until the South lost.

In a sense then, the contradictions of antebellum constitutional theory reproduced the contradictions of bourgeois and slave legal ideology. Absolute power was recognized but denied: recognized because it was the ideal end toward which both ideologies was working; denied because it was inconsistent with the legacy of one political struggle and with the conduct of another ongoing one.

This account provides a way of seeing constitutional theory from the Southern point of view as well. It suggests that the Progressive synthesis is accurate on a deeper level than first appeared. Strongly nationalist theories were indeed the dominant ones. In their struggle for cultural autonomy, slaveowners had to combat those theories by developing theories of absolute power. There was ideological space for that development because the theories were not inconsistent with one element in bourgeois legal thought. Yet, Southerners could not make those theories dominant for two reasons. First, as the outcome of the Civil War indicates, slave society lacked the force to overcome the power of a worldwide bourgeois political economy. Second, the immediate pressures of political struggle made it imperative for the South to be in a position to exploit national power when it could. The result was to confine the structure of constitutional theory to the contradictions of bourgeois legal thought.

IV. Conclusion

After the Civil War, Edward Tarble, then a minor, enlisted in the Army. Because his father had not given consent, the enlistment violated federal law. His father obtained a writ directing that Tarble be released from the Army. The writ was issued by the Wisconsin state courts, which obviously believed that Ableman v. Booth had been a case about slavery and so was no longer good law. The Supreme Court forcefully disagreed. Its opinion quoted extensively from Ableman and reiterated the theory of that case. The national government was "distinct and independent" from the states:

There are within the territorial limits of each State two govern-

\[125^{th} \text{ Tarble's Case, } 80 \text{ U.S. (13 Wall.) } 397 \text{ (1872).}\]
ments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. . . . Neither government can intrude within the jurisdiction, or authorize any interference therein . . . with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except [as regulated by the supremacy clause], that they would if their authority embraced distinct territories.126

The era of dual federalism that the Civil War ushered in was made possible by the elimination of the ideological and cultural threat slave society posed to bourgeois society. Having overcome the source of the objections to the theory of unitary and exclusive powers, bourgeois legal ideologists were able, for a short while, to develop that theory. Lochner's distinction between police power regulations and labor laws as such was the late nineteenth century's version of this approach.127 New contradictions developed which led to the replacement of this categorizing approach by the twentieth century's balancing approach. The transition may be symbolized by Justice Harlan's dissenting opinion in Lochner, which made the constitutional test one of general reasonableness.128

Because balancing is our natural way of thinking about constitutional law, I am not going to discuss it in detail. Examples could be drawn from virtually every area of constitutional law and virtually every decade in the twentieth century.129 Instead, I want to stress several points in conclusion. First, I have offered a different periodization from the Progressive synthesis. The Progressive synthesis looks for medium term continuity in the political arena, drawing on ideas like nationalism, Southern domination of national politics, Reconstruction, and the like. I have suggested that there is a different periodization: roughly, from the framing to the 1870's, a transitional period from the 1870's to the 1920's, and the modern era.130 This periodization identifies a continuity in general approach between antebellum law and the Lochner era. Second, this analysis does not deal with outcomes of particular cases. For example, under this analysis Lochner-era invalidations are reasonableness balancing cases just as is the modern view of state regulation of interstate commerce, whereas Cooley takes a categorization approach.

I am convinced that these modes of analyzing legal problems do exist,

126 Id. at 406-07.
127 See Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1830-1940, 3 RESEARCH IN LAW AND SOCIOLOGY 3 (1980).
129 See generally Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).
130 There may be a pre-1820 period, but I am not familiar enough with the materials to be comfortable with a finer periodization.
and that my suggested periodization is roughly correct. In other words, there is a period in which categorization is dominant, and then there is, later on, a period in which balancing is dominant, although at every period both modes are employed.

Finally, what is the explanation for this sort of long term continuity in approach? As the structure of this essay suggests, I am more confident of my explanation of the first period than of the second, that is, of the categorization period than of the balancing period. I have suggested that the explanation operates on the level of ideology, by which I mean, the attempt on the part of people to make sense of their world, and that ideology rests primarily on economic relations.

Finally, what of the emergence of balancing in this century? Again it seems to me that it is an ideological effort to make sense of the world of the regulatory welfare state. Consider the criticisms offered by people like Frederick von Hayek of administrative agencies as in conflict with the rule of law. Such agencies do not act according to pre-existing general rule. They make targeted grants to corporations; public assistance is individually determined with reference to a recipient's need in light of a strongly discretionary decision by a welfare worker. The Administrative Procedure Act and constitutional litigation about welfare rights illustrate efforts to control this non-rule of law behavior by imposing the rule of law. There is an alternative approach which is to reformulate the idea of the rule of law to accommodate this kind of behavior. The reformulation is precisely the balancing metaphor. Instead of the hard edge of the classical rule of law of pre-existing general rules determining what ought to be done, we have the image that the right way to do things is to take everything into account and balance.

Let me conclude with some qualifications. Historically, the categorical and balancing modes of thinking about law were in competition with each other. It is a question of dominance and subordination, not triumph and defeat. Here, our examples might be the Supreme Court's recent separation of powers cases. These constitute an effort to make sense explicitly of the modern administrative state. The Court has invoked rigidly categorical approaches, and not surprisingly, has been severely criticized by academics for not having taken up a sensible balancing approach to the problem. In my view, the reason for the persistence of categorizing and balancing is that the mode of production is contradictory. It alienates personality which always strives to assert itself. No matter what the predominant mode of alienation is, either categorization or balancing, the other side attempts to prevail. Finally, what that means is that the

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picture is going to be extremely complicated when it is filled in. That returns us to my opening comment that a revisionist history of the Supreme Court turned out to be a more daunting project than I anticipated. I hope though that this very sketchy outline does illuminate some aspects of the Supreme Court's decisions that the Progressive synthesis overlooks.