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The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis

Jack Wade Nowlin
University of Mississippi

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The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis

BY JACK WADE NOWLIN*

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* Assistant Professor of Law, University of Mississippi School of Law. Ph.D. 1999, M.A. 1997, Princeton University; J.D. 1994, The University of Texas School of Law; B.A. 1991, Angelo State University. The author wishes to thank Robert P. George, George W. Downs, Gerard V. Bradley, Keith Whittington, Timothy Hall, and Michael Hoffheimer for their many suggestions and comments.
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I. INTRODUCTION

The question of the proper scope of judicial power remains the subject of one of the most contentious and long-standing debates in American constitutional theory. The core of this debate centers around the question of the legitimacy of the more expansive or "activist" conceptions of the judicial role in American constitutional government, and in one form or another it dates back to the very writing and ratification of the Constitution. The question is also a highly controversial one because of its close link to the legitimacy of a number of particular Supreme Court decisions associated with divisive issues, such as abortion. Indeed, this judicial role question, as it relates to individual constitutional rights, can fairly be said to have been the single dominant issue in our constitutional discourse since at least the early 1960s. Theoretical inquiries into this question have obviously been driven chiefly by the decisional practices of the Supreme Court, and it was, notably, the Warren Court that first sparked the debate in its contemporary form. Moreover, the fact that the Supreme Court continues today to hand down and reaffirm decisions that are quite controversial from a judicial power perspective ensures that the question of the proper judicial role remains an important and timely subject of inquiry.

5 See, e.g., Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating a law prohibiting the "partial-birth" or "dilation and extraction" abortion procedure). The Court's federalism jurisprudence and its decisions relating to the limits on Congress's section 5 enforcement power under the Fourteenth Amendment have
Indeed, the Court's 1999-2000 Term—with its high number of controversial decisions as well as its display of deep ideological divisions and partisan rancor among the justices—has especially underscored the continuing importance of the question of the proper limits of judicial power. For instance, quite prominent legal commentators, from both the moderate right and the moderate left, maintain that the Court's most recent term evinced a particularly pronounced tendency to engage in more questionable exercises of judicial review. More specifically, commentators criticized the justices for their excessive partisanship, results-oriented judging, lack of respect for the dignity and authority of the law, political "feuding," and constituency-serving, as well as for their "hubris," "arrogance," "contempt for the competing views of the political branches," and improper "strategic concern for [the Court's] own institutional prerogatives." Even more recently, in the 2000-2001 Term, the Court's decision in *Bush v. Gore* has led to a new wave of concern among jurists about the dangers of judicial overreaching. Plainly, these observations are illustrative of our ongoing theoretical and practical concern about the function of the judiciary in the American system of government, particularly the question of the legitimacy of a highly political, ideologically-charged, and aggressive exercise of judicial review.

It is also worth noting, then, that while the Supreme Court's recent decisions may have provided, quite arguably, some especially egregious examples of questionable judicial behavior, this sort of judicial (mis)conduct and these sorts of charges against the Supreme Court are scarcely a new phenomenon in American political life. As recently as the 1960s, the Supreme Court's willingness to engage in controversial judicial policy-making seemed to reach an all-time high, as had criticism of the Supreme Court for asserting such expansive conceptions of its own power. Even

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11 On the Warren Court, see SCHWARTZ, *supra* note 3, at 263-85. Schwartz observes that the Supreme Court in this era "perform[ed] a transforming role,
much earlier, at the turn of the last century, the Court’s controversial policy-making on economic issues brought down an avalanche of criticism from the political left, including both the highly influential populist and progressive movements. In light of this long history, there is no reason to suppose that our (often acrimonious) debates about the proper judicial role will end anytime in the foreseeable future; rather, they will remain a permanent part of our discussions concerning constitutional law and government.

A question, therefore both timely and relatively timeless, continues to arise with each new judicial Term and demands further serious analysis. The most common understanding of this question is formulated as follows: Does an “activist” exercise of judicial review—one that is controversial, politically charged, aggressive, and only loosely grounded in traditional legal materials—constitute a “legitimate” use of the judicial power of the Supreme Court or, rather, is such an exercise an “abuse” of that power?12

This Article endeavors to provide an answer to this question, building on a new line of “structural interpretive” constitutional analysis developed in an earlier article.13 This approach takes the basic—and often rather

usually thought of as more appropriate to the legislator than the judge.” Id. at 263 (emphasis added).

12 On this era, see WILLIAM G. ROSS, MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 1890-1937 (1994).

13 The language of “legitimacy” and “abuse,” often obscure in its basis and implications, is regularly used in this context, rather than the language of “illegality” or “unconstitutionality.” This is because the debate about the scope of judicial power is routinely conceived to be a largely moral and political debate about the “justifications” for judicial review, rather than a more constrained legal-historical constitutional debate about the proper scope of judicial power under Article III of the Constitution. See, e.g., STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 106-08 (1996) (noting that the question of the legitimacy of judicial review is typically treated as a question of abstract moral philosophy or political prudence rather than one of constitutional interpretation). For an example of this moral-political approach, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 14-28 (1962). For an example of a legal-historical approach, see GEORGE CAREY, IN DEFENSE OF THE CONSTITUTION 122-38 (rev. and expanded ed. 1995).

14 See Jack Wade Nowlin, The Constitutional Limits of Judicial Review: A Structural Interpretive Approach, 52 OKLA. L. REV. 521 (1999) (arguing in part that the debate about judicial interpretive theory should be re-conceived as a debate about the interpretation of the structure of the Constitution and the Constitution’s allocation of authority to the Supreme Court).
abstract—moral-political question of the “legitimacy” of a particular conception of judicial power and re-conceives it as essentially a legal question of the constitutional legitimacy or structural constitutionality of an exercise of judicial power in light of the constraints of the American constitutional design. This method thus provides an answer in the slightly different but closely-related form of an analysis of the proper constitutional scope and limits of the judicial power implicit in the Constitution’s design for government. This shifts the argument from a largely moral, political, and philosophical discussion to a primarily legal, constitutional, and interpretive discussion about the meaning of the Constitution’s governmental architecture and its allocation of power to the Supreme Court.\textsuperscript{15}

This Article thus seeks an answer to the question of the proper judicial role through a careful structural interpretation of the governmental plan established by the Constitution. This structural interpretive analysis involves an analysis of the logic of judicial review,\textsuperscript{16} multiple variables of judicial power,\textsuperscript{17} and multiple fundamental constitutional principles in tension with expansive judicial power.\textsuperscript{18} The analysis also recognizes the importance of both the legal-historical (or “fit”) and moral-political (or “judgment”) aspects of structural constitutional interpretation.\textsuperscript{19} It therefore involves a primary “legal fit” analysis centering around traditional sources of law, as well as a secondary “moral judgment” analysis centering around an assessment of which reading of the legal materials is more attractive as a political matter. While this broad approach to the question of the proper judicial role is, of course, by no means wholly new,\textsuperscript{20} it does synthesize a number of commonly expressed concerns related to the judicial power—such as the “logic” of judicial review and the “counter-majoritarian” difficulty—into a more systematic, sophisticated, and holistic account of the proper judicial function. It also places this account more firmly and plainly in the crucial context of interpreting the structure of the

\textsuperscript{15} Id. As noted below, even a legal-historical debate will have important moral-political aspects, both in determining what legal materials to emphasize and how they should be read in cases where their meaning is less than clear. See infra Part III.

\textsuperscript{16} Nowlin, supra note 14, at 546-49. See also infra Part VII.C.1.

\textsuperscript{17} Nowlin, supra note 14, at 542-45. See also infra Part VII.C.2.

\textsuperscript{18} Nowlin, supra note 14, at 549-53. See also infra Parts III and VII.B.

\textsuperscript{19} Nowlin, supra note 14, at 554-62. See also infra Parts IV and V.

\textsuperscript{20} Nowlin, supra note 14, at 526-29 (discussing jurists such as Robert Bork, Frank Easterbrook, John Hart Ely, and Alexander Bickel, whose work contains elements of a structural interpretive approach to questions of judicial power).
Constitution to determine the parameters of a constitutionally legitimate exercise of the power of judicial review.

This Article, as part of an on-going project, concentrates on the narrow issue of the (primary) legal-historical aspect of structural constitutional interpretation. It asks—in light of the logic of judicial review, the multiple variables of judicial power, and the multiple constitutional principles in tension with expansive judicial power—on what legal-historical grounds can one justify an expansive conception of judicial power as a structural reading of the Constitution. Therefore, in determining the constitutional legitimacy of expansive judicial power, this innovative structural interpretive approach leads one to ask a number of more pointed “structural interpretive” questions. What basis is there in the constitutional text for a reading of the constitutional design that includes an “expansive” allocation of power to the judiciary? What basis is there in the range of original structural understandings of the text for this same proposition? What basis in our original or early constitutional traditions? What basis in later, innovative, evolving constitutional traditions?

Part of this analysis involves asking, further, the question of what these sources of law may tell us about the logic of judicial review, the multiple variables of judicial power, and the multiple fundamental constitutional principles in facial conflict with expansive judicial power. Moreover, one must also ask what weight should be given in determining the constitutional limits of the judicial power to such traditional sources of law as text, original understanding, and constitutional traditions. What interpretive methodologies, then, would one use to establish the meaning of the contours of the American constitutional design? Finally, what influence, if any, should be given to the widely-recognized “populist” or “popular sovereignty” basis of the U.S. Constitution in determining the weight to be accorded various sources of law in our structural interpretation of the constitutional design?

This Article’s line of analysis will therefore involve several inquiries. It will first be necessary to clarify what is meant by “expansive judicial power” and to compare it to an alternative understanding of the proper judicial role. It will also be necessary to discuss the way in which the question of the proper judicial role is a question both of constitutional structure and constitutional interpretation—and thus one that must be answered through a structural interpretation of the architecture of the

21 The primary legal-historical sources of law are text, original understanding, and constitutional tradition in both its original and “evolving” forms. For a brief treatment of this subject, see id. at 553-58. See also infra Parts IV-V.
government established by the Constitution. To that end, this Article also discusses the manner in which one should draw on traditional sources of law—such as text, historical context, and constitutional tradition—in crafting an answer to the structural interpretive question of the proper judicial role. From this discussion follows an analysis of the role that legal-historical materials should play in structural interpretation, particularly in light of the foundational political and constitutional norm of popular sovereignty. Finally, this Article attempts a highly detailed analysis of each of these authoritative sources of law—constitutional text, original understanding and "original" constitutional practices, and later "innovative" or "evolving" practices—as they relate to the constitutional limits of judicial review.

This Article concludes that the constitutional limits of the judicial power can be determined through the sort of robust structural interpretive approach sketched above. This Article also concludes, more specifically, that one should endorse what may be called a "populist" theory of constitutional interpretation, one that gives great weight in structural interpretation to those sources of law with the strongest "populist" or popular sovereignty pedigrees: constitutional text, ratifier understanding, long-standing constitutional practices, and innovative constitutional practices evidencing long-standing, consensus-based popular support. As will be demonstrated, such an analysis reveals that constitutional text, original understanding, and original constitutional practice do not support expansive judicial power and in fact lend strong support to constitutional principles in clear and obvious tension with such judicial power—such as separation of powers, federalism, and representative democracy. Moreover, this analysis also reveals that later constitutional traditions are divided on the question of expansive judicial power and that a very expansive conception of the judicial function remains highly controversial even today. This last point, in turn, suggests that such a conception cannot be considered a new consensus-based popular "reinterpretation" of the American constitutional design. On these grounds, then, this Article concludes that expansive judicial power is, in fact, constitutionally illegitimate, that such a conception of the judicial function exceeds the scope of power allocated to the Supreme Court by the Constitution.

II. TWO RIVAL UNDERSTANDINGS OF THE PROPER JUDICIAL ROLE

Contemporary debates about judicial power center around two broad rival visions of the proper role for courts in the American constitutional design. What may be termed the judicial minimalist vision envisages a
proper exercise of judicial review as one that is firmly grounded in traditional legal materials, that minimizes the political discretion of judges, that strives to be apolitical, that shows considerable deference to the judgment of democratic political actors, and that results in a set of fairly "thin" and consensus-based, judicially-enforceable constitutional norms. Some of the most obvious exemplars of this view of the judicial role among American judges would include Oliver Wendell Holmes, Learned Hand, Benjamin Cardozo, Felix Frankfurter, John Marshall Harlan III, and William Rehnquist. A broad definition of minimalism would also include originalist judges, such as Robert Bork and Antonin Scalia, who justify judicial originalism primarily as a means of limiting judicial discretion and preserving the contours of the constitutional design. Under this judicial minimalist vision, greater discretionary political authority is exercised by voters and their elected representatives in accordance with the constitutional norms of representation, separation of powers, bicameralism, presentment, and federalism. Less discretionary power, comparatively speaking, is exercised by unelected federal judges, given the strict limits this view places on more aggressive forms of judicial review. This conception of the constitutional design might then also be fairly called a "populist," "democratic," "republican," or "federalist" understanding.

The judicial maximalist vision, by contrast, envisages a proper exercise of judicial review as one including decisions that are only very loosely grounded in traditional legal materials, that involve substantial judicial political discretion, that are politically-driven, that show only very little deference to democratic political actors, and that result in a set of quite "thick" and controversial constitutional norms. Some obvious exemplars of this view among judges would include Earl Warren, William Brennan, Thurgood Marshall, and Harry Blackmun. Under this judicial maximalist

22 The definition of the "judicial minimalist" vision given here is essentially a "judicial restraint" definition and differs substantially from that popularized by Cass Sunstein. See CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-23 (1998).


vision, much less discretionary political authority is exercised by voters and their elected representatives, and considerably more discretionary political authority is exercised by federal judges. This exercise of political authority by the federal judiciary is in clear tension with constitutional norms such as representation, separation of powers, bicameralism, presentment, and federalism. This conception of the constitutional design might also be called an "elitist," "centralist," "judge-centered," or perhaps "juristocratic" conception. As a starting point for analysis, these two broad categories capture the most basic and important differences reflected in contemporary debates about the proper understanding of the judicial role. Even so, in pursuing an historical analysis, it is important to keep in mind that these two categories also necessarily simplify what is in fact a much more complex array of viewpoints involving a much larger number of variables that differ in degree and proportion.

III. THE PRIMACY OF STRUCTURAL INTERPRETIVE ANALYSIS

It should also be obvious as well that a view of the proper judicial role does not occur in a vacuum, but rather is often simply the implicit logical outgrowth of a wider set of assumptions about the American constitutional design. This is especially true of the basic structural logic of judicial review and the proper relation of the judicial function to fundamental constitutional principles such as popular sovereignty, representative democracy, separation of powers, and federalism. Of course, one's understanding of the proper judicial role should reflect these norms of constitutional structure, but should do so expressly, self-consciously, reflectively, and in a structural interpretive context. In fact, one cannot really answer the question of what judges should "do" about the Bill of Rights and Fourteenth Amendment until one has

336-42 (discussing Earl Warren). For one of the most cogent theoretical defenses of this perspective, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996).

While the neologism "juristocratic" is something of a barbarism, it does serve the useful purpose of denominating much more precisely than terms such as "elitist" or "aristocratic" the tendency to support granting greater discretionary political power to an elite class of judges, lawyers, and legal scholars as opposed to ordinary voters and their representatives. See MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 89-145 (1998).

See Nowlin, supra note 14 (emphasizing the important constitutional nature of the limits on the judicial power as opposed to mere moral, political, or prudential limits).
answered a much more fundamental, structural-interpretative question: What is the proper role of courts within the American constitutional design, including the legitimate scope and constitutional limits of the judicial power? This approach to the question of the proper judicial function would ask, in essence, whether the design of the Constitution can fairly be read as granting "expansive" power to the Supreme Court or, by contrast, power of some more limited degree. Therefore, this question of the limits of judicial power, rightly understood, is a question of both constitutional structure and constitutional interpretation. It thus requires a structural interpretation of the American constitutional design, an attempt to discern constitutional meaning as it relates to the distribution of power among the institutions of government, which in turn requires careful consideration of the Constitution's various structural strategies for protecting the rights of individuals.

Indeed, the question of the proper judicial role is also, as a question of constitutional interpretation, one logically antecedent to specific, second order questions such as judicial interpretation of the Bill of Rights or Fourteenth Amendment. Indeed, one simply cannot decide, at least properly so, how the Supreme Court should interpret the Bill of Rights until after one has considered the questions of the proper role of the judiciary in the American constitutional design, of what the Court is properly "to do" within the framework of government, and of the proper scope and constitutional limits of the judicial power. A court can scarcely premise an exercise of the judicial power on a particular conception of the judicial role without first determining if that conception of the judicial role is itself justified as a matter of structural constitutional interpretation. Moreover, this question is not purely or even largely a matter of prudence or political philosophy, as so often has been assumed, for the obvious reason that the Court may not exercise governmental power that exceeds the scope of the limited powers granted to it by the Constitution. Therefore, the difficulties of structural constitutional interpretation must be confronted and engaged rather than avoided or circumvented, and one's moral-political judgments about the judicial role must be placed in an interpretive context. As will be described, any plausible interpretation of the constitutional design must be firmly grounded in a "fit" analysis of traditional legal materials, and

28 See id. at 531-33.
29 See, e.g., GRIFFIN, supra note 13, at 106-08 (observing that the question of the legitimacy of judicial review is typically treated as a question of abstract moral philosophy or political prudence).
therefore a moral-political analysis must take a subordinate role to a legal-historical one.\textsuperscript{30}

Further, this structural interpretive question concerning the contours of the proper judicial role is a much more fundamental constitutional question than that of how judges should interpret a particular provision or structural aspect of the Constitution. This is so because the former question itself implicates a sweeping array of foundational constitutional principles—such as popular sovereignty, representative democracy, separation of powers, checks and balances, and federalism.\textsuperscript{31} Though space constraints do not permit a full analysis here, it may be noted that the Court’s aggressive use of politically-charged (and, in substance, quasi-legislative) power threatens the following constitutional norms: (1) popular sovereignty (by detaching constitutional meaning from the will of the Ratifiers and constitutional alteration from the Article V amendment process), (2) representative democracy (by shifting political power from elected bodies to the unelected court), (3) separation of powers (by shifting the functional equivalent of legislative power from legislative bodies to the judicial branch), (4) checks and balances (by, for instance, circumventing the requirement of present-ment of a legislative act to the executive), (5) bicameralism (by shifting legislative power from the bicameral Congress to the “unicameral” Court), and (6) federalism (by shifting authority from the states to the national government). It is also important to note here that the constitutional principle of federalism incorporates a parallel set of constitutional norms—including popular sovereignty, representation, and separation of powers—into the American constitutional system, as these principles are reflected in state constitutional designs.

It should be apparent, then, that the answer to the question of the proper scope of judicial power has obvious wide-ranging and important repercussions for the structure of American government. Indeed, constitutional structure was the chief concern of the original Constitution and most of its later amendments, and therefore a structural inquiry into the proper judicial role must be considered a highly fundamental question of constitutional interpretation. Moreover, while space constraints do not permit an additional moral-political structural interpretive analysis to determine the

\textsuperscript{30} See infra Parts IV-V.

\textsuperscript{31} See Nowlin, supra note 14, at 549-53 (discussing judicial minimalist and maximalist understandings of the structure of the Constitution). For a valuable discussion of these principles in action, see CAREY, supra note 13; PUBLIUS, THE FEDERALIST PAPERS, reprinted in FEDERALISTS AND ANTIFEDERALISTS (John P. Kaminski & Richard Leffler eds., 1989).
precise nature and degree of the conflicts between expansive judicial power and the multiple fundamental constitutional values outlined above, it is highly unlikely that an aggressive, politically-charged, quasi-legislative role for the Court can be understood as structurally supportive of, rather than inimical to, these basic republican principles of government. Additionally, it should be clear that the burden of reconciling these prima facie conflicts lies with the proponents of expansive judicial power. This Article therefore assumes the presence of a high degree of conflict between the traditional understanding of these principles and expansive judicial power.

The answer to the structural interpretive question of the proper judicial role must guide, shape, and constrain responses to subordinate questions such as how judges should interpret the Bill of Rights or the Fourteenth Amendment. In short, the question of the constitutional limits of judicial review is a highly fundamental—even foundational—constitutional question, and one that must be confronted and answered, as a matter of structural constitutional interpretation, before one can determine the proper interpretive methodologies for judicial determination of other constitutional questions.

IV. DETERMINING CONSTITUTIONAL LIMITS: INTERPRETING THE CONSTITUTIONAL DESIGN

A. The Basic Sources of Law

What, then, is the proper methodology for interpreting the American constitutional design, in order to determine the proper constitutional role

32 See, e.g., BICKEL supra note 13, at 16-23 (discussing the “counter-majoritarian difficulty” posed by the tension between judicial review and American constitutional democracy); BORK, supra note 4, at 159 (discussing the conflict between “judicial activism” and constitutional principles such as representative democracy and separation of powers); Jeremy Waldron, A Rights-Based Critique of Constitutional Rights, 13 OXFORD J. LEGAL STUD. 18 (1993) (discussing the conflict between a liberal conception of the person that involves a commitment to participatory rights and judicial enforcement of a bill of rights trumping participatory rights).

33 See Nowlin, supra note 14, at 560-561 (arguing that proponents of expansive judicial power bear the burden of justification because expansive judicial power is “on its face, elitist, anti-democratic, anti-republican, anti-populist, and anti-federalist,” and that it is also a recent and informal innovation in constitutional practice).
for courts and the constitutional limits of judicial review? As discussed elsewhere, a full treatment of this important structural interpretive issue would include both a legal-historical and moral-political interpretive aspect. The former would consider the question of a conception’s “fit” with traditional legal materials and the latter would deal with which reading of the legal materials is most attractive as a normative matter. Both aspects of structural interpretation would also pay careful attention to sub-questions such as the structural logic of judicial review, the multiple variables of judicial power, and the multiple structural constitutional principles which the judicial power implicates. This Article limits itself primarily to the question of legal-historical “fit,” including the relevant structural sub-questions. It also maintains that traditional legal materials should chiefly govern answers to the question of the proper judicial role, and therefore that the relevance of moral-political analysis to one’s ultimate conclusions is strictly limited in scope.

Initially, the relevance of legal-historical materials to the structural interpretative enterprise must be established. The widely recognized legal-historical sources of law are: (1) text, (2) contextual or “original” meaning, and (3) precedent, including traditional governmental practices. What role should text, original meaning, and traditional practice play in the interpretation of the constitutional design? In common-sense fashion, Robert Dahl once observed that:

The authority for judicial review is based on two general kinds of arguments. The first is that judicial review is implied by the Constitution [which Dahl determines by original intent], which is itself accepted as legitimate; or at the very least, that judicial review rests on a long-standing tradition that for all practical purposes incorporates it into the constitutional system. This argument might be called the traditional constitutionality of judicial review. It is a very strong argument, and to most Americans concerned with the question, it seems to be convincing.

\[34\] Id.

\[35\] Cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (discussing a legal “fit” and moral “judgment” approach to legal interpretation).

\[36\] See Nowlin, supra note 14, at 541-53 (discussing the necessity of a robust structural interpretive approach that moves beyond the common concentration on judicial interpretive theory and representative democracy to analysis of multiple variables of judicial power and multiple structural principles in facial conflict with expansive judicial power).

\[37\] ROBERT A. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 143 (3d ed. 1976). The second argument attempts to reconcile
Of course, Dahl’s inquiry is much narrower than the one undertaken herein, which focuses on the proper role for courts in the constitutional design (rather than simply the legitimacy of judicial review). Dahl’s basic point, however, would remain much the same: evidence of textual support, original meaning, and long-standing tradition are generally widely-recognized as providing a strong and convincing basis for the authority of a particular conception of the judicial role, given their status as conventional sources of law and their link to the political will of the people. In fact, even Ronald Dworkin, a major advocate of the judicial use of moral philosophy in constitutional interpretation, has himself seemingly rejected wide-ranging “moral” readings of the American constitutional design. This is apparent from his criticism of so-called “external revisionists”—those who would draw on controversial democratic and republican theories in determining the limits of the proper judicial role under the Constitution.\textsuperscript{38}

In any event, whether or not one agrees with Dahl’s empirical point or shares Dworkin’s seeming rejection of a “moral” design reading, it is certainly hard to imagine any plausible structural interpretive method that would reject a strong reliance on the primary legal-historical sources of law. Certainly, even if one were to advocate a broader “moral” reading of the constitutional design, both common-sense and legal intuition suggest that a proper structural interpretation would still require a legal-historical “fit” analysis that implicates these conventional sources of law. In fact, this common intuition likely reflects a sense that both (1) interpretation of the Constitution, which itself is understood as a kind of law, must be linked to conventional legal interpretation and thus to conventional sources of law; and (2) interpretation of the Constitution, if it is not to devolve into a wholly unstable form of “constitutional politics,” must be grounded in something more substantial than any particular interpreter’s moral and political preferences.

\textbf{B. Popular Sovereignty as a Foundational Political Norm}

The common intuition in favor of a legal-historical approach also likely reflects the fact that there are very good reasons, aside from concerns

\textsuperscript{38} DWORKIN, \textit{supra} note 25, at 74–76. Whether this criticism is consistent with Dworkin's other views is, of course, another question. See Nowlin, \textit{supra} note 14, at 558–60 (noting the contradiction inherent in advocating a judicial “moral” reading of the Bill of Rights while opposing a broader “moral” reading of the constitutional design to determine the constitutionality of judicial “moral” readings of the Bill of Rights).
linked to legal conventionalism and constitutional stability, for emphasizing those traditional sources of law that have the strongest popular sovereignty bases—such as text, historical context, and long-standing constitutional traditions. Clearly, popular sovereignty is properly seen as a foundational political norm—one of overriding importance—and is viewed as such in the American political and constitutional tradition. It is thus a highly attractive and authoritative ultimate interpretive ground for legal legitimacy.

Why is this the case? First, popular sovereignty has an exceedingly high value in light of widely-accepted principles of moral-political theory. For instance, the relationship of the recognition of a right to equal political participation to a view of the human person as a dignified, rational, autonomous individual is strongly indicative of the value of popular sovereignty, a democratic foundation for government and a basis for fundamental political norms. Further, the relationship of popular government to the widely-recognized value of citizenship, civic virtue, and civic participation also strongly supports the value of popular sovereignty. Therefore, there is good reason to suppose that the principle of popular sovereignty has a powerful and convincing basis in moral-political argument as a basic source of political and constitutional legitimacy.

Second, the great value of this foundational norm is also widely recognized in the American political tradition, from its very beginnings in the colonial period to its ultimate flowering in contemporary America. Indeed, who in the mainstream of the American political tradition would deny that “all power is vested in, and consequently derived from, the People,” that governments “derive[ ] their just powers from the consent of the governed,” and that “[w]e, the People... ordain and establish” constitutional government? Moreover, the great democratizing of the American political system in the twentieth century greatly reinforces the conclusion that ultimate political authority is vested in the sovereign people

39 See, e.g., ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110-59 (1999) (defending judicial originalism by relating this interpretative approach to popular sovereignty and democratic theory); Waldron, supra note 32.


41 VIRGINIA DECLARATION OF RIGHTS art. II, reprinted in THE GEORGE MASON LECTURES at 20 (1776).

42 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

43 U.S. CONST. pmbl.
of the United States. Thus the strong moral-political value of popular sovereignty is not only morally persuasive; it is also deeply embedded in our political traditions. It is, therefore, unlikely to be seriously contested as a foundational value in our constitutional debates.

Third, this "populist" understanding of the requirements of political morality and the mainstream of the American political tradition is, not surprisingly, also strongly reinforced by the text of the Constitution itself. Indeed, a constitutional provision's status as supreme law depends precisely on whether it was properly ratified by a supermajority of American voters in conformity with the plain meaning of Articles V and VII, provisions inextricably linking legal legitimacy to popular sovereignty. Indeed, Article V is premised upon the foundational popular sovereignty/democratic principle of the evolving American political ethos, according substantially heightened moral-political legitimacy to laws passed through this sort of supermajority process. The Constitution's Article VII, setting the terms for adoption, was similarly rooted in the sovereignty of the people. As Madison wrote in The Federalist: "The express authority of the people alone could give due validity to the Constitution." The language of the Preamble and the Ninth and Tenth Amendments reinforce the moral foundation of these structural provisions. Several later constitutional amendments tend to confirm and reinforce this reading by further democratizing the structure of the Constitution through repeated expansions of the right to vote.

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44 See, e.g., ELY, supra note 4, at 81-101 (discussing the democratic norms of the Constitution).

45 See, e.g., Akhil Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988). Amar, for instance, observes that "By focusing exclusively on protections of minorities under our existing Constitution, statistically construed, we risk missing the majoritarian character of permissible change over the document, and therefore, the majoritarian character of minority and individual rights." Id. at 1103.


47 The Preamble, of course, reads in part: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Id. amend. IX. The Tenth Amendment reads: "The Powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people." Id. amend. X.

48 See id. amend. XV (prohibiting the use of race as a qualification for voting); id. amend. XVII (providing for direct election of senators); id. amend. XIX
It is justifiable to conclude, then, that the fundamental norm of popular sovereignty (1) has great moral-political appeal, (2) is both deeply-valued and widely-recognized in the American political tradition, and, finally, (3) is strongly confirmed, substantiated, and reinforced by a simple “plain-meaning” interpretation of the constitutional text itself (including, most notably, the Constitution’s adoption and amendment procedures). Therefore, an interpretive methodology that closely links constitutional meaning to the text ratified by the sovereign people, the range of understandings of that text at the time of ratification, and the long-standing constitutional traditions that have since been accepted as legitimate will together provide a highly authoritative reading of the constitutional design. On the other hand, a method that links constitutional meaning chiefly to the moral views of a given interpreter or the political practices of any set of governmental actors simply has much less a claim to constitutional respect.

V. A “Populist” Structural Interpretive Approach

A. Weighing the Basic Sources of Law

There is good reason, then, to give primacy to traditional legal materials with strong popular-sovereignty pedigrees when interpreting the structure of the Constitution. The chief question here, in order to determine the best interpretation of the Constitution’s design for government, is that of how to weigh or prioritize these sources of law when they point in conflicting directions. Indeed, if text, original meaning, original constitutional practice, and innovative later practices point in contradictory directions, how does one resolve the conflict?

B. Madisonian Interpretive Theory

In attempting to answer this question, it is worth examining what may be called the “populist” approach that James Madison developed in the 1790s in response to early disputes about the meaning of the structure of the Constitution. Charles Lofgren has provided a “capsule restatement of Madison’s [interpretive] views,” including the following list of “essential” guides to the meaning of the Constitution:

(granting women the right to vote); id. amend. XXIII (providing Electoral College representation for the District of Columbia in presidential election); id. amend. XXIV (abolishing the poll tax); id. amend. XXVI (reducing the voting age to eighteen years).
1. The text, viewed always with an eye on the dictates of limited government;
2. The deliberations in Philadelphia, insofar as they offer insight into the way contemporaries not present, and not privy to the debates, would generally have understood the final language of the text;
3. The commentaries and debates accompanying ratification, and most especially . . . those within the state conventions; and
4. Early and continued practice, particularly as a check on (but not an invariable barrier to) subsequent reinterpretation.49

Madison’s interpretive approach centered around (1) text, (2) original meaning, and (3) “original practice.” Why are these the touchstones of interpretation for Madison? Madison begins with the text, trying to construe it with an eye toward its purposes, principles, and structure. His reasoning is obvious enough: The constitutional text is the best evidence of its own meaning and, of course, has the sovereign authority of the people who ratified it as a basis for its legitimacy.50 Madison next turns to the “original understanding” of the text (again, for reasons that are obvious enough): It was the Ratifiers who made a proposed constitutional provision binding law, and therefore their understanding, to the extent it can be determined, should govern later disputes about constitutional meaning.51 In particular, the original understanding is valuable in narrowing the range of reasonable interpretations of the text, though it may often fail to provide a single conclusive answer. Finally, Madison turns to the original practice—the early, continuing constructions placed on the Constitution in the actual day-to-day practice of government. Madison’s reasons here are grounded in the value of original practice both as strong evidence of original understanding and as important legal precedent bringing stability and harmony to the workings of government—the latter by settling “doubtful or contested meanings.”52 In particular, Madison maintained that original practice as precedent should place definite prudential limitations on later reinterpretations, favoring the “early, deliberate [and] continued practice under the Constitution” to “constructions adapted on the spur of

50 See supra notes 46-48 and accompanying text.
51 See Lofgren, supra note 49, at 142.
52 Id. at 141 (quoting Letter from James Madison to M.L. Hurlbert (May 1830), reprinted in 9 WRITINGS OF JAMES MADISON 370, 371-72 (G. Hunt ed., 1910)).
occasions, and subject to the vicissitudes of party or personal ascen-
dencies."

Even so, later reinterpretation at odds with original practice still might
be in order if it were necessary, in Lofgren’s words, “to adhere even more
faithfully to the first three guidelines, and especially in order to observe the
‘authoritative intentions . . . of the people of the States, as expressed thro’
the Conventions which ratified the Constitution.’” A return to original
understanding, then, could justify an abandonment of original practice, if
the two happened to diverge in a particular case. Still, Madison—in
Lofgren’s view—maintained that “[i]f practice at variance with an original
understanding nonetheless continued, surviving with the long-term
acquiescence of Congress, this then evidenced the will of the sovereign
people” and would thus be considered legitimate.

What, then, of the legitimacy of subsequent reinterpretation, which
breaks both with original practice and original understanding? Lofgren
summarizes Madison’s position as follows: “[I]f the document as inter-
preted according to the intentions of those who made it an authoritative
instrument ceased to be adequate, then formal amendment, not novel
construction, was the remedy.” Clearly, Madison rejected innovative,
non-originalist constructions of the Constitution, maintaining instead that
constitutional meaning, “if ascertained by contemporaneous interpretation
and continued practice, could not be overruled by any latter meaning put
on the phrase, however warranted by the grammatical rules of construction
. . . were these at variance with it.” In short, Madison would have strongly
opposed any “reinterpretation” or “informal amendment” breaking with
both original practice and original understanding.

C. Informal Constitutional Change

Still, it is reasonable to imagine a Madisonian interprerter, if not
approving of such novel constructions, at least according them a limited
measure of legitimacy under certain circumstances. Plainly, the Madisonian
objection to innovative, non-originalist reinterpretations would be muted,

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53 Id.
54 Id.
55 Id.
56 Id. at 139.
57 Id. at 137-38 (quoting undated Letter from James Madison to Professor John
Davis), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 232,
242 (1884)) (alteration in original) (emphasis added).
at least somewhat, if such a reinterpretation did express the authoritative will of the sovereign people. This is so because the Madisonian interpretive approach is itself based upon the principle of popular sovereignty. If text, original understanding, and original practice are valued as sources of law because of their grounding in the popular will, there may also be reason to value popular re-interpretations of the constitutional design. Why is this important in this context? It is important because, the “role and power of the [Supreme] Court” in the American constitutional design have changed dramatically over time, and that change is not clearly or firmly linked to any formal amendment to the Constitution. Therefore, any legal-historical analysis of the role of courts in the constitutional design must confront the question of the legitimacy of various methods of constitutional change, including the inevitable minor shifts in institutional power relations, formal constitutional amendments, informal “amendments,” and non-originalist reinterpretations.

What of the legitimacy of various informal methods of constitutional change? Of course, some degree of legitimate “change” in the constitutional design may occur simply through the natural play in the joints of the governmental structure. As Robert Bork has observed in his own brief structural defense of (judicial) originalism, “[t]he political arrangements of [our republican] form of government are complex, its balances of power continually shifting.” Naturally, the legitimacy of these minor shifts within the constitutional design are not in question, though their political attractiveness might be. Legitimate change can also occur through the formal amendment process provided for in Article V. Certainly, the American people are entitled to alter the structure of their government—and on several occasions they have done so. Finally, perhaps even some dramatic, informal shifts in the constitutional design—whether one thinks of them as informal “amendments” or as more drastic non-originalist reinterpretations—may well become “legitimated” in some important sense, at least if they are widely accepted by the American people for some substantial period of time.

59 Id. at 62-63.
60 BORK, supra note 4, at 153.
61 See, e.g., U.S. CONST. amend. XIV; id., amend. XVII (providing for direct election of senators); id. amend. XXIII (providing for Electoral College representation for the District of Columbia in presidential elections).
62 See supra note 55 and accompanying text.
It is necessary to examine this last process in some detail. What, for instance, of the legitimacy of fundamental but informal shifts in the constitutional design, such as those that occurred in conjunction with the dramatic expansion of federal economic and social regulatory power during the New Deal and second World War? It is possible to think of such major alterations of the constitutional design as either informal “amendments” or as drastic non-originalist reinterpretations, but the question of legitimacy would remain essentially the same. Certainly, there is no easy answer to this question, though we might imagine that if legitimization is to occur at all it must be through some approximation of the federalist/republican/populist requirements of Article V. The founding generation recognized the necessity of constitutional change, and thus they provided a formal method for amending the Constitution. Moreover, as a student of The Federalist would expect, the formal amendment process was intended to be highly deliberative. The amendment process is designed precisely to promote the highest degrees of reflection, persuasion, compromise, and consensus building—ultimately requiring supermajority support in both the U.S. Congress and in the states. In short, it is a process intended (1) to be consistent with populist, federal, and republican theory, and (2) to encourage, via deliberation, moral reflection, prudence, legal-historical continuity, and broad popular support.

An informal “amendment” to or structural reinterpretation of the constitutional design could be considered “legitimized” in an important sense, and thus “incorporated” into the constitutional design, to the extent it approximates the requirements of the formal amendment process. Bruce Ackerman has outlined his own understanding of an “alternative” informal amendment process, but there is no reason why it could not take a number of forms and occur much more gradually. On this view, what would ultimately matter is whether a solid, deliberate, supermajority consensus has evolved around the alteration—to the extent that it could today pass as a formal Amendment if necessary. An informal change in the constitutional design that could meet this (admittedly high) standard would acquire, at least, a partial share of the legitimacy accorded a formal change. Of course, recognition of the legitimacy of “informal” methods of constitutional change is dangerous to a degree, since such a practice may well encourage circumvention of Article V and promote factionalism and constitutional

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63 For a detailed history and analysis of this period, and its social, political and economic consequences in the ensuing decades, see Michael Barone, Our Country (1989).

64 See Bruce Ackerman, We the People: Foundations 266-70 (1991).
instability. Still, a rigid originalist formalism that misses the important organic nature of the Constitution and constitutional development has its own significant dangers. The most obvious of these is the reduction of the textualist-originalist approach to almost total irrelevance—given the high proportion of contemporary constitutional practice incompatible with original understanding—while missing the deeper implications of originalism's populist justification, thus leaving the interpretive field largely to implicitly anti-populist "political" readings of the structure of the Constitution.\textsuperscript{65}

If popular informal amendments or non-originalist, innovative reinterpretations are accepted as legitimate in some instances, how may the public's authoritative reinterpretation or informal amendments be differentiated from the highly suspect, factional alterations rooted in the vicissitudes of parties and personalities? Common sense suggests an examination of several questions that arise in the context of a break from both original understanding and original practice, including: (1) whether the constitutional change was a self-serving one with respect to the institution(s) that initiated it; (2) whether there is reason to think that the change was driven in whole or in part by partisan, political, or factional maneuverings; (3) whether the change was initiated by democratic branches of government presumptively reflecting the will of a majority of the American people; (4) whether the constitutional change involved a process readily understandable to ordinary Americans and thus one likely involving some high degree of informed popular consent; and, finally, (5) whether the change has ceased to be controversial and has achieved broad-based, long-standing, supermajority "populist" support such that a formal amendment in favor of it would likely pass today.

Again, the reasons for this broad line of inquiry should be obvious. A constitutional change initiated by an institution that benefits from the change or seems driven by partisan politics or simple forum-shopping is more likely to be a "factional" alteration "adapted on the spur of occasions, \[\textsuperscript{65}\] Originalists, of course, writing in the somewhat different context of constitutional adjudication, usually approach this problem through the doctrine of stare decisis. See BORK, supra note 4, at 155-59; SCALIA, supra note 24, at 139-41. In the context of adjudication, originalists typically treat the question of when to overrule a mistaken decision as one of mere prudence. Given that popular sovereignty is the argumentative force behind originalism as a judicial interpretive approach, it is worth noting here that contemporary "populist" support for an earlier deviation from original understanding may be a non-prudential reason for adherence to such a deviation.
and subject to the vicissitudes of party or personal ascendencies\textsuperscript{65} of the sort that should be discouraged in the interest of popular sovereignty and constitutional stability.\textsuperscript{67} A change that is obvious and easily understandable is more likely to actually express "the will of the people" than one that is subtle, complex, confusing, or subject to pretextual exercise. Obviously, if an alteration in the constitutional design is suspect on any of these grounds, or if it threatens preexisting fundamental constitutional principles, a high degree of long-standing popular support should be demanded before according a change even a limited degree of legitimacy. To do otherwise would simply be to encourage the sort of partisan "factional" alterations in the constitutional design that Madison feared, undermining both the democratic legitimacy and the long-term stability of the alteration.

\textbf{D. Conclusion}

The modified "Madisonian" populist structural-interpretive theory presented here is ultimately grounded in a concern for the principle of popular sovereignty as a foundational moral, political, and constitutional norm. This approach recognizes that the status of a constitutional provision as binding "law" is rooted in its ratification in accord with the principles of popular sovereignty reflected both in the text of the Constitution and in the broad mainstream of the evolving American political tradition. The reliance of this approach on extrinsic evidence of "original meaning" to narrow the range of legitimate interpretations is grounded in the same overriding populism rooted in morality, politics, law, and history. Finally, a limited recognition of the legitimacy of popular, long-standing constitutional practices deviating from text, original understanding, and original practices is grounded in the same important source of ultimate constitutional legitimacy. This modified Madisonian structuralist, textualist, originalist, and evolving practice interpretive theory has as its underlying principle, then, the idea of popular sovereignty—the notion that the Constitution is fundamentally that of "we, the people," and not that of federal judges or any particular political, cultural, or financial elite class or faction. Therefore, the structure of the Constitution should be interpreted in such a way as to maximize this foundational normative principle and minimize partisan and results-oriented manipulations of constitutional structure by political factions.

\textsuperscript{65} See Lofgren, \textit{supra} note 49, at 141.

\textsuperscript{67} See id.
Of course, such an interpretive theory is bound to be controversial in a number of ways and at a number of levels, and space constraints do not permit a full elaboration of its inevitable intricacies. Still, even someone who disagrees with this particular interpretive approach must recognize the importance of these basic sources of law to structural interpretation and the serious moral, political, and prudential problems attendant to radical structural deviations from our constitutional text, its original understanding, early constitutional practices, and true consensus-based evolving constitutional practices. Any approach that does not seriously consider these sources of law in structural interpretation undermines the popular sovereignty-based legitimacy of the Constitution—as well as its status as fundamental law—and the stability of our constitutional order. These basic sources of law must be examined in some detail in order to determine the proper scope of the judicial power.

VI. THE "NATURAL" TEXTUAL STRUCTURAL READING OF THE CONSTITUTIONAL TEXT

A. Introduction

As described, any attempt to interpret the American constitutional design must rely heavily on basic sources of law because of the importance of the conventional understanding of law, the great need for constitutional stability, and the foundational value of popular sovereignty. The primary source of law in this context is clearly that of the constitutional text. Therefore, what the "plain meaning" or most "natural reading" of the text suggests about the architecture of the constitutional design, the role of courts within that design, and the constitutional limits of the judicial power is of great interest.

Ronald Dworkin, for instance, argues that the Bill of Rights, including the Fourteenth Amendment, on "its most natural reading" suggests a concern with abstract "substantive" rights and, thus, in light of Marbury v. Madison and the growth of judicial power in American constitutional practice, "seems to give judges almost incredible power." It is certainly worth following Dworkin's approach—if for no other reason than to test his (quite counter-intuitive) conclusions. However, given that Dworkin’s

60 See supra Part IV A-B.
61 DWORKIN, supra note 25, at 74.
63 DWORKIN, supra note 25, at 74.
point is one concerning constitutional structure, one should actually raise a slightly different textual question: Whether the design of the Constitution as a whole—from its Preamble to its last amendment—on its most “natural reading” accords federal judges a degree of power appropriately described as “almost incredible.”

It is also important at the outset to recognize the decided limits of such a purely textualist approach. Indeed, a text-centered “natural” reading of a document cannot go very far at all without placing the text—implicitly or explicitly, consciously or unconsciously—in some sort of interpretive context. In other words, what a particular interpreter may deem to be the most “natural” reading of a particular text may, in fact, be simply a naive or anachronistic reading driven less by the text itself than by the ideological baggage that the interpreter brings with him. To some degree, then, a “natural” reading of a text serves as a political “ink blot” test, reflecting the outlook of the interpreter as much as the “plain meaning” of the text. Obviously, this is one of the reasons that textual readings tend to shade into attempts to recapture the “original” textual meaning by reference to the interpretive context that can be found in extrinsic historical sources. A meaning that is obscure in modern context may in fact be quite “plain” in its original context of the late eighteenth century. Even so, it is still likely that a text may have a limited range of more or less “natural” interpretations. It is worth attempting, therefore, to examine the constitutional text—with a fresh eye—in order to see what interpretation is most plainly or naturally suggested.

B. The Philadelphia Constitution

What, then, is the most “natural” reading of the Philadelphia Constitution of 1787, from the Preamble to Article VII? As John Hart Ely has pointed out, the constitutional text evinces, not surprisingly, an overwhelming concern with structural and procedural questions—as distinguished from substantive “rights” questions. Moreover, the text on its face demonstrates a clear concern with a number of structural constitutional values, principles, and devices in direct tension with expansive judicial power. Such principles include popular sovereignty, civic republicanism, “federalism, separation of powers, bicameralism, representation, and constitutional amendment”—constitutional features indicative of a plan

\footnote{72 Id.}

\footnote{73 ELY, supra note 4, at 88-101.}

\footnote{74 Akhil Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1132 (1991).}
of establishing democratic institutions, and diffusing and balancing political power. The facial commitment to these multiple constitutional values alone, then, tends to undermine a judicial maximalist textual reading of the constitutional design.

Of course, it is possible that the apparent textual support of these values is implicitly modified by an equally apparent textual support of expansive judicial power. One might imagine that a natural reading of the constitutional text would reveal its commitment to some form of deliberative democracy but that this structural commitment, the argument would proceed, should be understood in light of an equal and "modifying" structural commitment to expansive judicial power. The two structural commitments might then be seen as simply conflicting—or perhaps, when rightly understood, complementary—constitutional values.

What, then, does the constitutional text suggest about expansive judicial power? Is there facial textual support for judicial maximalism? The obvious starting point is the text of Article III and its treatment of the most conspicuous variables of judicial power. What is immediately striking is that Article III contains no explicit mention of the linchpin of expansive judicial power: judicial review. In fact, not only is there no mention of judicial review, there is, of course, also no mention of the crucial "maximalist" doctrine of judicial supremacy, no mention of the status of the Supreme Court as the final arbiter of the meaning of the Constitution.

What is found instead, in Article III and elsewhere, is an array of serious structural limitations on the power and independence of the judiciary. The size of the Supreme Court is left to the discretion of Congress, suggesting a legislative power to "pack" the Court. Funding for the Supreme Court,

75 See supra Part III. As noted above, of course, the degree and more precise nature of the conflict between expansive judicial power and other fundamental constitutional principles needs to be demonstrated through a careful moral-political analysis. Space limitations preclude that demonstration here, but the conflicts, as discussed above, are obvious enough and widely recognized.

76 The Constitution merely gives the Court the "judicial power" and extends that power to cases "arising under this Constitution," a grant of power that does not necessarily entail a judicial power to invalidate legislation. U.S. CONST. art. III.

77 One, for instance, looks in vain for language suggesting that the judicial power shall include the ultimate authority to determine the meaning of the Constitution and that determination shall be binding on all branches of government.

78 As Bernard Schwartz notes, the power over the Court granted to Congress is such that "[t]he Court could not . . . come into operation until the details of its organization were provided by Congress. The Judiciary Act of 1789 set up a Supreme Court consisting of a Chief Justice and five Associate Justices and set
aside from judicial salaries, is left to the discretion of Congress.\textsuperscript{79} The decision whether to establish lower federal courts is wholly within the power of Congress as well.\textsuperscript{80} Additionally, Congress arguably has the power to strip the Supreme Court of its appellate jurisdiction.\textsuperscript{81} Finally, Congress has the power to impeach federal judges at its own discretion.\textsuperscript{82} It is also "plain" that the Court has no enforcement or appropriations powers of any kind and, again, that there are no textual provisions suggesting that other political actors must defer to the Court's judgment on constitutional questions or that they must use their powers to carry out or fund its decisions.\textsuperscript{83} Indeed, the text of the Philadelphia Constitution, viewed in isolation, is clearly suggestive of a \textit{weak} Supreme Court with very limited authority and of a \textit{very strong} Congress with powerful checks on the judiciary. That conclusion is simply by far the most "natural" reading of the text.

\textsuperscript{79} "Compensation" for the Justices is guaranteed. U.S. Const. art. III, § 1. However, there is no provision that expressly provides other funding for the Court. Congress could thus essentially defund the Supreme Court simply by declining to appropriate funds for its operation.

\textsuperscript{80} Id. ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.").

\textsuperscript{81} Id. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

\textsuperscript{82} Id. art. III, § 1 ("The Judges . . . shall hold their offices during good behavior . . . "). Hamilton suggests in \textit{The Federalist No. 81} that:

> There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations through the impeachment power.


\textsuperscript{83} Again, no Constitutional provision, for instance, reads anything like: "The President and Congress shall defer to the judgments of the Supreme Court as to the meaning of the Constitution and shall use their executive and legislative powers to carry out the Court's judgments." As Hamilton pointed out:

> The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither \textit{FORCE} nor \textit{WILL}, but merely \textit{judgment}; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Of course, one can simply argue that the power of judicial review is implicit in the text, that it follows from principles of separation of powers and constitutional supremacy. Indeed, one could even argue that a judicial power to engage in controversial "moral" readings of constitutional provisions is also somehow implicit in the text, though the reasons behind that view seem far from obvious. One could further argue that the text's seeming support of deliberative democracy, federalism, separation of powers, and other constitutional values must be understood as implicitly limited by expansive judicial power. Along the same lines, one could argue that Congress's structural powers over the Supreme Court are implicitly limited in some way by various structural concerns related to expansive judicial power itself, judicial independence, and the constitutional norm of separation of powers. Indeed, piling inference upon inference upon inference, one could construct an argument for expansive judicial review. In short, one could engage in a subtle, nuanced, and decidedly strained reading of the constitutional text that would favor an expansive conception of judicial power. Such a reading, however, is plainly not a "natural" reading of the text, much less the most "natural" one.

In sum, the design for American government gleaned from the textual face of the Philadelphia Constitution, given its more "natural" range of readings, does not suggest a maximalist judiciary. Rather, it implies a decidedly minimalist judiciary, perhaps one even lacking a power of judicial review beyond a limited departmentalist form.

C. The Bill of Rights

What, then, is the most "natural" reading of the text of the Bill of Rights—the first ten amendments to the Constitution—particularly when read "holistically" in light of the "background" text of the original Philadelphia Constitution? Specifically, one must consider the substance of the rights protected, though even more important is the basic structural question of the role of the judiciary with respect to the Bill of Rights.

What, then, is the substance of the rights protected in the Bill of Rights as suggested by the text? Ronald Dworkin concludes that:

On its most natural reading, then, the Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction. Taken together, these principles define a

\textsuperscript{84} See, e.g., id. at 435 (indicating that the power of judicial review may be an inherent part of the judicial power).
political ideal: they construct the constitutional skeleton of a society of citizens both equal and free.\textsuperscript{5}

In Dworkin’s view, the text of the Bill of Rights displays serious concern with non-structural, non-procedural, non-participatory (that is, “substantive”) rights, and is also quite compatible with a political morality centered around “freedom” and “equality”—including, of course, contemporary liberal individualism.

Other scholars, such as John Hart Ely and Akhil Amar, read the substance of the first ten amendments as heavily structural and procedural in nature, and as emphasizing democratic, republican, federalist, and populist themes. These scholars, then, perceive the Bill of Rights as much more consistent with the overall design of the Philadelphia Constitution.\textsuperscript{6} For example, Amar notes that the First Amendment freedoms of speech, press, assembly, petition, and religion are all directly related to the federalist and republican norms of the Constitution.\textsuperscript{7} The Second, or “Militia,” Amendment is related to structural norms of populism, federalism, and civic republicanism.\textsuperscript{8} Even the evident concern with juries in the Bill of Rights is related to the populist and republican preference for popular “representation” even in the judiciary.\textsuperscript{9} Finally, the Bill of Rights “ends with back-to-back invocations of ‘the people,’” found in the Ninth Amendment’s strong statement of popular sovereignty and the Tenth Amendment’s statement of popular sovereignty and federalism.\textsuperscript{10} Amar, therefore, concludes that “[t]he essence of the Bill of Rights was more structural than not, and more majoritarian than counter.”\textsuperscript{11} In fact, Ely and Amar both minimize the risk of ideological or anachronistic bias in their interpretation by reading the Constitution “holistically”\textsuperscript{12} and by informing their textualism with a substantial degree of historical context. In view of the overarching design apparent on the face of the Constitution, this is a convincing interpretation of the Bill of Rights.

\textsuperscript{5} \textit{Dworkin, supra note 25, at 73} (emphasis added). Dworkin is referring to the Fourteenth Amendment as well, but his own analysis makes clear that the Fifth Amendment Due Process Clause is, in Dworkin’s opinion, “abstract” enough to include the basic principles of “freedom” and “equality.” \textit{Id.}

\textsuperscript{6} \textit{See Ely, supra note 4, at 88-101; Amar, supra note 74, at 1205.}

\textsuperscript{7} \textit{See Amar, supra note 74, at 1146-62.}

\textsuperscript{8} \textit{Id. at 1162-73.}

\textsuperscript{9} \textit{Id. at 1182-99.}

\textsuperscript{10} \textit{Id. at 1199-1201.}

\textsuperscript{11} \textit{Id. at 1133.}

\textsuperscript{12} \textit{Id. at 1131.}
What, then, is the most "natural" reading of the text of the Bill of Rights with respect to the structural question of judicial enforcement and judicial power? The striking point here is simply that there is no mention in the text itself of judicial enforcement. The Bill of Rights simply does not say that it is to be interpreted or enforced by the Supreme Court. Moreover, it is also worth noting that a number of the amendments concern the inner workings of the judicial process and thus display a serious distrust of the federal judges necessitating citizen juries as a popular check on judicial misconduct.93

Still, perhaps the failure of the text to mention judicial enforcement is a red herring. Perhaps it is simply self-evident that the Supreme Court is to be the primary interpreter and final arbiter of the meaning of the Constitution. And if not the Supreme Court, one might ask, then who would interpret and enforce these provisions? Surely not Congress—at whom so many of the Constitution’s limitations are directed.

This line of argument, upon reflection, is actually very weak. As pointed out, the most natural readings of the Philadelphia Constitution are suggestive of a decidedly minimalist judiciary.94 This fact alone undermines any notion that it is simply textually self-evident that the Supreme Court is to play a primary role in the enforcement of the provisions of the Bill of Rights. In fact, it is not even clear, on a purely textual reading, that the Supreme Court has the necessary power to enable it to play such a role effectively. Nor is it clear that such judicial power would cohere with the text’s apparent commitment to other constitutional values such as deliberative democracy, civic republicanism, or separation of powers. Why, then, would anyone imagine that the text supports expansive judicial power, a wide-ranging judicial “veto power” over Congress? As described, there is, in fact, nothing in the text of the Bill of Rights itself to support this conclusion, nothing that actually supports even limited judicial enforcement. Further, the multiple provisions displaying distrust of the federal judiciary tend to further demonstrate that judges, as well as Congress, were

93 See Gerard V. Bradley, The Post-Constitutional Era, in REINVENTING THE AMERICAN PEOPLE 137, 141 (1995) (arguing that a number of “amendments in the Bill of Rights (the Fourth, much of the Fifth, the Sixth, Seventh, and Eighth Amendments) reveal a lack of confidence in the judiciary: they guarantee rights within judicial proceedings” and provide that jury trials were “meant to be a protection against government oppression of the people and an instrument of the local community’s self government”); see generally Amar, supra note 74, at 1181-99.

94 See also supra Part VI.
viewed by the Framers as potential threats to the rights of individuals. Therefore, when the text of the Bill of Rights is read holistically—and in light of the background context of the Philadelphia Constitution—the absence of a textual provision providing for judicial enforcement becomes very telling indeed.

Moreover, a closer textual analysis combined with the broader historical context suggests another possible source of interpretation and enforcement of the Bill of Rights: the American people. As many writers have observed, strong democratic, republican, and populist themes recur throughout the document. Notably, the simple phrase “the People” appears only once in the entire Philadelphia Constitution—in the Preamble—but it occurs an additional five times within the short space of the first ten amendments. In the view of Robert Goldwin, the Bill of Rights established that the American people were intended to be “an integral part of the Constitution, in a way they had not been before.” Indeed, the Ninth and Tenth Amendments, in particular, speak of the rights “retained” and “reserved” by the American people against their government, including—presumably—their government’s judiciary. The text of the Bill of Rights, then, is highly indicative of a “sovereign people” who have established a limited government and delegated to it quite limited powers. It takes no great leap of the imagination to suppose that the people themselves, rather than another agency of the limited government, have the responsibility for determining what rights they have “retained” and “reserved.” This textual reading is strongly reinforced by historical materials, as will be discussed.

In sum, the most “natural” reading of the Bill of Rights suggests that its provisions are heavily structural-procedural in nature, that they cohere well with and reinforce the basic structural concerns evinced by the Philadelphia Constitution, that they reinforce the multiple constitutional values in tension with expansive judicial power, and that they are designed principally to empower the sovereign people as opposed to unelected federal judges. The Bill of Rights thus provides no affirmative textual support for expansive judicial power. To the contrary, the document displays a commitment to constitutional principles that expansive judicial power tends dramatically to erode.

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95 See, e.g., Lofgren, supra note 49.
96 ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 178 (1997).
97 See generally Amar, supra note 74.
98 See discussion infra Part VII.D.
D. The Fourteenth Amendment

What is the most “natural” reading of the Fourteenth Amendment? Again, in this context, the substance of the rights protected is important, but even more important is the basic structural question of the role of the judiciary with respect to its provisions. As for the substance of the “rights” protected by the Fourteenth Amendment, some of the language, such as the references to “privileges or immunities,” is indeed quite abstract in character and suggestive of individual rights unrelated to governmental structure. Even here, though, a “holistic” reading of the amendment might suggest that its provisions should be seen as “echoing” the great structural themes of the Philadelphia Constitution and the Bill of Rights. As John Hart Ely suggests, it is reasonable to read these abstract provisions as references principally to the dominant overarching populist, democratic, and republican themes quite apparent elsewhere in the text of the Constitution.

What, then, is the most “natural” reading of the text of the Fourteenth Amendment with respect to the structural question of judicial enforcement and judicial power? Here, too, there is no language to suggest that the judiciary is to have principal interpretive and enforcement powers, a failure amplified significantly by the judicial minimalism apparent in the background text of the Philadelphia Constitution. Moreover, even more suggestive here is the fact that the text of section 5 specifies an institution with the authority to enforce the Amendment’s provisions. Section 5 reads: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Why then would anyone think that the most “natural” holistic (or even clause-by-clause) reading of the Fourteenth Amendment is suggestive of expansive judicial power? It would seem the contrary is true: In light of its own language and perceived against the backdrop of the Philadelphia Constitution and the Bill of Rights, the most natural reading of the Fourteenth Amendment is that it principally empowers Congress—not the Supreme Court. As will be explained, this “textual” reading is greatly reinforced when supplemented by historical materials concerning the general lack of debate about the Amendment’s effect on republican government and the Reconstruction era Republican Party’s general disenchantment with the federal judiciary.

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99 See ELY, supra note 4, at 73-104.
100 U.S. CONST. amend. XIV, § 5.
101 See infra Part VILE.
E. Conclusion

Dworkin asserts that the Bill of Rights, on “its most natural reading,” suggests a concern with highly abstract “substantive” rights and also that structurally (in light of Marbury v. Madison\textsuperscript{102}) it “seems to give judges almost incredible power.”\textsuperscript{103} Inspired by Dworkin’s textual analysis, one can ask a slightly different but closely-related textual question involving constitutional structure: Whether the Constitution, as a whole—from its Preamble to its last amendment—and on its most “natural” reading, grants “almost incredible power”\textsuperscript{104} to the U.S. Supreme Court. The simple answer is that it does not.

On the whole, and by quite a margin, the most “natural” textual reading of the structure of the Constitution is decidedly a judicial minimalist one. The text of the Philadelphia Constitution displays a commitment to a wide array of structural values in obvious tension with expansive judicial power, displays no express commitment even to judicial review (much less to the maximalist doctrine of judicial supremacy), and provides Congress with a number of weighty checks on the judiciary’s power and independence. The text of the Bill of Rights echoes many of these structural themes in tension with expansive judicial power, evinces clear distrust of the federal judiciary, and has no provision suggesting judicial (rather than popular, state, or congressional) enforcement. Further, the Fourteenth Amendment is emphatically not suggestive of expansive judicial power, as evidenced by the absence of provisions concerning judicial enforcement and, as well, by its direct express textual commitment to enforcement by Congress. Finally, a series of post-Reconstruction amendments to the text have further democratized the Constitution, undermining a textual reading in support of expansive judicial power.\textsuperscript{105}

Thus, while some form of judicial review may be a fair implication of the constitutional text, the most “natural” reading of the constitutional text as a whole strongly favors some form of judicial minimalism. These conclusions are reinforced, quite dramatically, when the text is considered in the proper historical context of its original range of meanings and the original constitutional practices of the early American Republic.

\textsuperscript{102} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{103} DWORKIN, supra note 25, at 74.
\textsuperscript{104} Id.
\textsuperscript{105} See supra note 48 and accompanying text.
VII. THE "ORIGINAL" STRUCTURAL MEANING OF THE CONSTITUTIONAL DESIGN

A. Introduction

The "original meaning" of the constitutional text is a second widely-recognized and authoritative source of law, particularly in light of the foundational norm of popular sovereignty, the authority of legal conventionalism, and the important need for constitutional stability. Therefore, conclusions about the "original meaning" of the American constitutional design are highly relevant to structural constitutional interpretation. Of course, it is also important at the outset to recognize the limits of this approach. All one can expect here is to determine a limited range of meanings more or less reasonably attributable to the Framers and Ratifiers, as held either expressly or impliedly, in light of available historical materials. There is certainly no reason to suppose that the founding generation shared one highly specific view of the constitutional design, and our historical source materials are imperfect, incomplete, and often ambiguous—a fact that renders our conclusions on difficult constitutional questions typically quite provisional. Even so, it can be demonstrated that certain readings of the constitutional text, in all likelihood, fall within or without the range of reasonably contemplated explicit and implicit "original" meaning(s), and that demonstration alone is of decided value to the interpretive enterprise. The task, then, is to determine as much as possible about the range of reasonably attributable "original" meanings of (1) the "overarching" constitutional design, including the multiple constitutional principles in potential conflict with expansive judicial power; (2) the role of courts within that design, including the logic of judicial review and the multiple variables of judicial power; (3) the structural

dimension of the Bill of Rights; and (4) the structural dimension of the Fourteenth Amendment.

B. The Founders’ Original Constitutional Design

The Constitution’s basic strategy for preserving individual rights is quite evident in the constitutional text, the historical record, and documents such as The Federalist. The strategy is chiefly a structural one, involving the creation of representative institutions in order to protect the people from governmental tyranny. This strategy also involves the careful diffusion and balancing of political power among the institutions of government. The Framers’ intention here in part was to further weaken the government to prevent tyranny as well as to slow down the political process, to make it more deliberative, and to promote reflection, persuasion, compromise, consensus-building, and incrementalism. In fact, as Michael Sandel has observed, in the early American Republic liberty was simply “understood as a function of democratic institutions and dispersed power.”

The ultimate guarantor of individuals rights, then, on this view, is the “sovereign people.” Thus, it is not surprising that so many of the Founders—including Madison, Jefferson, and Marshall—expressed their belief in the crucial importance of fostering civic virtue in the citizenry in order to maintain a free society. The founding generation, therefore, broadly recognized the importance of civic virtue—in addition to representative democracy and the dispersal of political power—to the preservation of individual “rights.” Indeed, in Madison’s view the primary value of the Bill of Rights was the educative value it would have with respect to the citizenry as a solemn declaration of the basic political principles of republican government. The Constitution’s plan for protecting civil liberties is, in essence, then, an attempt to promote just rule by the “deliberate sense of the community” through a combination of demo-

108 SANDEL, supra note 40, at 27.
110 For a more comprehensive discussion of the educative function of the Bill of Rights, see discussion infra Part VII.D.2.
111 The phrase “deliberate sense of the community” is Madison’s. THE FEDERALIST No. 63 (James Madison) (stating that “the cool and deliberate sense of the community ought, in all governments, and actually will, in all free
ocratic institutions, the balancing and diffusing of political power, and the promotion of civic virtue among citizens.\textsuperscript{112}

This concentration on an indirect "design" strategy is, of course, part of the reason why the Constitution itself displays a clear textual commitment to structural principles such as popular sovereignty, representative democracy, separation of powers, federalism, bicameralism, and presentation, along with other forms of checks and balances. The design strategy also illustrates the primary reason why structural debates about the intricacies of the constitutional design dominated the Philadelphia Convention, and were also the main source of contention in the political struggles surrounding the Bill of Rights. The strategy is in fact embodied in the Bill of Rights itself, in its important structural dimension echoing the "design" themes of the original Constitution.\textsuperscript{113} Finally, this overarching structural strategy reveals why the Founders could confidently refer to the judiciary as "the least dangerous"\textsuperscript{114} branch of the federal government; why they could leave the question of the proper scope of judicial power—including the existence of a power of judicial review—\textit{implicit} in the Constitution’s governmental design. The Framers’ simply did not see the judiciary as the primary actor in the Constitution’s structural plan for rights preservation.

Therefore, one may conclude that the overarching constitutional design of the Founders evinces a desire to instantiate participatory rights directly and to protect non-participatory rights indirectly—through the establishment of democratic institutions, the dispersal of political power, and the promotion of civic virtue.\textsuperscript{115} For instance, the structural constitutional constraints on the exercise of the national legislation power demonstrate precisely this strategy. The original constitutional design envisages that the national legislative power is to be: (1) exercised by Congress, rather than the President or the Supreme Court, in accordance with the constitutional principle of separation of powers; (2) exercised by an elected and electorally-accountable institution in accordance with the constitutional

\textsuperscript{112} See CAREY, \textit{supra} note 13, at 122-38. \textit{See generally} CAREY, \textit{THE FEDERALIST, supra} note 107.

\textsuperscript{113} See \textit{generally} Amar, \textit{supra} note 45.

\textsuperscript{114} \textit{THE FEDERALIST NO. 78, at} 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

\textsuperscript{115} For a broader discussion of the constitutional theory of the Founders, see also \textit{JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION} (1996).
principle of representation; (3) divided between two legislative houses in accordance with the constitutional principle of bicameralism; (4) exercised only with the support of the executive or a supermajority of the legislature, in accordance with the constitutional principle of presentment; and (5) limited in its scope via the delegation and enumeration of powers to the national government, in accordance with the constitutional principle of federalism. Without further elaboration, it is quite evident that the exercise of legislative power by the national government is subject to a series of important constitutional constraints of a structural-procedural nature, designed both to confer participatory rights directly on citizens and to protect non-participatory rights indirectly—these dual aims to be accomplished by diffusing and balancing the power necessary to the exercise of the legislative authority and by making such power accountable to the people. As suggested above, expansive judicial power is in obvious tension with this array of constitutional principles and values.

This important constitutional background sheds light on the original understanding of the role of the judiciary in this constitutional design. In particular, this structural background highlights the manner in which the Court’s exercise of the functional equivalent of broad discretionary legislative power—unconstrained by the careful procedural-structural limits the constitutional system places on Congress—is in conflict with (and is thus a threat to) fundamental constitutional principles, the overarching structural integrity of the American constitutional order, and the participatory and non-participatory rights of American citizens. The important potential for conflict in these areas must be kept in mind as the issues below are explored.

C. The Original Understanding of the Role of the Judiciary

What was the “original understanding” of the role of courts in the American constitutional design? Of course, it would be more accurate to

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116 Another notable aspect of the original constitutional design assumes that the state governments will—and are to a degree constitutionally required to—incorporate similar structural principles into their own governmental structures. See U.S. CONST. art. IV, § 4. Thus, the design of the Constitution also envisages that these sorts of structural safeguards will be in place in the state governments as they operate in the federal system, and that the decentralized political power of the states will follow similar constitutional procedures implicating democratic accountability and dispersion of political power.

117 See supra Part III.
say "original understandings;," since there is no reason to suppose that there
was a simple consensus on the matter—or even, perhaps, that the matter
had been carefully considered at all. On the contrary, there was merely an
implicit understanding of what courts would and would not do in the
American system of government, in light of the traditional understanding
of the judicial function, and the basic structure and principles of the
Constitution. Therefore, it is necessary to identify the range of understand-
ings of judicial power in place at the time of the Founding and in the years
of the early Republic. This is most effectively accomplished by examining
the justification for judicial review, the variables of judicial power, and the
actual exercise of judicial review.

1. The Original Justifications for Judicial Review

The classical justification for the original conception of judicial
constitutional review lies in two documents: The Federalist No. 78, written
by Alexander Hamilton, and Justice Marshall's opinion in Marbury v.
Madison.\(^{118}\) According to the classical view, the foundation of judicial
constitutional review is based on a simple syllogism: (1) it is the duty and
province of the judiciary to resolve legal questions; (2) questions of
constitutionality are inherently legal questions; and thus (3) it is the duty
and province of the judiciary to resolve questions of constitutionality.\(^{119}\)
The heart of this justification rests upon an understanding of the nature
of the Constitution as a form of "law" and the function of the courts as the
chief "interpreters" of the law, and its logical force necessarily rests upon
a sharp distinction between law and politics—a distinction in which
Hamilton (and the Founders generally) very strongly believed.\(^{120}\) As

\(^{118}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\(^{119}\) In The Federalist No. 78, Hamilton writes: "The interpretation of the laws
is the proper and peculiar province of the courts. A constitution is, in fact, and must
be regarded by the judges as, a fundamental law. It therefore belongs to them to
ascertain its meaning . . . ." The Federalist No. 78, at 101 (Alexander Hamilton)
(Clinton Rossiter ed., 1999). In Marbury, Marshall writes: "It is emphatically the
province and duty of the judicial department to say what the law is." Marbury v.
Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\(^{120}\) In fact, as Hamilton's writings suggests, judicial review was premised on the
(then) widely-accepted view that judging is purely an exercise of legal "judgment"
and not "legislative" will. See The Federalist No. 78, at 437 (Alexander
Hamilton). Indeed, the dominant understanding of legal interpretation of the day
generally held that there were "right" answers to legal questions and that these
could be discovered without recourse to controversial moral and political
numerous theorists have noted, the more one is inclined to believe that constitutional interpretation necessarily is, or normatively should be, suffused with moral-political judgment, the less force this argument possesses.\textsuperscript{121}

The preceding line of analysis is principally the basis for an argument in favor of granting the judiciary the power of constitutional interpretation.\textsuperscript{122} Yet, a second question must also be confronted and answered: How is the power of judicial review justified in light of the competing constitutional and moral-political values that may be in potential conflict with it? As explained, the initial line of argument in \textit{The Federalist No. 78} bases the structural choice of judicial review on the obvious and quite plausible grounds related to separation of powers, the judicial function, and the institutional responsibility of the judiciary. In essence, the classicists adopt the view that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”\textsuperscript{123}

Hamilton's argument does not end at this point but continues to confront the crucial question of the compatibility of judicial constitutional review with the overarching republican design of the Constitution. Indeed, Hamilton concludes that such a power does not elevate the judicial branch above the legislative branch in violation of the basic republican principles for four reasons: (1) the Court is “designed to be an intermediate body between the people and the legislature,”\textsuperscript{124} simply enforcing the “superior” constitutional will of the former on the latter;\textsuperscript{125} (2) the courts are to exercise the apolitical legal “judgment” of judges in determining the meaning of the Constitution, and are not to exercise the political “will” of legislators;\textsuperscript{126} (3) judicial review is limited to “certain specified exceptions
to the legislative authority" such as bills of attainder and ex post facto laws, as well as to laws that are "contrary to the manifest tenor of" and demonstrating an "irreconcilable variance" from such specific exceptions;\(^2\) and (4) the judiciary is the "least dangerous [branch] to the political rights of the Constitution" and "can never attack with success either of the other two" branches.\(^2\)

Thus, Hamilton premises his "compatibility" analysis on four grounds. Namely, he relies on (1) a close link between popular sovereignty and the meaning judges attribute to the Constitution, (2) the maintenance of a sharp distinction between apolitical legal judgment and political will, (3) a general policy of judicial deference limiting judicial review to manifest violations of specific constitutional limitations, and (4) the relative weakness of the judiciary, which renders any judicial "usurpation" of political power unlikely.\(^2\) Therefore, judicial review, even by electorally-unaccountable federal judges, was not understood by Hamilton (or the members of the founding generation who actually supported a broad conception of judicial review) to elevate judges over elected legislators. Indeed, this was so because judges were seen as simply enforcing the "higher" will of the people—the Constitution—on either its "lower" will—legislatures—or on rogue members of the government opposed to both.\(^1\)

While Marshall in *Marbury* makes only a truncated version of this Hamiltonian argument, there are no grounds for supposing that his conception of the judicial power was any broader than Hamilton's conception. Indeed, Marshall's argument is somewhat narrower in scope, omitting any discussion of judges as a check on the popular passions that might drive government officials to violate the Constitution.\(^1\) *Marbury* also involved a purely departmentalist exercise concerning the Supreme

of the executive arm even for the efficacy of its judgments." *Id.* at 433.

\(^{127}\) *Id.* at 434-35. Indeed, Justice Chase, for example, endorsed a "clear-mistake" doctrine as early as 1796, in *Hylton v. United States*, 3 U.S. (1 Dall.) 171 (1796), and in 1798 defined the meaning of ex post facto law in light of its technical legal understanding in *Calder v. Bull*, 3 U.S. (1 Dall.) 386 (1798).


\(^{129}\) For more extended analyses of this cluster of questions, see CAREY, supra note 13, at 122-38, and CAREY, *The Federalist*, supra note 107, at 129-45.

\(^{130}\) See, e.g., RAKOVE, supra note 115, at 336.

Finally, while many members of the founding generation may have had an even more modest conception of the judicial role than did Hamilton and Marshall, few, if any, held a broader view. Indeed, then, the most widely held "original" justification for judicial review in this era seems to have suggested a structural role for the courts that was highly "minimalist" in nature. This minimalist view envisaged a Court that would be politically vulnerable, deferential, apolitical, and "legalistic," and an expounder of a constitutional law reflecting the sovereign people's "higher" will. Under this view, the Court would emphatically not be a strongly independent, aggressive, politically-motivated, and "moralistic" institution making policy through creative and highly discretionary constitutional interpretation. The range of "original" justifications for judicial review, then, does not support an expansive conception of the judicial power.

2. The Original Variables of Judicial Power

The above conclusions concerning the original theory of judicial review are greatly reinforced when the "original" set of variables of judicial power are examined. Indeed, in discussing the role of courts in the American constitutional design, it is crucial to pay careful attention to all the variables of judicial power, since the actual scope of the judicial function is in practice best seen as a result of a given combination of them. This broader perspective will provide a much more accurate view of the actual scope of judicial power at the time of the Founding and in the early days of the Republic than will a narrow focus on the interpretive methods used by judges in a selected handful of cases. Indeed, the

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132 See, e.g., CLINTON, supra note 122 and accompanying text.
133 See also RAOUl BERGER, GOVERNMENT BY JUDICIARY 322-36 (2d ed. 1997) (arguing that the Founders denied the courts any role in policy-making).
134 Nowlin, supra note 14, at 542-45 (arguing that an "awareness of the importance of the numerous dimensions of judicial power for structural interpretive analysis can help [one] avoid" fundamental structural errors such as an overemphasis on judicial interpretive theory).
135 For instance, dicta involving the language of social compacts and natural rights in early cases such as Calder v. Bull, 3 U.S. (1 Dall.) 386 (1798), and Fletcher v. Peck, 10 U.S. (1 Cranch) 87 (1810), has been invoked by some theorists as precedent bolstering the legitimacy of the discretionary use of political power by courts in the contemporary period. See, e.g., Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1176-77 (1987) (emphasizing judicial discussions of "unenumerated rights" as precedent for expansive judicial
exercise of judicial review is, in fact, affected by a number of factors falling outside the realm of judicial interpretive theory. Many of these variables have changed substantially over the course of American history, suggesting that an approach centered purely on the interpretive methodology of early American judges would be significantly flawed and would present a highly misleading picture of the actual judicial role at the time.\(^{136}\)

The most important "variables" of judicial power include the claim of judicial review, the claim of judicial supremacy, the degree of judicial independence, judicial-political deference, and judicial interpretive theory.\(^{137}\) As argued elsewhere,\(^ {138} \) if the Court of today is compared with the Court of 1800, a number of instructive changes appear indicative of a great increase in judicial power since the early American Republic.

For instance, as of 1800, the Court had yet to establish with any firmness or clarity even the bare doctrine of limited departmentalist judicial review.\(^ {139} \) Additionally, the proper scope of judicial review remained an open question. In fact, the important "maximalist" claim regarding judicial supremacy in constitutional interpretation remained quite controversial until at least the last third of the nineteenth century.\(^ {140} \) Moreover, it is far from clear that Marbury itself stands for any principle broader than departmentalist judicial review.\(^ {141} \) It is worth noting, in particular, that Thomas Jefferson, James Madison, Andrew Jackson, and Abraham Lincoln all embraced various forms of "coordinate" or "departmentalist" review, denying that the co-equal branches of government were uniformly bound by the Supreme Court's constitutional interpretations.\(^ {142} \)

power while glossing over the general timidity of early American courts and their sparing use of judicial review, particularly on questions involving individual rights). Of course, this language may well have been misinterpreted. See, e.g., ELY, supra note 4, at 210-11 n.41 (noting that Calder, for instance, is in fact a fiercely positivistic decision). In any event, the implications of this language for the Founders' view of the judicial role is easily misunderstood unless a broader focus on all the variables of judicial power, including consideration of the overall fragility of the Court and its sparing use of judicial review, is maintained.

\(^ {136} \) See Nowlin, supra note 14, at 542-45.  
\(^ {137} \) See id.  
\(^ {138} \) See id.  
\(^ {139} \) This would, of course, come later in the form of Marbury v. Madison in 1803.  
\(^ {140} \) See generally CLINTON, supra note 122.  
\(^ {141} \) Id.  
\(^ {142} \) See WALTER MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 267 (2d ed. 1995). This noteworthy group includes, respectively, the principal
Moreover, the Court in the early Republic was less willing to challenge the authority of legislative assemblies, and legislators tended to be much less deferential to the Court. As early as the 1790s, Supreme Court justices endorsed “clear mistake” doctrines and feared that controversial decisions would meet with defiance from legislators—who might well question the Court’s authority or the merits of its particular decision. These “clear mistake” doctrines were often invoked and cited as “traditional” or “universal” well past the year 1900. In fact, the actual exercise of judicial review was infrequent in the early Republic, a rare rather than routine event. Additionally, the relationship of the Bill of Rights to the Court’s power of judicial review was unclear, and the Bill of Rights itself clearly did not apply to state governments, which at this time held most of the general legislative authority. Further, the Court’s political insulation was subject to threat by the Congress, both through the impeachment power and the power to determine the number of justices staffing the Supreme Court. There was also some question as to whether Congress would exercise its “exceptions and regulations” authority under Article III to “strip” the Supreme Court of its appellate jurisdiction on various controversial constitutional matters.

See, e.g., Hylton v. United States, 3 U.S. (1 Dall.) 171, 175 (1796); James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893).

See, e.g., Lochner v. New York, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (arguing that “the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power”).

See infra Parts VII.C.3, VIII.B.1.

See infra Part VII.D.


Hamilton viewed the impeachment power as the ultimate deterrent to judicial usurpations of legislative authority. See supra note 126 and accompanying text.

See SCHWARTZ, supra note 3, at 16 (noting that the Congress determines the details of the Court’s organization and operation and that, for instance, the “Judiciary Act of 1789 set up a Supreme Court consisting of a Chief Justice and five Associate Justices”).

See, e.g., id. Schwartz notes that the Judiciary Act of 1789 also “set forth the jurisdiction vested” in the Supreme Court. Id; see also CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL 48 (1963) (observing that between 1821 and 1882 “[a]t
Finally, as mentioned, it is also true that legal interpretation itself was understood as an essentially apolitical, perhaps even mechanical, "oracular" or "declaratory" enterprise.\textsuperscript{151} As Edward D. White has observed, at the time of the Founding, "the predominant jurisprudential assumption [was] that judges merely ‘found’ law, mechanically applying existing rules to new situations," a view that fostered the widely-held "image of judges as oracles who could discover the law’s technical mysteries but who could not influence the content of law itself."\textsuperscript{152} In short, judges typically were not seen, and typically did not see themselves, as possessing any significant measure of discretionary political authority in resolving constitutional cases. The legal "judgment" of judges and the political "will" of legislators were thus seen as sharply distinct.

Again, examining this broader set of variables provides a much more accurate picture of the judicial role at the Founding and in the early Republic than does a narrower focus on the interpretive arguments used in selected cases. This "original" set of variables makes it much easier to understand why the Court did not strike down even a single law under the Bill of Rights until as late as 1857\textsuperscript{153} and why judicial review was a relatively rare occurrence in American political life well into the late 1800s.\textsuperscript{154} In fact, as this arrangement of variables demonstrates, the fledgling Court of the 1790s was in fact quite weak. Thus, one can well understand why the first Chief Justice, John Jay, resigned to become governor of New York,\textsuperscript{155} why Alexander Hamilton declined the opportunity to fill his vacant seat,\textsuperscript{156} and why another early justice resigned to become a South Carolina state judge.\textsuperscript{157}

In light of this "original" arrangement of the variables of judicial power, there is no reason to doubt Alexander Hamilton’s sincerity in proclaiming the judiciary the “least dangerous” branch of American government—as indeed it was, even as it gradually grew in power, for nearly a century after the Founding.\textsuperscript{158} Nor is there reason to doubt his

\footnotesize{least ten proposals to restrict the Supreme Court’s appellate jurisdiction were considered in Congress\textsuperscript{1})}.

\textsuperscript{151} WHITE, supra note 23, at 7-8.

\textsuperscript{152} Id.

\textsuperscript{153} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

\textsuperscript{154} LAWRENCE FRIEDMAN, THE HISTORY OF AMERICAN LAW 344-45, 355-58 (1973); O’BRIEN, supra note 58, at 63-64.

\textsuperscript{155} SCHWARTZ, supra note 3, at 16.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).}
sincerity in dismissing the concern that the Supreme Court would be able to “abuse” its power by exercising political “will” in the place of legal “judgment”—thereby encroaching on the constitutional authority of other political actors.\(^{159}\) One is therefore quite justified in concluding that the original set of variables of judicial power in place at the time of the Founding was a highly minimalist one.

3. \textit{The Original Constitutional Practice of Judicial Review}

Ultimately, perhaps the best evidence of the original understanding of the role of courts in the constitutional design may be the “original” practice of judicial review—that is, the manner in which courts actually used their power in the first several decades of the Republic. As the preceding analysis suggests, the evidence is strongly indicative of a highly minimalist understanding of judicial practice.\(^{160}\) As discussed, the use of judicial review was quite rare in the early Republic, and only somewhat less so until the last decades of the nineteenth century.\(^{161}\) Indeed, the Supreme Court struck down only one act of Congress during the first fifty years of its existence and invalidated only a small number of state statutes in the same period.\(^{162}\) In fact, only since the late nineteenth century has the court assumed what may be considered a “major” role in monitoring the governmental process.\(^{163}\) As Robert Nagel has observed, the United States “in the first half of its history saw very little judicial review and during the second half saw it often exercised in lurching defiance of precedent.”\(^{164}\) Particularly jarring to contemporary sensibilities is the fact that the Court’s emphasis on “civil liberties” is an even much later, mid-twentieth century judicial innovation. As Lawrence Friedman has observed, the Court’s putative role as the guardian of civil liberties—as opposed to defender of federalism or property rights—is a “surprisingly recent” one.\(^{165}\) Few important decisions in the area of civil liberties precede the 1940s, and the great majority date from the 1950s and thereafter.\(^{166}\) It should be plain, then, that analysis of “original” constitutional practice strongly suggests a

\(^{159}\) Id.

\(^{160}\) See supra Part VII.C.

\(^{161}\) See, e.g., O’BRIEN, supra note 58, at 63.

\(^{162}\) See id. at 62-63.

\(^{163}\) Id. at 63 (emphasis added).

\(^{164}\) ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 33 (1994).

\(^{165}\) LAWRENCE FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 221 (1998).

\(^{166}\) Id.
much more limited judicial role, including a more sparing use of judicial review, greater deference to legislative majorities, and general avoidance of controversial questions regarding individual rights.

In summary, the original justifications for judicial review, the original variables of judicial power, and the original practice of judicial review in the early American Republic reflect a (mutually reinforcing) "minimalist" view of the proper judicial role in the American constitutional design. As suggested, this conclusion is often obscured by a narrow focus on the reasoning of a few atypical constitutional cases, a focus which misses the larger systemic limits of the function of the Court in the American constitutional system. Given the broader focus presented here, it should be clear that the range of original understandings was highly minimalist in nature: The Supreme Court was understood to be an institution largely apolitical in its determination of constitutional meaning, decidedly limited and deferential in its application of that meaning to other institutions of government, and politically vulnerable as measured against Congress or the President. This original structural understanding of the judicial role and the implicit recognition of (and respect for) a range of fundamental constitutional values relating to representation, separation of powers, and federalism thus strongly weigh in favor of a judicial minimalist reading of the Constitution.

D. The Original Structural Understanding of the Bill of Rights

Given that enforcement of civil liberties has become both the dominant interest and most controversial activity of the Court in the years since the Second World War, it is certainly worth assessing the range of original structural understandings of the Bill of Rights and the Fourteenth Amendment. Such analysis is relevant in that these provisions may reinforce or undermine earlier conclusions about the original structural understanding of the judicial role.

First, it is necessary to examine the original structural understanding of the Bill of Rights—not so much to see what the Bill of Rights "means" substantively but, rather, to examine generally what the Bill of Rights was meant to "do" structurally. Among the important questions are the following. What was the "original understanding" of the structural role or function of the Bill of Rights in the constitutional design? How was it intended to protect rights? Who was to interpret and enforce it? Was it understood to confer additional powers on the federal courts?

167 See supra notes 16-18 and accompanying text.
1. The Founders' Emphasis on the Structure of Government

It is today often forgotten that the debates surrounding the Bill of Rights were not, in fact, debates about "what rights people have," a question on which there was a quite broad consensus at the time of the Founding, but almost wholly discussions about the structure of the proposed government. The question, simply stated, was this: To what degree did the national government pose a threat to the rights of states and individual citizens, and could a bill of rights ameliorate whatever threat it might in fact pose? Of course, the Federalists’ common political argument against a bill of rights was that such a document would constitute a meaningless "parchment" barrier against governmental action in a democratic republic; they thought that the best way to protect individual rights was rather indirectly through the structure of government itself. Indeed, as discussed, in the "early [American] republic, liberty was understood as a function of democratic institutions and dispersed power," not as a function of enumerated lists of individual rights, to be enforced by powerful and independent courts. The proposed Constitution, then, was itself the equivalent of a bill of rights, given the array of principles of limited government it incorporated—representation, federalism, separation of powers, bicameralism, and staggered terms are but a few. These basic devices of limited government, the Federalists maintained, would insure that a citizenry of quite ordinary wisdom and virtue could select leaders who would rule with reasonable prudence and justice, which would in turn insure that the rights of both states and individuals would be protected.

168 See RAVOKE, supra note 115, at 290-97.
169 See generally AMAR, supra note 109; GOLDWIN, supra note 96, at 179-80; RAKOVE, supra note 115; SANDEL, supra note 40.
170 See, e.g., GOLDWIN, supra note 96. The other common Federalist argument was a "legalistic" one concerning the potentially misleading implication that a bill of rights could have for the constitutional principles of federalism and the delegation and enumeration of national powers. See THE FEDERALIST No. 84 (Alexander Hamilton).
171 See generally SANDEL, supra note 40, at 27.
172 See THE FEDERALIST No. 84, at 483 (Alexander Hamilton) (Clinton Rossiter ed., 1999); AMAR, supra note 74, at 1132; cf. VIRGINIA DECLARATION OF RIGHTS, supra note 41, at 20-21 (containing numerous structural provisions related to issues such as popular sovereignty, separation of powers, and representation).
Of course, it is also true that the Anti-Federalists’ plea for a bill of rights was largely structural in nature. In fact, the Anti-Federalists’ complaints about the lack of protection for individual rights were largely a cover for more searching structural objections to what they saw as a dangerously powerful federal government. As Michael Sandel has observed, “[i]n opposing the Constitution, [the Anti-Federalists] sought to limit national power, and they found in the Bill of Rights the most popular, though not necessarily the most effective, way of doing so.”

Moreover, the Anti-Federalists often complained directly about the lack of protection for states’ rights, and many of the provisions eventually incorporated into the Bill of Rights are in fact best read as federalist provisions, which reaffirm the federal government’s lack of regulatory power over such matters as speech, religion, or the state militias, but which do not alter the Philadelphia Constitution’s actual design. Indeed, the Bill of Rights can be read primarily as a “structural” document, echoing the great design themes—deliberative democracy, civic republicanism, separation of powers, and federalism—of the Philadelphia Constitution. Perhaps most tellingly, the Anti-Federalists overwhelmingly disclaimed the version of the Bill of Rights that actually passed precisely because it did nothing to alter the structure of the Constitution. It seems plain, then, that the significance of the Bill of Rights—in the eyes of the Founders, Federalists and Anti-Federalists alike—was substantially structural in nature.

2. The Political and Educative Functions of a Bill of Rights

If Federalists and Anti-Federalists both agreed that individual rights were best protected indirectly through the structure of government, what value, if any, did they think a bill of rights might have? In answering this question, two basic points must be kept in mind. First, the majority of the founding generation was primarily concerned with the governmental oppression of the governed, rather than with the modern focus on majoritarian oppression of minorities. Secondly, the vast majority of the

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174 See SANDEL, supra note 40, at 35.
175 See id.
176 Id.
178 See AMAR, supra note 74, at 1132.
179 See SANDEL, supra note 40, at 38.
180 See RAKOVE, supra note 115, at 336.
founding generation certainly did not view the Supreme Court as a powerful, benign vindicator of constitutional rights, but rather as a weak (but still, perhaps, potentially tyrannical) branch of the federal government.181

What, then, did they think was the value of a bill of rights? As Jack Rakove writes, Madison’s contemporaries—the Anti-Federalists and Federalists alike—regarded the document as providing a set of standards that would enable the people to judge the behavior of their governors and “to know when their legitimate rights and interests were being violated.”182 In short, by far the most common view of the function of a bill of rights was one that envisaged a set of standards that would allow the people to judge whether their government was acting tyrannically. A bill of rights was viewed as providing a standard of judgment and a rallying point from which to oppose abuses of power.183 It is also highly significant that the judiciary itself was looked upon with skepticism. Indeed, as Gerard Bradley writes, many of the “amendments in the Bill of Rights (the Fourth, much of the Fifth, the Sixth, Seventh, and Eighth Amendments) reveal a lack of confidence in the judiciary: they guarantee rights within judicial proceedings.”184 In sum, then, the consensus understanding at the time of the Founding of the value of a bill of rights was that it would provide a written standard to judge whether the government, including the courts, was acting tyrannically.

Moreover, this is precisely why Madison—and many other Federalists—thought that a bill of rights had little intrinsic value in a republic, given that “the people,” who would provide practical political force to a bill of rights, would also be in control of the government that violated it. Clearly, if the efficacy of a bill of rights depended on rousing the populace against itself, a bill of rights would indeed be a mere “parchment barrier.” In fact, Madison’s primary motive for supporting a bill of rights was clearly a prudential concern for national unity.185 Madison understood that the primary problem facing the proponents of the Constitution, even after ratification, was simply “the widespread public mistrust of the powers of the new government it established.”186 Madison, of course, felt this mistrust

181 Indeed, those who viewed, or claimed to view, the Supreme Court as a powerful institution invariably were its Anti-Federalist critics. See Brutus, supra note 1, at 162-87.
182 RAKOVE, supra note 115, at 336.
183 GOLDWIN, supra note 96, at 65.
184 Bradley, supra note 93, at 141.
185 GOLDWIN, supra note 96, at 72.
186 Id. at 73.
was unwarranted, but also knew that widespread support was essential to the success of the new Constitution. Therefore, he used the passage of an innocuous bill of rights, one that left the structure of the Constitution unchanged, to assuage the public’s fears—thereby “saving” the Philadelphia Constitution.

It must be noted, however, that Madison did concede two (relatively minor) intrinsic benefits of a bill of rights. First, upon occasion, though very rarely, the federal government might indeed engage in unpopular “governmental” oppression, in which case a bill of rights would serve as both a standard and rallying point to oppose oppression. Second, a bill of rights might have an educational, civic republican use in that it would help to instill republican political values in the populace. Madison observed that “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.” Or, as Rakove has put it, “Bills of rights [in Madison’s view] would best promote the cause of republican self-government if they enabled republican citizens to govern themselves—to resist the impulses of interest and passion that were the root of factious behavior.” Therefore, even in a government premised on protecting rights through the mechanisms of democratic institutions and dispersed political power, a bill of rights could render those protections more effective indirectly by fostering civic virtue among voters.

Madison certainly did not see any value of a bill of rights in the power it might be thought to confer on federal judges (he mentioned judicial enforcement of the Bill of Rights only in passing), a point reinforced when viewed in light of both the weakness of the judiciary and the shaky status of judicial review in these early years. On the contrary, Madison thought that a bill of rights might have some value in its traditional and educational functions, and that the “true benefits of a bill of rights” were to be found solely in the latter. Indeed, this conclusion is even further supported when viewed against the era’s background of general judicial quiescence.

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187 Id.
188 Id.
189 See RAKOVE, supra note 115, at 333.
190 See id. at 332.
191 See id. at 333.
192 GOLDWIN, supra note 96, at 72 (emphasis added).
193 RAKOVE, supra note 115, at 336.
194 Id. at 335.
195 Id.
and political vulnerability, as well as concerns regarding judicial governmental misconduct. Madison thus reflected the thought of his generation, and that of several generations to come, in thinking that the Bill of Rights was of limited substantive importance and would play only a limited role in the protection of individual rights.

3. The Dormancy of the Bill of Rights

As with the exercise of judicial review, the Bill of Rights has also increased dramatically in importance, rising up from its status as a minor footnote to become the pole star of modern constitutional law. As noted, at the time of the Founding, the Federalists largely considered a bill of rights a superfluous “parchment” barrier and viewed its passage as inconsequential. The Anti-Federalists, on the other hand, were deeply displeased with the Bill of Right’s final contents, given that it did nothing to further their actual goal of weakening the structure of the federal government, and therefore denounced the document as worse than worthless. After the document’s passage, as James H. Hutson observes:

Federalists in Congress were not inclined to take much credit for a measure they passed with so little enthusiasm, and their Anti-Federalist adversaries wrote the Bill of Rights campaign off as a bad investment of their time. Taking their cue from Congress, the state parties received and ratified the Bill of Rights so unceremoniously that, except in Virginia, they left scarcely any evidence of what they had done. The Bill of Rights forthwith fell into a kind of national oblivion . . . not to be “discovered” until the beginning of World War II.

Robert Goldwin is in accord:

[W]hen, finally, the ratification of the Bill of Rights was officially announced, there were no great ceremonies, no glowing editorials, no passionate speeches, no grand parades, no fireworks lighting up the sky; there was nothing to indicate that anything had occurred that was more

196 See supra notes 142-43 and accompanying text.
197 See supra note 170 and accompanying text.
consequential than the legislative acts concerning fisheries, fishermen, post offices, and post roads. The Bill of Rights slipped quietly into the Constitution and passed from sight and public consciousness until given a new and very different life by the Supreme Court more than a century later.\footnote{GOLDWIN, supra note 96, at 175.}

Indeed, for the next one-hundred and fifty years or so, the Bill of Rights was “dormant,” used by the Court only on the rarest of occasions, until the eve of World War II. For instance, as Michael Sandel has observed, “[d]espite the prominence of First Amendment rights in our contemporary understandings of liberty, the Supreme Court did not strike down a law of Congress for violating the First Amendment until 1965.\footnote{SANDEL, supra note 40, at 38. See Lamont v. Postmaster General, 381 U.S. 301 (1965) (striking down § 305(a) of the Postal Service and Federal Employees Salary Act of 1962).} The centrality of the Bill of Rights to American constitutional law and to the protection of individual rights from governmental action is, then, a surprisingly recent constitutional innovation, one that dates largely from the 1940s and 1950s. This novel constitutional practice displaced an earlier, long-standing, and widely-supported tradition of judicial non-enforcement of the Bill of Rights that had endured for nearly 150 years.

It is hard to avoid the conclusion, then, that the original structural understanding of the Bill of Rights, as strongly supported by the “original” constitutional practice surrounding it, did not confer vast new powers on the Supreme Court. Rather the document was intended to emphasize, clarify, and reinforce the original structural principles of the Philadelphia Constitution and to function in a primarily political and educational manner. Of course, those structural principles, such as popular sovereignty, representative democracy, separation of powers, and federalism, are themselves in facial conflict with expansive judicial power.\footnote{See discussion supra Part VII.C.3.} This suggests that the original structural understanding of the Bill of Rights provides no positive support for expansive judicial power and, in fact, to the contrary, demonstrates a commitment to architectural principles of government in deep structural tension with such power. The original structural understanding of the Bill of Rights thus lends strong support to a judicially minimalist structural interpretation of the American constitutional design.
E. The Original Structural Understandings of the Fourteenth Amendment

1. One or Two Constitutional Revolutions?

In the search for a formal constitutional basis for sweeping judicial power, one is naturally drawn to the Fourteenth Amendment. After all, the amendment was ratified only a decade before the outburst of judicial power in the late nineteenth century, was the textual basis for much of that era's radically innovative use of judicial review, and is today the textual basis for much of the Court's most controversial jurisprudence. One might well imagine that if the notion of expansive judicial power has any formal constitutional basis, it is to be found here. Of course, any analysis of the original understanding of the Fourteenth Amendment is greatly complicated by the fact that the historical record surrounding its framing and ratification is notoriously confusing, contradictory, and ambiguous.

Even so, it is possible to determine some limited range of original understandings reasonably attributable to the Framers of the Fourteenth Amendment, given the values, principles, and goals to which they were collectively committed.

Did the Fourteenth Amendment involve a conscious effort to confer sweeping new powers on the federal courts, breaking with constitutional tradition and altering dramatically the American constitutional design? As Robert Bork has suggested, some constitutional theorists do seem to suppose that:

[t]he ratifiers of the fourteenth amendment intended two constitutional revolutions rather than one, applying the restrictions of the United States Constitution to the states, which had not been done prior to the Civil War, and also subordinating the legislatures of all the states, Northern as well as Southern, to the uncontrolled discretion of judges.

Bork's point may be somewhat overstated, but the focus is, quite properly, on crucial design implications—not on substantive protection of rights. The Amendment was passed in order to alter the federal structure of the Constitution, to place important national limits on the exercise of state police power, and (to some extent) to confer interpretive and enforcement powers on a federal institution or institutions.

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202 See MCCLOSKEY, supra note 3, at 78.
203 BORK, supra note 4, at 181 (emphasis added).
Still, a much more specific question must be asked: How, if at all, was the Fourteenth Amendment intended to alter the role of federal courts in the American constitutional design? In particular, did the Framers or Ratifiers of the amendment imagine that ratification would confer important new discretionary political powers on the Supreme Court, thereby endorsing something akin to modern expansive judicial power? In short, did these Framers and Ratifiers actually embrace expansive judicial power despite the facial conflict between such power and both the traditional logic of judicial review and other fundamental principles of American constitutional government, such as popular sovereignty, representation, separation of powers, bicameralism, and the principle of checks and balances?

2. The Great Debate that Did Not Occur

At the outset, one can take note of a dog that did not bark. In discussing the two possible constitutional “revolutions”—the first “anti-federal” and the second “anti-republican”—Robert Bork has concluded:

We know the ratifiers intended the former revolution; there is not a shred of evidence that they contemplated the latter. Had any such radical departure from the American method of governance been intended, had courts been intended to supplant legislatures, there would be more than a shred of evidence. That proposal would have provoked an enormous debate and public discussion.204

Bork is right on this point. There was, indeed, a great deal of discussion about the Fourteenth Amendment and federalism, but virtually none about the Fourteenth Amendment, judicial power, and the foundational principles of American republican government.205 What does this suggest? If the Fourteenth Amendment was thought to shift broad political power from the state governments to the Congress, the only constitutional principle substantially affected would be that of “pure” federalism. On such an understanding, the Amendment would shift a number of state legislative decisions to the national legislature, where they would still be made consistent with basic constitutional principles of popular representation, separation of powers, bicameralism, and presentment. Therefore, if this was, indeed, the broad understanding of the Amendment, one would expect

204 Id. at 181–82 (emphasis added).
205 See generally CONG. GLOBE, 40th Cong., 1st Sess. 144 (1866).
political debate to concentrate on the issue of federalism and federalism alone. That is, of course, precisely how the debates played out. Moreover, if the Fourteenth Amendment were also thought to shift some narrow quantum of power from state legislatures to the Court—without discarding the notion that judicial interpretation and enforcement would involve traditionally narrow, apolitical, deferential, and legalistic use of judicial review—one would still expect political debate surrounding the Fourteenth Amendment to concentrate more narrowly on the issue of federalism, as it did, rather than generally on a broad range of republican constitutional structures.

On the other hand, if the Fourteenth Amendment were thought to shift broad political power from state governments to the Court—involving a controversial, innovative, aggressive, politically-driven use of judicial review—a wide range of American constitutional principles would be significantly undercut. On this understanding of the Fourteenth Amendment, a large number of state legislative decisions would become discretionary matters for the federal courts. Such a shift, however, would be in open conflict with the republican principles of separation of powers, bicameralism, presentment, and representation. It would, of course, also raise serious questions concerning the traditional understanding of judicial review—an understanding founded on a deferential, apolitical, and "legalistic" treatment of constitutional questions. One would thus expect political debate to concentrate on the entire range of issues surrounding republican constitutional structures and an innovative judicial role raised by such an understanding of the Fourteenth Amendment. That debate, of course, did not occur.

Indeed, it is precisely because the notion of expansive judicial power both deviates from the logic of judicial review and clearly undermines these other basic constitutional principles that it remains so very controversial today, where many jurists view it as an "illegitimate" usurpation of legislative authority. Of course, expansive judicial power was terribly controversial in the 1960s and (even in its somewhat milder earlier form) in the 1890s. There is, then, every reason to suppose that expansive judicial power would have been terribly controversial in the 1860s—when, it is worth noting, it would have been a much greater novelty and one closely associated with the pro-slavery Dred Scott decision. Yet there is simply no record of such a controversy, or, indeed, of any serious discussion of the question at all—no discussion of the ramifications of

206 Id.
207 See infra Part VIII.
shifting substantial legislative power from the state legislatures, which, like Congress, are limited by traditional structural constitutional principles associated with the legislative process, to the Supreme Court.

In short, there is no evidence that the Framers and Ratifiers of the Fourteenth Amendment contemplated any sort of "revolution" in judicial power and republican government. If nothing else, they did not envision a truly expansive—and thus a radically innovative—role for the Court in contravention of the ordinary constitutional constraints on the exercise of discretionary political power.

3. Reconstruction and the Background Understanding of Judicial Power

The conclusion above is further reinforced by the general historical context of the passage and ratification of the Fourteenth Amendment. Any analysis of judicial power with respect to the Fourteenth Amendment has to account for the "background" understanding of the judicial function in the early American Republic—in general and in the Reconstruction era in particular. As explained, the Philadelphia Constitution itself established a "minimalist" judiciary, one relatively quiescent, deferential, and politically vulnerable in nature.\(^\text{208}\) It is true, of course, that the Courts grew in power substantially throughout the early nineteenth century, but it is also true that during the ante-bellum period the exercise of judicial review at both the state and federal levels was still a fairly rare occurrence.\(^\text{209}\) Moreover, the \textit{Dred Scott} decision and its aftermath, particularly relevant in the context of Reconstruction, also very severely undermined judicial power in American government by highlighting its potential for partisan abuse.

Certainly, as Lawrence Freidman has noted, "\textit{Dred Scott} and after were relatively dark days" for the Supreme Court.\(^\text{210}\) In fact, it is fair to say, as William G. Ross maintains, that "the prestige of the federal courts remained at a low ebb during Reconstruction."\(^\text{211}\) Or as another leading historian has put it: "Never ha[d] the Supreme Court been treated with such ineffable contempt, and never ha[d] that tribunal so often cringed before the clamor of the mob."\(^\text{212}\) Indeed, Robert McCloskey writes that "[a]n

\(^{208}\) See supra notes 160-67 and accompanying text.

\(^{209}\) O'BRIEN, supra note 58, at 63.

\(^{210}\) FRIEDMAN, supra note 154, at 378.

\(^{211}\) ROSS, supra note 12, at 7.

observer viewing the Court [in 1866] might have felt warranted to predict that judicial review had reached its twilight period, that the Court’s career as an important factor in the American political process was drawing to a close.”

Clearly, our attempt to reconstruct the original “structural” understanding of judicial enforcement of the Fourteenth Amendment must take into account the crucial structural context of a significantly enfeebled, discredited, and demoralized Supreme Court, a Court that many considered to be close to the very nadir of its power.

This point is greatly reinforced when one examines the views of the men who drafted the Fourteenth Amendment on the issue of judicial power. The Fourteenth Amendment was, of course, wholly a creature of the Republican Party, whose members wrote it, ushered it through Congress, and forced the occupied southern states to ratify it. Is it plausible, then, that these Republicans were advocates of an innovative and facially anti-republican judiciary? It is important to recall that the period from *Dred Scott* through Reconstruction was an era of intense Republican disillusionment with—and often outright hostility toward—the federal courts.

Abraham Lincoln’s reaction to *Dred Scott* was typical enough. As David Herbert Donald has noted: “So blatant was [Chief Justice Taney’s] misreading of the law, so gross was his distortion of the documents so fundamental to American liberty, that Lincoln’s faith in an impartial, rational judiciary was shaken; never again did he give deference to the rulings of the Supreme Court.” In fact, Justice Benjamin R. Curtis expressed the views of many Republicans on the question of judicial power in his dissent in *Dred Scott*. There he denounced "political judging," observing that:

> Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of the laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of republican government, with limited and

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213 McCLOSKEY, supra note 3, at 121.
defined powers, we have a Government which is merely an exponent . . .
of the individual political opinions of the members of this court.215

Moreover, Lincoln himself—in his First Inaugural Address—readily acknowledged the threat that expansive judicial power might pose to democratic self-government. He observed:

[T]he candid citizen must confess that if the policy of the government,
on vital questions, affecting the whole people, is to be irrevocably fixed
by decisions of the Supreme Court, the instant they are made, in ordinary
litigation between parties, in personal actions, the people will have ceased,
to be their own rulers, having, to that extent, practically resigned their
government, into the hands of that eminent tribunal.216

In fact, Lincoln seriously questioned the doctrine of judicial supremacy, a
crucial foundation of expansive judicial power, and maintained that judicial
interpretations of the Constitution simply do not always bind the Congress
and President, outside of the particular case or controversy in question. It
is not surprising, then, that in 1858 he declared that: “If I were in Congress,
and a vote should come up on a question whether slavery should be
prohibited in a new territory, in spite of that Dred Scott decision, I would
vote that it should.”217 True to his word, Lincoln in 1862 gladly “signed a
law prohibiting slavery in all the national territories—even though the
Supreme Court in the Dred Scott decision had declared such exclusion
unconstitutional.”218 There is good reason to suppose that this rejection of
judicial supremacy was a common view in the Republican Party—at least
through Reconstruction.219

In fact, the Republican Party’s affection for the Supreme Court most
decidedly did not substantially increase during Reconstruction. The Court
was seen as a threat to a number of the Republican “reform” measures,
including the Civil Rights Act of 1866, a threat which in fact prompted the

216 Abraham Lincoln, First Inaugural Address, Mar. 4, 1861 (Marion Mills Miller, ed.).
218 DONALD, supra note 214, at 342.
passage of the Fourteenth Amendment. Indeed, those endeavoring to list prominent critics of judicial power would have to reserve a special place for the Reconstruction era Republicans, both radicals and conservatives, virtually all of whom were severe critics of the Court. During Reconstruction, the Republican Congress both engaged in court “un-packing,” reducing the membership of the Court from ten to seven (depriving Andrew Johnson of the opportunity to appoint any new justices) and generally “bullied” the Court, finally stripping it of its appellate jurisdiction in habeas corpus appeals. The Court meekly complied, prompting one observer to note that the justices had not “possessed half the nerve that belongs to many a justice of the peace.”

Indeed, in early 1867, Rep. John Bingham, the principal author of the Fourteenth Amendment, which had issued from Congress only six months earlier, proposed “sweeping away at once the Court’s appellate jurisdiction in all cases,” if the Court were to interfere with important Reconstruction measures. Bingham then further observed that:

[If] the court usurps power to decide political questions and defy a free people’s will . . . it will only remain for a people, thus insulted and defied to demonstrate that the servant is not above his lord, by procuring a further Constitutional Amendment and ratifying the same, which will defy judicial usurpation, by annihilating the usurpers in the abolition of the tribunal itself.

Indeed, in 1868, Bingham again “advocated taming the Court’s power,” this time “by requiring a two-thirds majority of the Court to strike down congressional legislation,” and “goaded his fellow members of Congress to vote for the proposal by reminding them of the ‘horrid blasphemy’ of Dred Scott.” But Bingham was by no means alone. Other Republicans of this era routinely attacked political judging, questioned judicial supremacy, asserted congressional supremacy, threatened the Court, and considered and proposed radical structural measures to keep judicial power within what they considered to be minimalist bounds. In sum, these facts are plainly indicative of the Reconstruction era Republicans’ general and obvious opposition to expansive judicial power.

222 See ACKERMAN, supra note 221, at 196.
223 McConnell, supra note 219, at 182.
It must be conceded, then, that—viewed against this background of Republican hostility toward "activist" federal courts, Republican dominance of Congress, congressional dominance of the government, and the fact of a demoralized judiciary—it is hard to imagine that the Republican Party's Fourteenth Amendment was understood structurally to confer sweeping new discretionary powers on the Court. Most certainly, then, Bork is right in observing that the amendment was not intended to "subordinat[e] the legislatures of all the states, loyal Northern as well as disloyal Southern states, to the uncontrolled discretion" of the judiciary.

4. The Fourteenth Amendment, Section 5, and Congressional Power

If the Fourteenth Amendment was not understood as principally empowering the Supreme Court to protect the rights of individuals in a politically discretionary fashion, what was it intended to do? First, both the text of the Fourteenth Amendment and its historical background direct our attention toward Congress as the preeminent, though not the sole, constitutional interpreter and enforcer of the provision. In fact, the Fourteenth Amendment itself states that "[the] Congress shall have [the] power to enforce, by appropriate legislation, the provisions of this article." Moreover, the historical event prompting the passage of the Fourteenth Amendment was congressional concern about the authority of Congress to pass legislation such as the Civil Rights Act of 1866 and concern that the Supreme Court would take the opportunity to strike down the Act. Indeed, as Republican Senator Oliver Morton, a contemporary, later explained: "The remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress." Or as John Bingham, principal author of the Fourteenth Amendment, put it: "The powers of the States have been limited and the powers of Congress extended."

There is, then, some good reason to suppose that the Republican Congress wrote the Fourteenth Amendment chiefly to empower itself—not

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224 BORK, supra note 4 and accompanying text.
225 U.S. CONST. amend. XIV, § 5.
226 McConnell, supra note 219, at 182 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872)) (footnote omitted).
227 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 258 (1988). Foner in fact endorses a judicial supremacy reading of the Fourteenth Amendment, while recognizing a significant role for Congress in its enforcement.
the Supreme Court. Not surprisingly, many scholars share this view. For instance, Walter Berns has concluded that Congress, not the Court, has the proper authority to determine the substantive rights protected by the Fourteenth Amendment. William Nelson has also observed that “the framing generation anticipated that Congress rather than the courts would be the principal enforcer of section one.” Cass Sunstein notes that: “The framers of the Fourteenth Amendment were entirely correct in thinking that Congress, rather than the courts, should be the principal vehicle for enforcement of the Fourteenth Amendment.” Raoul Berger has observed that the debates surrounding the framing of the Fourteenth Amendment “indicate that the framers meant Congress to play the leading role.”

Michael McConnell also maintains that “[t]he historical record shows that the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function.” James E. Bond has concluded that this was also the general understanding of the highly reluctant Ratifiers in the defeated southern states, who were generally much more concerned with the effects of Congress’s section 5 power than with judicial enforcement. Additionally, Christopher Wolfe has argued that the understanding of judicial power in place in the nineteenth century requires the Supreme Court to grant a presumption of constitutionality to both (1) state legislation potentially violative of the Amendment and (2) congressional legislation purporting to enforce the Amendment against the states. Wolfe’s view, then, also suggests that Congress has potentially much broader interpretive/enforcement power than the Court.

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231 BERGER, supra note 133, at 250.
232 McConnell, supra note 219, at 194.
234 WOLFE, supra note 106, at 141-42.
235 Id. at 141. Michael McConnell shares this view in cases where the institutional-structural aspect of constitutional interpretation leads the Court to favor a narrower reading of the Fourteenth Amendment’s substantive protections. See McConnell, supra note 219, at 156; cf. Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that Congress’s section 5 enforcement power is not limited to remedial measures designed to correct judicially-determined violations of the
5. *The Fourteenth Amendment, Section 1, and the Judicial Power*

The fact that the Framers of the Fourteenth Amendment thought that Congress would be the primary agent of its enforcement does not, of course, preclude a reading of the Amendment allowing for an important degree of judicial enforcement. In fact, it is almost certain that the Fourteenth Amendment was intended to have judicially-enforced substantive content, and was intended in part to prevent any future Congress from repealing the Civil Rights Act of 1866. This fact, however, does not change the essence of our “structural” analysis of the very limited nature of the power conferred on courts by the Fourteenth Amendment. Whatever the proper distribution of enforcement authority between the Court and Congress, it is certain that the congressional Republicans of the Reconstruction era did not intend the Fourteenth Amendment to confer sweeping discretionary powers on the Supreme Court. In fact, congressional Republicans declined to confer such powers even on themselves, the elected and electorally-accountable Congress. Indeed, the Framers of the Fourteenth Amendment quite specifically disclaimed the notion that even the Congress had the plenary power to engage in a broad moral reading of the Fourteenth Amendment; even this branch could not simply “fill in” whatever rights it happened to think were “fundamental” at any given time but were, to the contrary, required to rely on the preexisting rights established in the Bill of Rights, the common law, and traditional American political practice. Such sweeping congressional power would have dealt a fatal blow to federalism, one that even congressional Republicans in 1868 felt obliged to oppose. Indeed, as William Nelson observes: “Most Republican supporters of the amendment, like Democratic opponents,
feared centralized power and did not want to see state and local power substantially curtailed...”; therefore the Republican “[p]roponents of the Fourteenth Amendment made it clear that they did not intend such vast power for Congress.”

Republican support for the constitutional principle of federalism thus led them to support limits on the substance of the constitutional rights that even the national legislature could “enforce” under section 5. It is therefore quite unlikely, in the political context of the time, that the Reconstruction era Republicans intended to confer sweeping discretionary political power on judges, an act that would establish a radically innovative and extravagantly expansive conception of national judicial power.

Indeed, if the Republicans’ qualified concern for federalism led them generally to disclaim plenary congressional power under section 5, it is a virtual certainty that their unqualified support for the principles of popular sovereignty, separation of powers, bicameralism, presentment, and representation would also have led them to disclaim broad judicial power under the Amendment. Moreover, total absence of debate on these matters suggests that such an innovative conception of judicial power was well beyond the range of viewpoints given even minor consideration during the framing and ratification of the Fourteenth Amendment. If judges were understood to play some major interpretive/enforcement role at all with respect to the Amendment, it is also clear that that role must have been understood as a structurally “minimalist” one. It is particularly worth emphasizing that, even if one assumes (as seems likely) that the Fourteenth Amendment was intended to incorporate the majority of the provisions of the Bill of Rights, those provisions themselves had not generally been judicially enforced prior to the writing of the Fourteenth Amendment. The only exception, Dred Scott, is a case the Reconstruction era Republicans were unlikely to admire as precedent. Therefore, incorporation is not itself in any way suggestive of expansive judicial enforcement.

Thus, regardless of how one views the substantive content of the Fourteenth Amendment and its more specific structural implications, it is quite evident that most expansive conceptions of judicial power (those associated with the Lochner and Roe eras) are well outside the range of reasonable interpretations of the Fourteenth Amendment’s original structural meanings. There is no evidence that the Framers and Ratifiers of the Fourteenth Amendment intended to confer any substantial degree of

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239 NELSON supra note 229, at 114.
240 See supra Part VII.E.
241 See also WOLFE, supra note 106, at 140-43.
discretionary political authority on the federal courts. In fact, as shown, virtually all the evidence plainly points in the other direction. These Framers and Ratifiers shared a traditional mid-nineteenth century "minimalist" understanding of the judicial role, and were also deeply committed to basic constitutional principles in conflict with such expansive judicial power. In short, then, an analysis of the range of original structural understandings of the Fourteenth Amendment reasonably attributable to its Framers and Ratifiers is strongly supportive of a judicial minimalist reading of the structural dimension of the Fourteenth Amendment.

F. Conclusion

In conclusion, it is plain that the range of original understandings of the structural plan of the Constitution strongly supports both judicial restraint and republican constitutional principles in facial conflict with an activist judiciary. It may be said, then, that the original understanding of the American constitutional design lends no support to the claim that our basic law grants expansive power to the judiciary. It is simply beyond dispute that the Philadelphia Constitution was understood by its Framers and Ratifiers to create only a very "minimalist" judiciary, a judicial supplement to a constitutional plan premised on protecting rights through democratic institutions, broad dispersal and balancing of political power, and cultivation of civic virtue among voting citizens. It is also clear that the Bill of Rights was not understood to alter this structural arrangement by conferring expansive powers on the judiciary; to the contrary, the document was intended to implicitly reflect and reinforce the original design plan, including the Philadelphia Constitution's commitment to constitutional principles in deep tension with expansive judicial power.

Additionally, there is no evidence that the Fourteenth Amendment was understood to dilute, erode, or otherwise diminish the traditional constitutional commitment to principles of popular sovereignty, representative democracy, separation of powers, bicameralism, or presentment. Indeed, it should be quite plain that the Fourteenth Amendment was not understood to alter the "republican" character of the original constitutional design by conferring new and "expansive" discretionary political powers on the federal judiciary. Rather, the Fourteenth Amendment's alteration of the constitutional structure was limited to a change in the federal character of the constitutional design, a change that chiefly provided Congress with broader, though not unlimited, political authority to protect substantive individual rights.

In sum, the range of "original understanding(s)" of the American constitutional design, from its Preamble to its most recent amendments, is
simply not supportive of the sort of modern expansive judicial power underpinning decisions such as *Roe v. Wade* and advocated by constitutional theorists such as Ronald Dworkin.

VIII. CONSTITUTIONAL TRADITIONS AND THE CONSTITUTIONAL DESIGN

A. Introduction

The most obvious response to the textualist, originalist, and early practice interpretive analysis presented above is that it proves too much: it suggests that even proponents of judicial restraint may have too expansive a conception of judicial power. Indeed, the contemporary proponent of judicial restraint typically supports a fairly routine use of a moderate form of judicial review, judicial enforcement of the Fourteenth Amendment and the Bill of Rights, and judicial supremacy in the area of constitutional interpretation. Surely this fact suggests that the "populist" legal-historical interpretive approach is seriously flawed or, at least, is impractical, given entrenched modern constitutional practice.

There is, of course, much to be said for this line of argument. In fact, contemporary proponents of moderate judicial restraint likely have a substantially more expansive conception of the proper judicial role than did most Americans in the 1870s. Even so, as discussed above, these facts do not create a difficulty for the sort of "populist" structural interpretive theory outlined herein; this is the case because of the openness of the "populist" approach to evolving constitutional practice grounded in broad popular support. Indeed, the structural interpretive theory defended in this Article suggests that a natural reading of the text, the range of original understandings, and original constitutional practices provide interpreters with a crucial *benchmark* for evaluating the constitutional legitimacy of informal innovations in governmental practice—those that may present a deviation from or threat to fundamental constitutional principles. As noted in the previous discussion of structural interpretive theory, such informal constitutional change has been quite important in our organic constitutional tradition and should be accorded substantial legitimacy to the extent it reflects the long-standing, widely-held views of the American people. Clearly, if popular sovereignty is the basis and foundation of the Constitution, innovations in governmental practice deviating from the text, original understanding, and earlier practices *may* be accorded significant constitu-

242 See *supra* Parts III-IV.
tional legitimacy even if they present a serious alteration in the Constitution's basic principles, at least to the extent that the innovations have achieved the status of genuine populist reinterpretations of the Constitution and reflect clear or long-standing informed constitutional opinion.

Thus, it is necessary to examine the changing conceptions of the judicial role reflected in our constitutional practices over the last two hundred years. In particular, the proper inquiry is one that assesses (1) the precise way in which judicial power has expanded over time; (2) whether there is any suggestion of narrow, "factional" motivations underlying these expansions; and (3) whether these expansions have achieved a degree of informed, long-standing popular support. With respect to the second and third points, of particular interest is whether there has been a vigorous "counter-tradition" to these expansions, a movement undermining claims that such expansions reflect the people's sovereign reinterpretation of the Constitution as well as reinforcing the commonplace allegations that these expansions in judicial power have been driven by the partisan motivations of the various political "factions" in control of the judiciary at different times.

B. The Expansion of Judicial Power

1. The Original Minimalist Era

As discussed, it is quite evident that the exercise of judicial power has changed radically since the founding.\(^{243}\) Indeed, the evolution of judicial review has involved both an immense increase in the power of the judiciary and an almost total re-orientation of its focus from questions of constitutional structure to those of civil liberties.\(^{244}\) As noted, there was very little judicial constitutional review until the late nineteenth century, and the primary constitutional concerns of the court up to that time were issues related to federalism.\(^{245}\) That state of affairs changed radically in the last years of the nineteenth century, when the courts began to engage in much more expansive exercises of judicial power and increasingly directed their attention to governmental-business relations and traditional property rights.\(^{246}\)

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\(^{243}\) Nowlin, supra note 14, at 556-57; see supra Part VII.C.

\(^{244}\) There was, of course, also an intermediate period of concentration on property rights and government-business relations. See McCloskey, supra note 3, at 148-73.


\(^{246}\) See McCloskey, supra note 3, at 91-120.
As David O'Brien has observed, only "[s]ince the late nineteenth century [has] the Court ... assumed a major role in monitoring the governmental process."\(^{247}\) Similarly, Bruce Ackerman has noted that "[o]nly during the [post-Civil War] middle Republic did the Court begin to review the constitutionality of national legislation on a regular basis; the scope and intensity of its scrutiny of state legislation also dramatically increased."\(^{248}\)

It is plain, then, that the first century of our constitutional practice—indeed our "original," early, and long-standing constitutional practice—was a decidedly minimalist one in that it was characterized by the sparing and deferential exercise of the power of judicial review. Of course, this fact alone does not necessarily render expansive judicial power illegitimate, but it should decidedly sharpen one’s inquiry into the legitimacy of the more grandiose conceptions of the judicial role that have been asserted in the modern era.

2. The Lochner Era

As pointed out, it was only in the late nineteenth century that the courts began to assume a role we can associate with the more expansive conceptions of the judicial power familiar today.\(^{249}\) A series of gradual changes in the understanding of the American constitutional design, including both the variables of the judicial power and the constitutional design principles in potential conflict with expansive judicial power, set the stage for this controversial structural innovation. One of these developments was a partial decline in the value accorded the constitutional principle of federalism in the aftermath of the Civil War—the passage of the Fourteenth Amendment is most reflective of the turning tide.\(^{250}\) Another important development in this context was the gradual acceptance in the late nineteenth century of the doctrine of judicial supremacy, the constitutional status of the Supreme Court as the final arbiter of the meaning of the Constitution.\(^{251}\) Even so, neither of these structural developments should be viewed as a rejection of or an attempt to dilute foundational republican principles such as representation, separation of powers, or popular sover-
eighthty—as the great controversy of the *Lochner* era expansion in judicial power clearly attests. On the contrary, the evidence suggests instead that these structural innovations were rightly seen as quite consistent with traditional principles of American republican government, given the implicit assumption that judges would engage in deferential, apolitical, and legalistic interpretation of the Constitution. These innovations, then, were not intended to alter the republican character of the constitutional design, though unintentionally they did put in place much of the institutional framework necessary for the expansion of judicial power in the *Lochner* and *Roe* eras.

What has come to be known as “the *Lochner* era” dates from the sudden and dramatic expansion in the exercise of judicial review in the late 1880s to its (temporary) demise in 1937 in the face of overwhelming political opposition. The decisions of this era were notable both for their radical use of judicial power and their conservative economic tenor. As Lawrence Friedman has observed, “[h]eavy use of the fourteenth amendment occurred only at the very end of the 19th century. In the first decade of the amendment, the United States Supreme Court decided only three cases; in the next decade, forty-six.” Even so, this was only the thin end of the wedge. Between 1896 and 1905, the Supreme Court decided an astonishing 297 cases involving the Fourteenth Amendment. Friedman concludes that “clearly the Supreme Court had developed a dangerous appetite for power.” And, as stated earlier, it was at this point, only “[s]ince the late nineteenth century, [that] the Court has assumed a major role in monitoring the governmental process . . . , regularly overturn[ing] acts of Congress, of the states, and even of local and municipal governments.” Nor was the “*Lochner* era” confined solely to the federal courts. In fact, as Friedman writes, “[state supreme court] review of state statutes was a rare, extraordinary event in 1850; it was a common occurrence in 1900. What happened in the state courts paralleled what happened in the federal courts. The taste for power was intoxicating . . . .”

As Christopher Wolfe has noted, decisions such as *Lochner* “easily qualified the economic due process Court era as the most activist [up to its time]. Never had the judiciary struck down so many laws with so slender a constitutional basis for its holdings.” Many of the most controversial

252 FRIEDMAN, supra note 154, at 345.
253 Id.
254 Id.
255 O'BRIEN, supra note 58, at 63-64.
256 FRIEDMAN, supra note 154, at 355.
257 WOLFE, supra note 106, at 153.
decisions in the federal courts centered around the Fourteenth Amendment, and all were based upon a notion of implied individual rights only tenuously connected to constitutional text, original understand-
ing, or judicial precedent. Indeed, such decisions were drawn from various (often competing) strains of the American political tradition, including the common law, Lockean property rights, the Founders' views of the importance of property, the Jacksonian ideal of laissez-faire, the "free labor" ideal of the Whigs and Republicans, the Civil Rights Act of 1866, and influential new ideas such as Social Darwinism. The Court, then, began to exercise its judicial power in an unprecedented aggressive and politically-charged manner, striking down legislation at a much higher rate than it ever had in the past and grounding its decisions only loosely in conventional legal materials. Even so, it is highly significant that the Lochner era property-rights decisions did at least have some claim of resting specifically in American political traditions rather than in purely innovative political ideas.

Not surprisingly, these decisions—economically conservative and institutionally radical—were attacked by the center and left as a politically motivated usurpation of legislative power by conservative judges. In fact, the populist and progressive critics of this assertion made the judicial

258 Of course, a number of controversial Lochner-era decisions involved the Commerce Clause.
261 See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); THE FEDERALIST NO. 10 (James Madison); RAKOVE, supra note 115, at 290-97.
263 See, e.g., id. at 118-74.
264 The text of the Civil Rights Act of 1866 reads in part:
[C]itizens of the United States . . . of every race and color, without regard to any condition of slavery or involuntary servitude shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .
Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).
266 See generally ROSS, supra note 12.
"usurpation of power" phrase very common. These decisions also provoked a series of canonical dissents from the Court, opinions that endorsed a more limited role for the Court in the interest of preserving the value of constitutional principles such as representative democracy, separation of powers, and federalism.\(^{267}\) Of course, eventually, the *Lochner* era ended in defeat for proponents of expansive judicial power and laissez-faire constitutionalism—the Depression and New Deal ultimately discredited the proponents of *Lochner* era structural and substantive doctrines.\(^{268}\) Consequently, the *Lochner* era is quite dubious structural precedent for contemporary assertions of expansive judicial power offered in support of innovative conceptions of civil liberties, given (1) the controversial nature of the expansion of judicial power in the *Lochner* era, (2) the era's focus on "traditional" rights, (3) its focus on rights related to property and contract, and (4) the wholesale repudiation of the *Lochner* constitutional philosophy in 1937 by the New Deal Court and by later Courts.

3. The Roe Era

The federal courts, however, by the late 1940s began to reassert a more "radical" conception of judicial power in the service of a new mission: the protection of innovative, "progressive" understandings of the rights of the individual, often against very traditional legislation.\(^{269}\) What may be designated as "the Roe era," then, dates from the late 1940s to the present day. The decisions of this era are notable for their renewed (and increasingly) radical use of judicial power as well as their liberal social tenor.\(^{270}\) Civil liberties, as McCloskey has observed, were indeed the "interest that was to dominate the third great era of judicial history."\(^{271}\) Again, many of the most controversial decisions centered around the Fourteenth Amendment—either directly or as a vehicle for the incorporation of the Bill of Rights.\(^{272}\)

Indeed, it is important to recognize that this new focus on individual rights—unrelated to traditional property and contract rights—was in many ways a startling innovation in American constitutional practice. In parti-

\(^{267}\) See, e.g., *Lochner*, 198 U.S. at 65 (Holmes, J., dissenting); *id.* (Harlan, J., dissenting); see also *Wolfe*, supra note 106, at 160-61.

\(^{268}\) See *McCloskey*, supra note 3, at 108-20; *Schwartz*, supra note 3, at 230-45.

\(^{269}\) See, e.g., *Wolfe*, supra note 106, at 241-91.

\(^{270}\) See *infra* notes 277-79 and accompanying text.

\(^{271}\) *McCloskey*, supra note 3, at 122.

\(^{272}\) See *O'Brien*, supra note 58, at 261.
cular, the Court routinely embraced "progressive" and highly innovative conceptions of rights, often striking down laws that had been on the statute books for fifty, seventy-five, or well over a hundred years.\textsuperscript{273} Courts in the \textit{Lochner} era, by contrast, had displayed a tendency to uphold long-standing legislation and had limited themselves to striking down innovative legislation in the name of traditional economic liberties—liberties that had at least some sort of plausible connection to the common law, Lockean views on the nature and importance of property rights, laissez faire doctrines of the Jacksonians, Whig-Republican "free labor" political origins of the Fourteenth Amendment, and thus to long-standing political traditions generally.\textsuperscript{274}

The \textit{Roe} era Court, however, \textit{reversed} this trend, routinely striking down traditional legislation in the name of innovative (and highly controversial) social "liberties" and invalidating many laws that had been on the books since the turn of the century—including laws that predated the Fourteenth Amendment\textsuperscript{275} and even the Bill of Rights.\textsuperscript{276} The Court, therefore, went from serving as a \textit{brake} on social change to acting as its \textit{catalyst}.\textsuperscript{277} This implicit understanding of the courts as major agents of social change represented an even more expansive conception of the judicial role than that of the \textit{Lochner} era.

The vast number of laws struck down and the Court's highly tenuous legal basis of its rulings are quite startling indeed. The decisions of the third great era in judicial history have been notable for their \textit{especially} radical take on judicial power and their liberal tenor on social issues.\textsuperscript{278} Again, not surprisingly, these decisions have been attacked by the center


\textsuperscript{274} \textit{See supra} notes 249-68 and accompanying text.

\textsuperscript{275} \textit{See supra} notes 269-73 and accompanying text. The Texas anti-abortion statute struck down in \textit{Roe} as a violation of the Fourteenth Amendment was in fact "substantially unchanged" from its first enactment in 1857, nine years before the adoption of the Fourteenth Amendment. \textit{See Roe}, 410 U.S. at 175-77 (Rehnquist, J., dissenting).

\textsuperscript{276} Justices William Brennan and Thurgood Marshall, for instance, both maintained that the death penalty was a violation of the Eighth Amendment despite both its broad political support and its history of long-standing use since well before the ratification of even the Philadelphia Constitution. \textit{See Furman v. Georgia}, 408 U.S. 238, 251 (1972) (Brennan, J., concurring); \textit{id.} at 315 (Marshall, J., concurring).

\textsuperscript{277} \textit{See}, e.g., \textit{SCHWARTZ}, \textit{supra} note 3, at 263.

\textsuperscript{278} \textit{See SANDEL}, \textit{supra} note 40, at 53, 274-85 (discussing the liberal individualist underpinnings of post-war American constitutional law).
and the right as a politically-motivated usurpation of legislative authority by liberal judges. These decisions also provoked a series of classic canonical dissents, often echoing Harlan’s and Holmes’s classic dissents in \textit{Lochner v. New York}.\footnote{See BORK, supra note 4, at 69-100.} It is under these precedents—so very different from our first one-hundred years of constitutional practice and even significantly more “radical” than the fifty-years of the \textit{Lochner} era—that we live today. The legitimacy of this conception of judicial power, of course, remains seriously in question.

C. \textit{Factionalism in the Lochner and Roe Eras}

Is it possible that the \textit{Lochner} and \textit{Roe} era expansions in judicial power—their radical break with the most natural reading of the constitutional text, the original understanding, and most of our first century of constitutional practice—may have been narrow “factional” alterations in the American constitutional design driven by short-term political motivations? Indeed, what might have prompted the explosion in the use of judicial review by both federal and state courts in the \textit{Lochner} era? Aside from the natural human desire for self-aggrandizement, it is not too simple

\footnote{See \textit{Lochner v. New York}, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting); \textit{id.} at 75 (Harlan, J., dissenting). White, dissenting in \textit{Roe}, characterized the Court’s opinion as “an exercise of raw judicial power” unsupported by “the language or history of the Constitution.” \textit{Roe}, 410 U.S. at 221-22 (White, J., dissenting). He further noted that in a case such as abortion where “reasonable men may easily and heatedly differ,” the “issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.” \textit{id.} at 222 (White, J., dissenting). Justice Rehnquist in his \textit{Roe} dissent noted that “[w]hile the Court’s opinion quotes from the dissent of Mr. Justice Holmes in \textit{[Lochner]}, the result it reaches is more closely attuned to the majority opinion . . . in that case.” \textit{id.} at 174 (citation omitted). Rehnquist went on to observe: As in \textit{Lochner} and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.” The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. \textit{id.} at 113.}
an answer to point toward the almost inevitable clash of the Gilded-Age conservatism of *Lochner*-era judges with the economic liberalism of the new agricultural, labor, populist, and progressive movements.\(^{281}\) As Friedman writes:

> It was tempting for the courts to cross over from procedure to substance. And the demand for the product was there. When a power bloc was thwarted in one branch of government, it naturally turned to another. If the legislatures were populist or Granger, there was always one last hope for a railroad or mining company: the courts.\(^{282}\)

Of course, judges of this era—overwhelmingly white, protestant, native-born, upper-middle class, conservative, and pro-business—were often only too happy to oblige.\(^{283}\) In particular, the Republican Party engaged in a political about-face, over the course of two or three decades, moving from a narrow conception of judicial power to one broader than had ever been seriously advocated up to that time.\(^{284}\) It seems very likely, then, that if the dominant judicial class (at both the federal and state levels) had found the legislation of this era less politically objectionable, the courts simply would not have assumed such a radically innovative and intrusive role. Even if one questions these judges’ self-awareness and objectivity (rather than their good faith), it is still fair to say that the expansion of judicial power in the *Lochner* era was directly related to the class, partisan, and ideological biases of those serving on the judiciary.

What might have prompted the reemergence of expansive judicial power in the post-war years and in the 1960s? It is plain that the central decisions of the *Roe* era reflect a highly controversial, moral-political viewpoint—what is often called “liberal individualism.”\(^{285}\) There is good reason to link this viewpoint to the class, partisan, and ideological biases of judges, lawyers, academics, and the professional classes more generally.\(^{286}\) Again, it is not difficult to connect this expansion of judicial

\(^{281}\) Friedman, supra note 154, at 362.

\(^{282}\) Id. at 361.

\(^{283}\) Id. at 362.

\(^{284}\) See Wolfe, supra note 106, at 241-91

\(^{285}\) See, e.g., Sandel, supra note 40, at 4-5, 274-85.

\(^{286}\) For discussions of the question of social class and political outlook linking upper-middle class professional values to social liberalism, see, for example, Steven Brint, In an Age of Experts: The Changing Role of Professionals in Politics and Public Life 81-103 (1994); Ely, supra note 4, at 58-59; Christopher Lasch, The True and Only Heaven: Progress and Its Critics
power to the inevitable clash between the social liberalism of the courts and the social centrist and relative conservatism of the representative institutions. It seems very likely that if the judicial “class” had found the legislation of this era less objectionable from a moral-political standpoint, the courts would not have (re-)assumed (and significantly extended) such an intrusive judicial role in American government. It is fair to say, therefore, that the sweeping expansion of judicial power in the Roe era was directly tied to the class, partisan, and ideological perspectives of the members of the judiciary.

It follows logically, that the establishment of the more expansive conceptions of judicial power in the Lochner era (focusing on “traditional” property rights) and in the Roe era (focusing on “progressive” social rights) was, as the dissents of those eras so often attest, severely tainted by controversial political motivations. The holdings of these periods were, in Madison’s language, “adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendancies.” This fact should heighten one’s scrutiny of the question of the constitutional legitimacy of these broader conceptions of the judicial role.

D. The Counter-Tradition of Dissent Against Expansive Judicial Power

1. Introduction

The vast expansion in judicial power, particularly since the 1880s, should not blind us to the existence of a vigorous tradition against grandiose conceptions of judicial power. In particular, since the 1890s, when the Court abandoned the sparing use of judicial review and asserted a much more politically-charged judicial role in “monitoring the governmental process,” quite vigorous criticism of judicial “usurpation of

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287 One might note here Justice Holmes’s dissent in Lochner v. New York, 198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting), and Justice Rehnquist’s dissent in Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting). Justice Scalia has also observed that “[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.” Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

288 Letter from James Madison to M.L. Hurlbert, supra note 52, at 370 (quoted in Lofgren, supra note 49, at 141).

289 O'BRIEN, supra note 58, at 63 (footnote omitted).
power" has become a permanent fixture in public discourse. It is worth examining, then, however briefly, both the judicial and political "counter-traditions" of dissent against expansive judicial power.

2. The Judicial Tradition

As discussed, the judicial tradition of dissent against more expansive conceptions of the judicial role is perhaps best viewed as a form of "structural restraint" rooted in a "sense of the Court’s appropriate place in [the] constitutional design." Indeed, the desire to reconcile the judicial role with other constitutional principles is a recurring theme in the American judicial tradition. Not surprisingly, then, a great number of preeminent judges of the twentieth century endorsed judicial minimalism (in one form or another and to varying degrees), including Oliver Wendell Holmes, Louis Brandeis, Learned Hand, Benjamin Cardozo, Felix Frankfurter, Hugo Black, John Marshall Harlan III, and Byron White. On the present Court, Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas also fall into this camp.

For instance, Oliver Wendell Holmes’s celebrated Lochner dissent remains a "canonical" statement of judicial restraint grounded in respect for the democratic process ingrained in the constitutional design. As Edward White has written, Holmes believed that "[e]ven on occasions when precedents gave no guidelines, a series of institutional constraints derived from [the] notion of majoritarian sovereignty limit[s] judicial freedom." Learned Hand, perhaps the greatest American judge never to sit on the Supreme Court, was also a "minimalist" and indeed a strong proponent of what has been called a "radical doctrine of judicial restraint," a doctrinal stance that amounted to almost "total abstinence" in the area of civil liberties. Hand articulated strong civic republican objections to rule by judicial "Platonic Guardians" in his brilliant essay The Bill of Rights, and viewed progressive attacks on judicial independence as troubling but also

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290 GLENDON, supra note 23, at 18.
291 Id. at 123.
292 For a broad discussion of the classical conception of judging associated with Holmes, Cardozo, Hand, and Frankfurter, see id. at 117-29.
293 See id. at 122-23.
294 WHITE, supra note 23, at 159.
predictable responses to activist political judging.\textsuperscript{297} Felix Frankfurter was a great admirer of Hand's jurisprudence and also clearly saw himself "as the heir of Holmes, Brandeis, Cardozo, and Stone, the architects of a passive model of appellate judging."\textsuperscript{298} In Frankfurter's view, if the Supreme Court were to serve as "a revisory legislative body,"\textsuperscript{299} it would sap the independence of legislatures and "mutilat[e] the educative process of responsibility," thereby undermining the American system of government.\textsuperscript{300} John Marshall Harlan III, the "great dissenter of the Warren Court,"\textsuperscript{301} also embraced a moderate form of judicial restraint, incorporating the "standard caveats about the unrestrained exercise of judicial power that [has] characterized one strand of twentieth-century jurisprudence since Holmes."\textsuperscript{302} Byron White's jurisprudence also reflected a serious concern with judicial restraint and a clear "structural" sense that the President and Congress—not the Supreme Court—are to be the primary agents of social change in the American system.\textsuperscript{303} Furthermore, the "originalist" interpretive theory associated with William Rehnquist, Antonin Scalia, Clarence Thomas, and Robert Bork is best understood as a means toward the end of structural restraint.\textsuperscript{304} As Bork has written:

No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers

\textsuperscript{297} See \textsc{Learned Hand}, \textit{The Contribution of an Independent Judiciary to Civilization}, in \textit{The Spirit of Liberty: Papers and Addresses of Learned Hand} 163 (1953). Hand, for instance, observes that "[i]f an independent judiciary seeks to fill [the abstract language of the Bill of Rights and Fourteenth Amendment] from its own bosom, in the end it will cease to be independent," that the price of judicial independence is in fact that judges "should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides.'" \textit{Id.} at 163-64.

\textsuperscript{298} \textsc{White}, \textit{supra} note 23, at 331.

\textsuperscript{299} \textit{Id.} at 327 (quoting \textit{Letter from Felix Frankfurter to Learned Hand (June 5, 1923)}).

\textsuperscript{300} Felix Frankfurter, \textit{The Supreme Court as Legislator}, 46 \textsc{New Republic} 158 (1926) (quoted in \textsc{White}, \textit{supra} note 23, at 327).

\textsuperscript{301} See \textsc{Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court} (1992).

\textsuperscript{302} \textsc{White}, \textit{supra} note 23, at 342; see also \textsc{Charles Fried, Order and Law: Arguing the Reagan Revolution} 55-88 (1991).

\textsuperscript{303} See \textsc{Dennis J. Hutchinson, The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White} (1998).

\textsuperscript{304} See \textsc{Dworkin, supra} note 25, at 13, 271-75, 319, 335-54.
whose exercise alters, perhaps radically, the design of the American Republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.\textsuperscript{305}

One may note, as well, that as recently as 1992 four justices of the Supreme Court were quite prepared to overrule \textit{Roe v. Wade} on “structural restraint” grounds relating to the proper limits of the judicial power.\textsuperscript{306} Finally, even if the originalists of the Rehnquist Court have not always evinced the degree of judicial restraint that the rhetoric of originalism may be thought to suggest (or that many of their supporters may have hoped for),\textsuperscript{307} it is still the case that there is currently not a single justice on the Court who advocates a conception of the judicial role as broadly expansive as that of Earl Warren, William Brennan, or Thurgood Marshall. All of these facts, indeed, suggest a long-standing, strong, and vibrant force in the American judicial tradition of opposition to the most expansive forms of judicial power.

3. \textit{The Political Tradition}

Even in the more “minimalist” pre-\textit{Lochner} days, a large number of America’s greatest political leaders were critics of what they saw as an overreaching judiciary, including, of course, Presidents Jefferson, Madison, and Jackson. Abraham Lincoln and the Republicans of the mid-nineteenth century were also outraged by the “maximalist,” pre-\textit{Lochner} Dred Scott decision, and consequently viewed the federal courts with suspicion and ambivalence for decades. With the advent of the \textit{Lochner} era, the newly imperialist Supreme Court soon found itself under fire from a number of prominent progressive, populist, and unionist political leaders, including William Jennings Bryan, Robert LaFollette, William Borah, Theodore Roosevelt, and, finally, Franklin D. Roosevelt. Many of these “left-wing”

\textsuperscript{305} BORK, \textit{supra} note 4, at 154-55. Whether originalism can always be applied in a manner consistent with a “restrained” understanding of the judicial role is, of course, a separate question, as is whether the preservation of the basic contours of the constitutional design requires an embrace of Borkian originalism rather than some more flexible and traditional form of judicial restraint. See, \textit{e.g.}, FRIED, \textit{supra} note 302, at 55-70; GLENDON, \textit{supra} note 23, at 117-29.


\textsuperscript{307} See, \textit{e.g.}, Rosen, \textit{supra} note 6.
critics of the Court called for fundamental structural change, even supporting popular referendums on judicial decisions and the judicial recall movement, though often only at the state level. Indeed, Bryan privately favored election of federal judges and publicly favored recall measures; LaFollette advocated allowing Congress to overrule the Supreme Court simply by reenacting any federal statute declared unconstitutional; Borah supported requiring a two-thirds majority of the Court to strike down federal laws; Theodore Roosevelt defended the state recall by popular referendum of individual decisions of state supreme courts; and, of course, Franklin D. Roosevelt made a valiant attempt to "pack" the Supreme Court by requesting Congress to increase its size to fifteen justices.308

The reemergence of expansive judicial power in the post-war Roe era (in even more radical form) prompted another wave of criticism—this time, predictably, from the political right.309 Indeed, the Warren Court's judicial activism helped to divide the New Deal coalition in the 1960s, driving many populists, communitarians, and social conservatives into the Republican Party.310 It also inspired Richard Nixon to advocate what he called "strict construction" of the Constitution311 and Ronald Reagan to endorse "originalist" interpretative methods,312 both intended as means to curb judicial discretion and limit judicial policy-making. Finally, the Republican Party of the 1990s, following the lead of Nixon and Reagan, remained steadfastly opposed to the most expansive conceptions of judicial power and committed to the nomination of proponents of judicial restraint to the federal judiciary.313 Numerous neo-conservative communitarians and

308 For a detailed treatment of the populist-progressive tradition of opposition to expansive judicial power, see ROSS, supra note 12.
309 See supra notes 269-88 and accompanying text.
310 For discussion of the movement of many working class voters away from the Democratic party in the 1960s and 70s, see E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS (1991). See also LASCH, supra note 286.
311 For a discussion and critique of Nixon's position, see DWORKIN, supra note 35, at 131-49.
313 The 1996 Republican Party Platform reads in part: "[T]he federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be 'unconstitutional' through the misapplication of the principle of judicial review." REPUBLICAN NAT'L COMM., THE REPUBLICAN PARTY PLATFORM, 1996 WL 489199, *52. The 2000
left-wing populist intellectuals also oppose the judicial usurpation of politics. All of these observations suggest a continuing, long-standing, and vibrant strain in the American political tradition of principled opposition to more expansive forms of judicial power. Of course, these strong counter-traditions undercut substantially any claim that sweeping judicial power has now achieved consensus-based popular support.

E. Conclusion

As discussed, our “original,” early, long-standing constitutional practices were plainly “minimalist” in nature. Indeed, the first century of constitutional practice reflected a very modest, though gradually expanding, conception of the proper role for courts, and one centered primarily around questions of the structure of government such as federal-state relations. This understanding of the judicial role was, in Madison’s words, our “early, deliberate & continued practice under the Constitution” for almost a century. The *Lochner* era involved a sharp break with this long-standing constitutional practice, dramatically expanding judicial power to encompass a major policy-making role for courts in the American constitutional system and reorienting the Court’s docket toward questions of property rights and government-business relations. Despite the ultimate forceful repudiation of the conception of judicial power associated

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Republican Party Platform reads:

The sound principle of judicial review has turned into an intolerable presumption of judicial supremacy. A Republican Congress, working with a Republican president, will restore the separation of powers and reestablish a government of law. There are different ways to achieve that goal—setting terms for federal judges, for example, or using Article III of the Constitution to limit their appellate jurisdiction—but the most important factor is the appointing power of the presidency. We applaud Governor Bush’s pledge to name only judges who have demonstrated that they share his conservative beliefs and respect the Constitution.


315 See supra Part VII.A-B.

316 Lofgren, *supra* note 49, at 141 (quoting Letter from James Madison to M.L. Hurlbert (May 1830)).

317 See supra Part VIII.B.1-2.
with the *Lochner* era, the modern *Roe* era has involved an even more
dramatic expansion in judicial power and consequently has produced
another fundamental reorientation, this time toward controversial questions
of civil liberties.\textsuperscript{318} Moreover, both eras are strongly tainted by the
suspicion of narrow factional motivations linked to elite judicial disapproval of legislative politics, and both have faced vigorous opposition to expansive judicial power—on and off the bench—by those rightly challenging these expansions as illegitimate judicial usurpations of legislative authority.\textsuperscript{319}

Clearly, this radical and somewhat haphazard expansion in judicial
power constitutes a veritable revolution in the American governmental
practice, altering fundamentally the role of courts, the nature of our design
for government, the Constitution’s basic plan for the structural protections
of rights, and the popular, republican, and federal character of the
American constitutional design. Moreover, while there is good reason to
suppose that routine use of judicial review and judicial enforcement of the
Bill of Rights and Fourteenth Amendment have today achieved some sort
of “populist” support, it is also obvious that the most expansive concep-
tions of the judicial role, including the use of aggressive, politically-driven,
highly discretionary judicial “veto” power, remain very controver-
sial—rendering the charge of illegitimate judicial “usurpation of power” a
regular term of political discourse.

In particular, then, there is good reason to suppose that the most
controversial aspects of this expansion have seriously undermined the
Constitution’s original strategy of protecting rights by establishing
democratic institutions, diffusing political power, and encouraging civic
virtue among citizens. As discussed, the exercise of such a sweeping
judicial power tends to erode fundamental constitutional norms and, for
these reasons, the exercise of such a power by the courts continues to be
contested as an illegitimate encroachment upon the constitutional authority
of legislatures. In sum, the constitutional legitimacy of expansive judicial
power remains seriously in question.

IX. THE ILLEGITIMACY OF EXPANSIVE JUDICIAL POWER

A. Text, Original Understanding, and Original Constitutional Practice

What can be said, then, about the constitutional legitimacy of this
expansion of judicial power, this fundamental transformation in our consti-

\textsuperscript{318} See supra Part VIII.B.3.
\textsuperscript{319} See supra Part VIII.C-D.
tutional practices and constitutional design? A "populist" structural interpretive analysis suggests that the answer can be found primarily in the basic sources of law examined above: in the constitutional text, original understanding, original constitutional practices, and innovative practices demonstrating clear and long-standing populist support. At a minimum, it should be clear that even without embracing some form of this Madisonian "populist" structural interpretive theory, basic legal materials are highly relevant to the legitimacy of the sort of informal constitutional change represented by the expansion of judicial power. To what degree, then, do basic sources of law such as constitutional text, original meaning, and constitutional tradition support expansive judicial power?

A summation of the findings above is in order. First, the most "natural" reading of the constitutional text certainly does not support expansive judicial power. Indeed, the text of the Constitution does not even explicitly provide for judicial review, much less establish the "maximalist" principle that the judiciary is the final arbiter of the meaning of the Constitution and that its decisions are binding on the other branches of government. Further, the constitutional text displays ample support for fundamental constitutional principles—representative democracy, federalism, separation of powers, and the like—that are incompatible with a highly expansive conception of judicial power. Finally, the text is highly suggestive of a wide array of congressional checks on the judiciary, such as those that limit its power to make social policy. The text therefore offers no obvious support for the claim that aggressive, quasi-legislative judicial interpretations of rights provisions are constitutionally legitimate. The constitutional text, as a whole, is much more suggestive of judicial minimalism than it is of maximalism.

Secondly, the range of "original understandings" of the Philadelphia Constitution, the Bill of Rights, and the Fourteenth Amendment do not support the expansive Lochner or Roe era conceptions of the judicial role. There is no significant evidence that the Framers or Ratifiers at the first or second American Founding were proponents of expansive judicial power or that they intended to entrench such power in the framework of the American constitutional design. Further, the evidence suggests quite the opposite, that in both the Founding and Reconstruction eras there was general embrace of a minimalist conception of the judicial role and a general concern about the compatibility of judicial review with traditional principles of republican government. In short, there is considerable evidence suggesting both explicit and implicit opposition to more expansive conceptions of judicial power, evidence consistent with notions
of basic constitutional principles. Indeed, the rise of expansive judicial power post-dates the ratification of the Philadelphia Constitution and the Bill of Rights by almost a century, and post-dates that of the Fourteenth Amendment by at least two decades. The original understanding of the judicial role, then, is much more supportive of judicial minimalism than maximalism.

Thirdly, the "original" or early practices surrounding these texts do not support more expansive conceptions of judicial power. The first century of our constitutional practice clearly reflects highly "minimalist" understandings of the judicial role. Indeed, there was, in fact, very little judicial review until the late 1800s, and almost no judicial review of rights questions, aside from those involving property and contract, until the middle 1900s. In fact, early American constitutional practices reflected an "original" constitutional tradition of virtual judicial non-enforcement of the Bill of Rights and a concomitant assignment of dispute-resolution power over individual "rights" to elected legislatures. Again, the evidence also strongly suggests that there was a tradition of firm positive commitment to multiple constitutional principles in conflict with expansive judicial power. This suggests that the traditional judicial minimalism of the early Republic was no mere happenstance, but was instead a logical outgrowth of a particular understanding of the American constitutional design. These facts, then, leave the highly expansive judicial power of the Roe era—an expansion of judicial power in the area of civil liberties that is scarcely over fifty years old—to stand alone and in obvious conflict with the traditional understanding of the core principles of republican constitutional government. The constitutional text, original understanding, and original constitutional practices from the Founding until the late 1880s, then, are all strongly supportive of judicial minimalism.

B. Innovative Constitutional Practice and Popular Reinterpretation

As argued above, however, even a substantial deviation from text, original understanding, and original constitutional practice might be accorded some significant measure of constitutional legitimacy if it became sufficiently accepted by the American people for a significant period of

320 See supra Part VII.
321 See supra Part VII.
322 See CLINTON, supra note 122, at 116-27.
323 See, e.g., BERGER, supra note 133, at 155-97.
324 See supra Parts IV, VII.
time to warrant recognition as an informal amendment or popular reinterpretation of the Constitution. What degree of popular support, then, have these more expansive conceptions of the judicial role achieved as part of what we might call an evolving "populist" constitutional consensus?

As noted above, both the Lochner and Roe eras were highly controversial and the expansive use of judicial power was strongly contested by major popular political movements. Of course, it should also be obvious that more expansive understandings of the judicial role enjoy widespread support today—whatever their actual structural grounding in text, original understanding, and original practices. These include a more routine use of judicial review, judicial supremacy, and judicial enforcement of the Bill of Rights and the Fourteenth Amendment. These developments are also quite consistent with moderate judicial minimalism as defined herein. What is more important for purposes of this Article, however, is the equally obvious fact that the most grandiose conceptions of the judicial role—those associated with justices such as William Brennan, decisions such as Roe v. Wade, and theorists such as Ronald Dworkin—remain highly controversial to this day. The reasons for this are not hard to fathom: expansive judicial power is in facial conflict with foundational constitutional principles and inconsistent with the basic logic of judicial review.

Moreover, another structural innovation—the rise of a truly robust conception of representative democracy expressed in several formal constitutional amendments and in American political practices more generally—has also dramatically increased the structural tension between expansive judicial power and the democratic ethos expressed in the evolving American constitutional design and political tradition. Finally, popular acceptance of structural innovations relating to routine judicial enforcement of rights provisions and judicial supremacy lend additional support to the force of arguments against an aggressive, politically-charged judicial role; these structural innovations in fact greatly increase the nature of the threat posed by the exercise of judicial political discretion to fundamental constitutional principles.

Indeed, even a proponent of highly expansive judicial power such as Ronald Dworkin recognizes the profound differences between the rhetoric and reality of our contemporary constitutional practices, a division rooted in the fact that expansive judicial power is simply not accepted by the

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325 See supra Part VIII.B.2-3.
326 See supra Parts II, VIII.D.2.
327 See supra Parts III, VII.B.
American public when its nature is stated candidly. Indeed, the traditional view of an “apolitical” Supreme Court remains the dominant paradigm for public discussion of surrounding issues—such as the confirmation of Court nominees. Significantly, there is not a single justice on the Court today whose vision of judicial power is as sweeping as that of Earl Warren, William Brennan, or Thurgood Marshall. Finally, at least one (if not both) of our major political parties clearly rejects a highly expansive understanding of the judicial role. In short, it is apparent that Lochner and Roe era expansive judicial power has always been and remains today a highly controversial matter politically.

Thus, only a limited part of this expansion in judicial power has achieved anything like widespread, long-standing, “populist” support. At most, the American people appear to support: (1) a moderate form and use of judicial review, (2) judicial enforcement of the Bill of Rights as incorporated by the Fourteenth Amendment, and (3) recognition of the principle of judicial supremacy in constitutional interpretation. These are important and beneficial constitutional developments and are quite consistent with a republican understanding of the American constitutional design, as well as with moderate forms of judicial minimalism as discussed in this Article. It should also be clear, however, that “populist” acceptance of structural innovations does not extend to expansive judicial power, as defined here, which includes a major judicial role in policy-making in areas of substantial political controversy. In short, then, the most grandiose conceptions of the judicial role—those that envision decisions that are highly political in nature, non-deferential in application, and only loosely grounded in legal authority—not only deviate from the judicial role established by text, original meaning, and original practice but also have no firm grounding in long-standing, consensus-based, “populist,” evolving constitutional practice.

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328 DWORKIN, supra note 25, at 3-7. Dworkin notes that there is a “striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation,” that it “is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities.” Id. at 3.

329 See id. at 5-6. Dworkin notes that at confirmation hearings “[n]ominees and legislators” all at least maintain the pretense “that hard constitutional cases can be decided in a morally neutral way, by just keeping faith with the ‘text’ of the document.” Id. at 6.

330 In the opinion of the author, Justices Stevens represents the most restrained of the old guard judicial activists.

331 See supra note 313, Republican Party Platform.
C. The Constitutional Illegitimacy of Expansive Judicial Power

What, then, of the ultimate constitutional legitimacy of expansive judicial power? The essential issue of structural interpretation confronted in this context is whether, broadly speaking, moderate judicial minimalism or expansionist judicial maximalism better reflects the more authoritative reading of the Constitution’s design for government and the constitutional limits of its implicit grant of the power of judicial review to the federal judiciary. As shown, the judicial role evinced in the constitutional text, the original understanding, and early constitutional practices is clearly a highly minimalist one, and these sources of law also point to a strong constitutional commitment to basic principles of republican government in obvious conflict with expansive judicial power.

Therefore, the expansion of the judicial role over the last century has plainly been an informal and irregular alteration in the structure of the Constitution. As discussed above, if a serious degree of force is given to the foundational norm of popular sovereignty in structural constitutional interpretation, then a legitimate informal alteration in the judicial role must be a “populist” one and must stand as the people’s reinterpretation of or informal amendment to the formal Constitution. Such informal constitutional change should be accorded some measure of legitimacy only if it approximates the supermajority requirements of Article V, thereby reflecting an evolving, informed, long-standing, popular consensus—one that would support a formal constitutional amendment if it were actually thought necessary.

Certainly, all of the factors discussed above suggest that expansive judicial power has not and does not today reflect such a consensus, and therefore cannot be considered a popular reinterpretation of or informal amendment to the Constitution. Indeed, as discussed, the dramatic alterations in the constitutional design in the Lochner and Roe eras were initiated by unelected judges, self-serving in that they expanded the power of the judiciary, and tainted by indications of dubious factional motivations. These expansions of judicial power were also highly contested, drawing routine censure from contemporaries as anti-democratic, partisan usurpations of legislative power. These expansive uses of judicial review were also typically opaque in nature to the average American and often concealed by the rhetoric of more traditional forms of legal interpretation. Moreover, while, as noted, there is much greater political support today than in times past for a more active federal judiciary, it is also plain that the most sweeping, grandiose, imperial conceptions of the judicial role—those associated with the Lochner decision, Roe v. Wade, and the Warren
Court—remain highly controversial. Not surprisingly, then, a vigorous judicial and political counter-tradition of opposition to more expansive forms of judicial power has existed since the rise of the *Lochner* era and continues unabated today. It is therefore simply indisputable that the broad *Lochner* and *Roe* era conceptions of the judicial role are not predicated upon any form of constitutional amendment and are far from attaining that minimal degree of informal constitutional legitimacy justifying inference of informal amendment to or reinterpretation of the Constitution. On the contrary, *Lochner* and *Roe* era judicial power reflects highly contested, narrow, factional attempts to alter the original constitutional design as established by its text, original meaning, original practice, and our later evolving consensus-based constitutional practices.

Further, as noted, while an extensive moral-political structural analysis would be required to make more than a tentative judgment, there are quite obvious moral-political reasons for thinking that a moderate form of minimalism far better fits with the traditional overarching structural design of the Constitution than does maximalism. In fact, the moderate minimalist understanding of the judicial role complements rather than erodes the Constitution’s strategy of protecting rights by establishing representative institutions, diffusing and balancing political power, and promoting popular respect for constitutional principles. These observations together suggest that any interpretation of the structure of the Constitution grounded in traditional legal materials and sensitive to the integrity of the constitutional design will endorse moderate judicial minimalism.

Clearly, then, given both the importance of traditional legal materials such as text, original meaning, and original practice, and of very broad popular democratic support for substantial informal alterations in the constitutional design, sweeping *Lochner* and *Roe* era judicial power stands on the shakiest of grounds. In particular, highly plausible charges of partisan “taint” to the expansion of judicial power in these eras should lead one to raise the threshold for determining whether and to what degree these expansions have been legitimized by some form of popular “ratification” via long-standing tradition of acquiescence. As James Madison argued two centuries ago, we have strong reasons to prefer structural interpretations firmly rooted in text, original understanding, and original practice—as opposed to those rooted in later practices “adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.”

332 Lofgren, *supra* note 49, at 141 (quoting Letter from James Madison to M.L. Hurlbert (May 1830)).
authoritative reading of the American constitutional design. One is therefore justified, on balance, in asserting the constitutional illegitimacy of the most expansive forms of judicial power—those typically associated with cases such as Roe, theorists such as Ronald Dworkin, and justices such as William Brennan.

X. CONCLUSION

The question of the limits of the proper judicial role should be seen as fundamentally a question of structural constitutional interpretation rather than one of abstract moral philosophy or political prudence. Under the American system of constitutionally limited government, the judicial arm of the government cannot legitimately claim power that has not been granted to it by the Constitution—even in the unlikely event that a careful moral analysis of the judicial power were to suggest that the constitutional design might otherwise be more attractive. Therefore, the “first-order” structural interpretive question of the proper role for the Supreme Court in the American constitutional design and the constitutional limits of judicial review must be analyzed before answering “second-order” questions such as how the Court should interpret and enforce the Bill of Rights and the Fourteenth Amendment. Obviously, any authoritative interpretation of the structure of the Constitution will have an important legal-historical aspect—one requiring examination of legal materials such as text, original understanding, original practice, and later long-standing, widely-supported, constitutional traditions. Indeed, there are good reasons to follow a “populist” approach in endorsing an interpretive presumption in favor of those sources of law evincing a strong “popular-sovereignty” pedigree. Moreover, even if design “populism” were rejected as the sole legitimate interpretive approach, the obvious need for legal authority and constitutional stability would continue to make a legal-historical analysis concentrating on text, original meaning, original practice, and evolving consensus-based constitutional practices highly relevant to the determination of structural constitutional meaning.

As indicated, constitutional text, original understanding, and original practice strongly suggest that the constitutional design is best read as reflecting foundational structural principles of popular sovereignty, representative democracy, separation of powers, bicameralism, presentation, and federalism. Within this design, the Supreme Court was understood to play only a modest role, using judicial review sparingly and apolitically and showing great deference to the elected representatives of the people, a role the Court generally played for a full century after the
Founding. The Bill of Rights was also understood to play only a modest educational and political role, remaining largely "undiscovered" and unenforced by the courts until well into the middle of the twentieth century. The Fourteenth Amendment was also understood to confer only very limited additional authority on the Court, and was primarily intended to alter the role of Congress and the federal nature of the Constitution while leaving the system's overarching republican structures wholly intact. Clearly a highly minimalistic understanding of the proper judicial role, one grounded structurally in constitutional text, original understanding, and original constitutional practice, remained in place until the 1880s and the rise of the *Lochner* era. With few exceptions, more moderate forms of judicial minimalism remained the norm in the area of civil liberties until well after the second World War.

Further, both the *Lochner* and *Roe* era conceptions of the judicial role represent dramatic alterations in the original constitutional design. Both conceptions were driven by "spur[s] of occasions" and "vicissitudes of party" and were also contested by contemporaries as judicial "usurpations" of power. Moreover, while it is important to recognize contemporary support for a more active and vigorous judiciary—support that rests on public endorsement of a set of valuable constitutional developments now deeply rooted in long-standing "populist" constitutional practice—highly expansive conceptions of the judicial role remain extremely controversial. Thus, the forms of expansive judicial power underpinning *Lochner* and *Roe* cannot plausibly claim legitimacy as valid popular reinterpretations of or informal amendments to the Constitution. To the contrary, such sweeping conceptions of the judicial power are both highly contested and facially incompatible with the populist/federal/republican structural logic of the Constitution. These conceptions of the judicial role represent a sharp break from authoritative legal materials and are the kind of narrow, politically-driven, factional alterations in the structure of the Constitution that should be discouraged in the interests of popular sovereignty, constitutional stability, and the rule of law. Certainly, vicissitudes of parties and political control cannot justify such permanent, drastic, and partisan alterations in the constitutional design.

In the final analysis, then, a populist structural interpretive analysis of the question of the proper role for courts in the American constitutional design strongly suggests an embrace of a modest judicial role—one more consistent with text, original understanding, and the first 100 years of original constitutional practice. Such an "embrace" would move the judiciary into a position of greater harmony with the overarching constitutional structure of protecting rights through democratic institutions,
diffusion of political power, and cultivation of civic virtue. Adherence to moderate judicial minimalism would also bring the judiciary into greater conformity with the moderate “minimalist” mainstream of our evolving popular constitutional traditions, more in line with a broad contemporary understanding of judicial power that enjoys long-standing, consensus-based, “populist” support.

On this minimalist view, a proper exercise of judicial review—an exercise within the scope of the limited power the Constitution grants to the judiciary—demands that judges firmly ground their decisions in traditional legal materials, minimize their political discretion, show considerable deference to the judgment of democratic political actors, and enforce only a set of reasonably “thin” and consensus-based constitutional norms. Judicial decisions exceeding this scope of power—decisions that are only very loosely grounded in traditional legal materials, that involve substantial judicial political discretion, that are driven by the personal political preferences of judges, that show only very little deference to democratic political actors, and that result in a set of quite “thick” and controversial judicially-enforceable norms—are constitutionally illegitimate. In short, the republican design of the Constitution, properly interpreted in populist structural fashion, requires some form of judicial minimalism and prohibits judicial maximalism. A careful populist structural interpretive analysis of the Constitution thus firmly establishes the constitutional illegitimacy of expansive judicial power.