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Law students learn the concept of judicial review by discussing Chief Justice John Marshall's opinion for the Supreme Court of the United States in *Marbury v. Madison*,[1] the case that established the legitimacy and necessity of judicial review in the American legal system. *Marbury* is a foundational decision in American constitutional law, and it rightly has earned pride of place in any discussion of the subject of judicial review or, as it sometimes is called, the counter-majoritarian difficulty in constitutional law.[2] Chief Justice Marshall's

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1. Marbury v. Madison, 5 U.S. 137 (1803).

2. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1962). For nearly 50 years, members of the academy, the profession, and the bench have debated, re-debated, and re-re-debated the proper approach to conducting judicial review. Viewed from thirty thousand feet, the debate can be characterized as a contest between "interpretivism" and "noninterpretivism," *see, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), or between "originalism" and "nonoriginalism," *see, e.g.*, Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2011). The literature on the subject is voluminous. For a small sample, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); JACK M. BALKIN, LIVING ORIGINALISM (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (Rev. ed. 2014); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (Vintage Books ed. 2006); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV.

opinion in *Marbury* not only provides the classic exposition of the theory that a written constitution trumps all other forms of law, written and unwritten, but also stands as a brilliant legal and political tour de force in how the judiciary could adopt that power without exposing itself to retaliation from the political branches. Writing in the nation's "salad days," Marshall firmly transplanted from Magna Carta to this country the "rule of law"—the principle that government officials, like private parties, are subject to legal rules[3]—and established the Supreme Court as the symbolic and ultimate arbiter of that principle.[4] The Chief Justice achieved that result in *Marbury* because he was able simultaneously to claim the right and duty to tell Congress and the President that each one had acted unlawfully, while also keeping them, to use the vernacular, from shoving that opinion down his throat.[5]

The brilliance of Chief Justice Marshall's ploy in that case has an ancient precedent in western civilization: the Apostle Paul's *Letter to Philemon*.[6] Forced to walk a fine line between abetting the escape of a

885 (1985). For an argument that says both sides are wrong, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014).

3. *See, e.g.*, Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law, and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y (forthcoming 2014) (manuscript 45-49) (discussing the origin of that tenet in Magna Carta).

4. *See* Edward S. Corbin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1292 (1937); *see also* OLIVER WENDELL HOLMES, *John Marshall*, *in* COLLECTED LEGAL PAPERS 266, 270 (1920) ("We live by symbols . . . .").

5. "[*Marbury*] is an essential part of the adolescence of American democratic republicanism, for in it the Court upheld the rule of law without calling into question the electoral revolution that turned the Federalists out of office and brought in the Jeffersonian Republicans. Marshall and his court also protected the independence of the judiciary and the High Court at a time when these institutions were under attack. Thus the legacy of the case is not only its doctrinal contribution of judicial review to American constitutionalism but its proof that the Court could remain, if not above all political considerations, at least safe from over partisanship."

Peter Charles Hoffer & N. E. H. Hull, *Editors' Preface* of WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW ix (2000).

6. Paul's very short Letter to Philemon reads as follows:

[1] Paul, a prisoner of Christ Jesus, and Timothy our brother, To Philemon our dear friend and co-worker, [2] to Apphia our sister, to Archippus our fellow soldier, and to the church in your house: [3] Grace to you and peace from God our Father and the Lord Jesus Christ. [4] When I remember you in my prayers, I always thank my God [5] because I hear of your love for all the saints and your faith toward the Lord Jesus. [6] I pray that the sharing of your faith may become effective when you perceive all the good that we may do for Christ. [7] I have indeed received much joy and encourage-

runaway slave and encouraging a slave owner to release him from bondage, Paul used his rhetorical skills to intellectually coerce or rhetorically persuade Philemon to free his slave Onesimus. Written as both a personal letter and a public essay, Paul's one-page letter is a masterful example of the use of moral suasion and a "white lie" in the face of legal and political powerlessness.

At the same time, the approach taken in *Philemon* and *Marbury* cannot be generalized very far beyond the unique subjects that each paper addressed. We often see government officials invoke authority that they do not have, or that they invoke for the purpose (they say) of making the world a better place without cost to anyone. If we favor the goal they seek, the public often forgives politicians for making assertions that are untrue. That acquiescence is risky, however, because not all causes are equally important, not all lies are innocuous, not all stratagems are defensible, and not all officials are elected for defined terms of office. *Philemon* and *Marbury* are exceptional cases, not the rule, and generalizing from them can be quite risky.[7]

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ment from your love, because the hearts of the saints have been refreshed through you, my brother. [8] For this reason, though I am bold enough in Christ to command you to do your duty, [9] yet I would rather appeal to you on the basis of love—and I, Paul, do this as an old man, and now also as a prisoner of Christ Jesus. [10] I am appealing to you for my child, Onesimus, whose father I have become during my imprisonment. [11] Formerly he was useless to you, but now he is indeed useful both to you and to me. [12] I am sending him, that is, my own heart, back to you. [13] I wanted to keep him with me, so that he might be of service to me in your place during my imprisonment for the gospel; [14] but I preferred to do nothing without your consent, in order that your good deed might be voluntary and not something forced. [15] Perhaps this is the reason he was separated from you for a while, so that you might have him back forever, [16] no longer as a slave but more than a slave, a beloved brother—especially to me but how much more to you, both in the flesh and in the Lord. [17] So if you consider me your partner, welcome him as you would welcome me. [18] If he has wronged you in any way, or owes you anything, charge that to my account. [19] I, Paul, am writing this with my own hand: I will repay it. I say nothing about your owing me even your own self. [20] Yes, brother, let me have this benefit from you in the Lord! Refresh my heart in Christ. [21] Confident of your obedience, I am writing to you, knowing that you will do even more than I say. [22] One thing more—prepare a guest room for me, for I am hoping through your prayers to be restored to you. [23] Epaphras, my fellow prisoner in Christ Jesus, sends greetings to you, [24] and so do Mark, Aristarchus, Demas, and Luke, my fellow workers. [25] The grace of the Lord Jesus Christ be with your spirit.

Phlm 1:1–25 (NRSV).

7. For discussions of *Philemon*, see WILLIAM BARCLAY, THE LETTERS TO TIMOTHY, TITUS, AND PHILEMON 309–24 (2d 1960); *see also* RAYMOND E. BROWN, AN INTRODUCTION TO THE NEW TESTAMENT 502–10 (1997); JAMES D. G. DUNN, THE THEOLOGY OF PAUL THE APOSTLE (1998); JOSEPH A. FITZMYER, S.J., THE LETTER TO PHILEMON: A NEW

I.

Philemon is unique among Paul's letters for two reasons: Paul wrote it for a specific reader, not a church, and he sought to mediate a dispute between two particular individuals—the runaway slave Onesimus, who had escaped and made his way to Paul in approximately 61 C.E., and Philemon, Onesimus's owner.[8] Paul likely was under house arrest in Rome, awaiting trial on charges stemming from an incident in Syria where he brought Gentiles with him into the

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TRANSLATION WITH INTRODUCTION AND COMMENTARY (2000); SARAH RUDEN, PAUL AMONG THE PEOPLE: THE APOSTLE REINTERPRETED AND REIMAGINED IN HIS OWN TIME 147–69 (2010); THEOLOGICAL BIBLE COMMENTARY 445–46 (Gail R. O'Day & David L. Petersen eds., 2009); 11 Cain Hope Felder, *The Letter to Philemon*, in THE NEW INTERPRETER'S BIBLE 897–905 (Leander E. Keck et al. eds., 2000); Loren T. Stuckenbruck, *Colossians and Philemon*, *in* THE CAMBRIDGE COMPANION TO ST. PAUL 126–30 (James D. G. Dunn ed., 2003).

The literature discussing *Marbury* is best identified by category. For general treatments of the case and its importance to American constitutional law, see CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); *see also* ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989); EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS (1914) [hereinafter THE DOCTRINE OF JUDICIAL REVIEW]; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 66–74 (1985); WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (rev. ed. 1994); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (1969); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997). For the legal background to *Marbury*, see EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 221–22 (Harold W. Chase & Craig R. Ducat eds., 13th ed. 1973); *see also* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (Cornell University Press, 14th prtg. 1995) (1928); Allen Dillard Boyer, *"Understanding Authority and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43 (1997); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51 (2003); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994); Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15 (1922). For the political background to the decision, see David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996); *see also* James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961). For the importance of *Marbury* in different areas of law today, see Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983). For an excellent bibliographical essay on *Marbury*, see NELSON, *supra*, at 127–35. For a biography of Marshall, see 1–4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916).

8. *See* Felder, *supra* note 7, at 883–84; FITZMYER, *supra* note 7, at 17.

Temple, in violation of Jewish law.[9] Paul said that he had become Onesimus's "father" while the latter was in Rome and sought Philemon's assistance on Onesimus's behalf. Paul made a faint claim of possessing the legal authority to direct Philemon to be merciful to Onesimus, but Paul ultimately chose instead to rely on Philemon's brotherhood and good will.[10] To make Philemon's charity as painless as possible, Paul offered to compensate Philemon for any loss he may have suffered from Onesimus's decision to abscond and, perhaps, to steal from Philemon the money that he used to journey to Rome.[11]

Paul's letter to Philemon uses the same device that John Marshall later was to exercise in *Marbury*. Paul made a passing claim of enjoying the power to order Philemon to free Onesimus and hold him harmless, but Paul clearly did not rely on that office in his dealing with Philemon. Instead, to borrow a line from Spike Lee, Paul entreated Philemon to "do the right thing"—to excuse Onesimus's conduct, and accept him as a brother.

Scholars have criticized Paul for not treating this matter as an opportunity to promote social justice by demanding that Philemon free Onesimus on the ground that slavery was an evil institution that should be condemned by all Christians.[12] That view, however, misreads the purpose of *Philemon*. The thrust of Paul's message is theological, not political. He argued that Christianity could have a transformative effect on all people, regardless of their class or social situation—even those relegated to the role of slaves in Roman society.[13] Paul tried to persuade Philemon to recognize that, regardless of the conditions of Roman society, there were no distinctions such as

9. *See Phlm.* 1:9, 13, 23 (NRSV); *Acts* 21–28 (NRSV); Felder, *supra* note 7, at 884, 891.

10. *See Phlm.* 1:8–9 ("[T]hough I am bold enough in Christ to command you to do your duty, yet I would rather appeal to you on the basis of love—and I, Paul, do this as an old man, and now also as a prisoner of Christ Jesus.").

11. *See id.* at 8.

12. *See* BROWN, *supra* note 7, at 507; Felder, *supra* note 7, at 885 ("During the period of the European and American slave trade, many slave owners and other defenders of the system who laid claim to Christian leadership appealed to the Letter to Philemon to justify the racial stereotypes they held and the compliance they believed that Scripture requires from those under the slavery system."); FITZMYER, *supra* note 7, at 36; RUDEN, *supra* note 7, at 147–69. For a discussion of slavery as part of the stratified Roman society at the time of Philemon, see BROWN, *supra* note 7, at 503–04; FITZMYER, *supra* note 7, at 25–33.

13. *See* BROWN, *supra* note 7, at 502–03 ("[I]n every line just beneath the surface is the basic challenge to the societal rank of master and slave offered by the changed relationship introduced by the gospel."); Felder, *supra* note 7, at 885.

master and slave in the religion that they shared,[14] meaning that Philemon should see Onesimus as a brother, not a slave. Paul could not have made that point by drafting a political tract that struck out at the prevailing Roman social and legal framework.[15]

Moreover, as a practical matter, Paul was limited in what he could hope to accomplish.[16] The circumstances of Onesimus' flight are unknown,[17] and some scenarios—if, for example, Onesimus had stolen Philemon's money or property to finance his escape—could have put Paul between a rock and a hard place had he tried to accomplish more than what his letter states. Remember that Paul likely was under house arrest in Rome awaiting trial when he wrote *Philemon*. Even if Paul were free under Roman law to urge Philemon to manumit Onesimus,[18] it was a crime for a slave to escape[19] and harboring a fugitive slave, along with helping a runaway slave escape with his owner's property, were also crimes[20]—offenses that Roman authori-

14. *See Phlm.* 1:16 (describing Onesimus "no longer as a slave but more than a slave, a beloved brother—especially to me but how much more to you, both in the flesh and in the Lord"); *see also Gal.* 3:28 ("There is neither Jew nor Greek, neither slave nor free, neither male nor female, for you are all one in Christ Jesus.").

15. Martin Luther recognized that point:

> This letter gives us a masterful and tender example of Christian love. For we see here how St. Paul takes the part of poor Onesimus and, as best he can, pleads his cause with his master. He presents himself not otherwise than if he were himself Onesimus, who has done wrong; yet he does this not with force or compulsion, as he had a right to do, but he empties himself of his right to get Philemon too to waive his right. Just as Christ did for us with God the Father, so St. Paul does for Onesimus with Philemon. For Christ emptied himself of his right and overcame the Father with love and humility, so that the Father had to put away his anger and rights and bring us into favor for the sake of Christ, who earnestly pleads our cause and so heartily takes our part. For we are all his Onesimi, just as we believe.

FITZMYER, *supra* note 7, at 36 (citation omitted).

16. *See* FITZMYER, *supra* note 7, at 35 ("Nowhere in any of his letters does Paul try to change the existing social structure, which reckoned with slavery, perhaps because he realized the futility of attempting to change the system, which was so much a part of the world in which he lived.").

17. *See* BROWN, *supra* note 7, at 504–05.

18. *See* Felder, *supra* note 7, at 897–98; Stuckenbruck, *supra* note 7, at 128–29.

19. *See* FITZMYER, *supra* note 7, at 26.

20. *See id.* at 28; FITZMYER, *supra* note 7, at 26 ("When a slave became a fugitive, he committed a serious crime, and his owner could take out a warrant against him."); *id.* at 28 ("To harbor a slave was a crime . . . because it involved *furtum* (theft) of the property of another."); JUSTINIAN, THE DIGEST OF ROMAN LAW: THEFT, RAPINE, DAMAGE AND INSULT 119 (C. F. Kolbert trans., Penguin Books 1979) (534); Stuckenbruck, *supra* note 7, at 128 ("Running away from his or her owner would have incurred severe penalties for a slave, and much the same applied to those who harboured such slaves."). At one time, it was a federal crime to harbor a run-

ties might have sought to repress with fervor.[21] So, if Roman officials wanted to punish Paul without offending his burgeoning religious movement, setting Onesimus free might have given the imperial authorities a ground to do so while avoiding a religiously and politically sticky issue. In addition, Paul may have wanted to allow Philemon not only to free Onesimus but also to believe that the decision to free Onesimus was his own, as a means of publicly defying Roman conventions and publicly acknowledging his beliefs.[22]

Paul, therefore, was quite astute in how he dealt with the problem of Onesimus.[23] He subtly asserted the right to dictate what should be done. That reasserted Paul's place in the hierarchy of the early Christian movement to Philemon and anyone else who learned of his letter. By suggesting that he could order Philemon to release Onesimus from bondage and by arguing that manumitting Onesimus also was the moral course, Paul indicated that the struggling new religious movement opposed the institution of slavery.[24] Yet Paul clearly disclaimed any intent to command Philemon what to do.[25] Instead, Paul followed the law and returned Onesimus to Philemon, all the while hoping that Philemon would treat Onesimus not as a "slave" but as a "beloved brother."[26] Even encouraging Philemon to release Onesimus posed the risk that Roman authorities would see Paul as a troublemaker.[27] But by declining to order Philemon to do anything, Paul

away slave in this country. *See* Fugitive Slave Act of 1850 (Act of Sept. 18, 1850), § 7, ch. 60, 9 Stat. 462 (1850) (repealed by Act of June 28, 1864, 13 Stat. 200 (1864)).

21. *See* BROWN, *supra* note 7, at 503 ("The dire results of the revolt of the slaves in Italy led by Spartacus in 73–71 BC show that any proposal of the abolition of slavery would have had Empire-shaking potentialities.").

22. *See id.* at 506–07; Felder, *supra* note 7, at 897–98.

23. *See* BROWN, *supra* note 7, at 505.

24. *See id.* ("Notice how much is being asked: not simply that Onesimus escape the punishment that could legally be imposed, not simply that Onesimus be freed (which we might have expected as a more noble gesture), but that Onesimus be moved to the plane of the Christian relationship: 'Receive him as you would receive me' (v. 17).").

25. *See id.*

26. *Phl.* 1:16; *See* BROWN, *supra* note 7, at 505 ("There is a double rhetorical touch in [verse] 21, where Paul both reminds Philemon that he owes obedience (to Paul as an apostle or to God and the gospel?) and expresses his confidence that Philemon will do more than asked."); Stuckenbruck, *supra* note 7, at 129 ("[Paul] "negotiat[ed] his argument between demand and constraint, on the one hand, and . . . appeal[ed] to Philemon's honour and goodwill, on the other . . . . Paul's rhetoric is, therefore, deliberative; for all the freedom accorded to Philemon, diplomacy and rhetoric are mustered to persuade Philemon that there is only one appropriate course of action toward Onesimus . . . .").

27. *See BROWN, supra note* 7, at 506–07 ("Taking such a gracious stance might have dele-

deprived the Roman authorities of any basis for using the charge of violating Roman law governing the treatment of slaves as a pretext for silencing him. In sum, Paul's letter is a brilliant exercise of a grand assertion of moral authority by someone who, in all likelihood, lacked legal or political authority to do anything other than precisely what he did.

II.

Flash forward seventeen centuries to *Marbury*.[28] *Marbury* involved the famous tale of the "Midnight Judges."[29] In the waning days of his administration, Federalist President John Adams tried to appoint as many judges as he was able in order to see his party's philosophy endure on the bench after Democratic-Republican President-Elect Thomas Jefferson took office. As often happens whenever people try to accomplish far too much in far too little time, the officials responsible for getting President Adams's appointees into office made some mistakes. In William Marbury's case, those officials did not transmit to Marbury the document representing the legal commission that he needed to hold federal officebefore Jefferson was inaugurated, and the officials appointed by now-President Jefferson refused to send it to Marbury.[30]

terious social consequences in the eyes of outsiders and even of less daring Christians. It might make one who acts thus look like a troubler of the social order and a revolutionary; but that is a price worth paying out of loyalty to the gospel.").

28. Or first stop off for a sojourn in the year 1610 to read Sir Edward Coke's opinion in *Dr. Bonham's Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610), which also is known as *Thomas Bonham v. College of Physicians* or *The Case of the College of Physicians*. *See* Raoul Berger, "*Dr. Bonham's Case:" Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521, 526–27 (1969); Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 32–34 (1926). The Royal College of Physicians, an elite organization, had Thomas Bonham arrested and charged with the unauthorized practice of medicine and malpractice because the College had not accepted him into its ranks. King Henry VIII had incorporated the College and empowered it to regulate the practice of medicine in London, authority later confirmed by an act of Parliament. Arguing that, as a medical graduate of Cambridge University, he had the right to practice medicine without prior approval of the College of Physicians, Bonham sought relief for false imprisonment in the English Court of Common Pleas, which ruled in his favor in an opinion by Coke, Chief Justice of that court. Coke ruled in Dr. Bonham's favor on several grounds, one of which was that, because the Royal College would receive one-half of all fines collected for violations of its licensing rules, the college was both a party to and the arbiter of the dispute in Dr. Bonham's matter, a combination that violated the common law precept that no one could be the judge in his own case. In the course of endorsing that proposition, Coke wrote a controversial passage, "words which challenged both Crown and Parliament, and provoked controversies which have continued to our own day." *Id.* at 34. Coke stated that "in many

Marbury sued Secretary of State James Madison, the officer responsible for issuing commissions to Executive Branch appointees.[31] Marbury filed his lawsuit in the Supreme Court under an act of Congress giving the Court jurisdiction to issue a writ of mandamus in cases like Marbury's. The lawsuit, as Professor Robert McCloskey once wrote, "created what seemed a painful and unpromising dilemma for Marshall and his Court."[32] On the one hand, Madison could have ignored a ruling in Marbury's favor, demonstrating that the Court was impotent. On the other hand, Jefferson could have touted a ruling against Marbury as proving the illegitimacy of the Midnight Judges.[33] As it turned out, Marbury did lose, but that outcome is perhaps the least important part of that legendary case.

In *Marbury*, Chief Justice John Marshall wrote that President Jef-

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cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void." 8 Co. Rep. at 118a, 77 Eng. Rep. at 652. Some parties later argued that Coke wrote that passage in order to justify judicial review and invalidation of legislative acts, while others treated those remarks as dicta in an opinion bottomed on statutory construction. *See*, *e.g.*, Hurtado v. California, 110 U.S. 516, 531 (1884); *see also* City of London v. Wood, 12 Mod. 669, 687–88, 88 Eng. Rep. 1592, 1602 (K.B. 1702) (Holt, C.J.); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 177 (2nd prtg. 1992); 1 WILLIAM BLACKSTONE, COMMENTARIES *91 (Rothman Reprints, Inc. 1969) (1803); HOLMES, *supra* note 4, at 266; Berger, *supra*; Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 368–75 (1929); Plucknett, *supra*, at 34–70. The Framers were very familiar with Coke and held him in great esteem. *See*, *e.g.*, DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 272 (2003); *see also* A. E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 22–23 (rev. ed. 1998); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 25 (5th ed. 1956); 1 BLACKSTONE, *supra*, at *72; Berger, *supra*, at 521–22; Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563–64 & n.25 (1938); Plucknett, *supra*, at 34–70. For example, James Otis invoked Coke to challenge the Writs of Assistance, and John Adams cited Coke to argue that the Stamp Act violated the right of the colonists. *See* Paxton's Case of the Writs of Assistance, Quin. 51 (Mass. Super Ct. 1761); 2 LEGAL PAPERS OF JOHN ADAMS 127 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); Plucknett, *supra*, at 63–64. Accordingly, although Marshall did not cite *Dr. Bonham's Case* in *Marbury*, it is possible that Marshall drew implicit theoretical support for judicial review *sub silentio* from Coke's famous dictum.

29. *See*, *e.g.*, BARNETT, *supra* note 2, at 144; *see also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 41 (1960); NELSON, *supra* note 7, at 54, 57.

30. *See* Marbury v. Madison, 5 U.S. 137, 154–55 (1803); MCCLOSKEY, *supra* note 29, at 40–41.

31. *See* NELSON, *supra* note 7, at 57. In 1803 the Secretary of State had quotidian duties that today's secretaries do not have. *See* Act of July 27, 1789, ch. 4, 1 Stat. 28.

32. MCCLOSKEY, *supra* note 29, at 41.

33. *Id.* at 43.

ferson had acted unlawfully in refusing to give Marbury the commission that Marbury was entitled to receive making him a judge.[34] But the Chief Justice knew that President Jefferson would ignore him, which would demonstrate the powerlessness of the new Supreme Court and also might end whatever legacy the Federalists had hoped to preserve, so Chief Justice Marshall used a brilliant ploy. He concluded that, although Marbury was entitled to receive his commission, the Supreme Court could not order Madison to award it to him. The reason was that the act of Congress giving the Supreme Court original jurisdiction over Marbury's case was unconstitutional. Asserting that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[35] Marshall assumed for the Court the responsibility not only to interpret the laws and Constitution, but also the authority to decide for the nation whether an Act of Congress violated a provision of the Constitution.[36] In so doing, Marshall

34. *See Marbury*, 5 U.S. at 157–62, 167–68. Marshall was certain that Marbury was entitled to receive the commission because he had signed Marbury's commission and others the night before Jefferson became president. *See* BARNETT, *supra* note 2, at 144 ("In a bizarre twist by today's lights, all these 'midnight commissions' had been sealed by John Marshall himself—who was not only chief justice, but also the outgoing secretary of state—and delivered by his brother James."). Marshall served as both Chief Justice and Secretary of State for a month. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 399 n.22 (1989); *see also* NELSON, *supra* note 7, at 52; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 275 (rev. ed. 1926); Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 193 (1953). That practice would seem at least odd and perhaps improper today, but Supreme Court justices throughout history have held nonjudicial positions in the federal government. *See Mistretta*, 488 U.S. at 398–408; Peter Alan Bell, Note, *The Extrajudicial Activities of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970).

35. *See Marbury*, 5 U.S. at 177. For earlier judicial statements pro and con on that issue, see Thayer, *supra* note 7, at 132–46. For the argument that judicial review of statutes under the Constitution grew out of the Court's practice of reviewing the legality of colonial acts under their charters, see Emlin McClain, *Unwritten Constitutions in the United States*, 15 HARV. L. REV. 531, 536–37 (1902); Thayer, *supra* note 7, at 130–31.

36. In Marshall's words:

> If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

concluded that Congress could not enlarge the original jurisdiction of the Supreme Court beyond what Article III specified[37] and any law that conflicted with the Constitution was "void."[38] The Supreme Court therefore denied Marbury's request for a writ of mandamus by entering a judgment holding unconstitutional the federal statute that

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> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.
>
> That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.

Id. at 177–78.

37. *See id.* at 175–80. The relevant portion of Article III provides as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2.

38. As Chief Justice Marshall explained:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.

Marbury, 5 U.S. at 176–77.

allowed the Court to entertain his case.[39]

Marbury lost because, despite the Court's ruling that he was entitled to be appointed as a judge, he did not receive his commission—the last, ministerial step in the appointment process. Jefferson technically won, despite the Court's ruling that Madison was acting unlawfully in holding onto Marbury's commission, because the Court refused to order Madison to correct his unlawful behavior by making Marbury a judge. But Jefferson symbolically lost more than he won, and the Supreme Court, as well as the public, turned out to be the true winner.[40]

The Court clearly said that Madison was subject to law and that he had acted unlawfully. The Court also went on to claim the right to order Jefferson, Madison, and Jefferson's other lieutenants to act in accordance with law. John Marshall had assumed for the Court the mantle of a true "Supreme Court" of the new nation by deciding that the Court had the power to hold acts of Congress unconstitutional and to order the President to comply with the law, thereby asserting the Court's right to overrule the acts of the other two branches of the new national government. All without being placed at risk of seeing Jefferson—a revered figure in Virginia, the young nation's most important state, author of the Declaration of Independence, Ambassador to France, and now President of the United States—ignore Marshall's decree. *Marbury v. Madison* "is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."[41] To be sure, Marshall's decision "was criticized for its dictum that the executive *could* be called to account by judicial process," as Professor McCloskey points out, "but since the requested writ was in fact denied, no really great heat was generated

39. *See id.* at 180.

40. *See* THE DOCTRINE OF JUDICIAL REVIEW, *supra* note 7, at 9–10 ("To speak quite frankly, the decision bears many of the earmarks of a deliberate partisan *coup*. The court was bent on reading the President a lecture on his legal and moral duty to recent federalist appointees to judicial office, whose commissions the last Administration had not had time to deliver, but at the same time hesitated to invite a snub by actually asserting jurisdiction of the matter. It therefore took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendent power.").

41. MCCLOSKEY, *supra* note 29, at 40.

even on this point."[42] While the Federalists "warmly approv[ed]" Marshall's claimed right of judicial review, "the Jeffersonians shed few tears over the voiding of a law that had been passed by Federalists in the first place."[43]

Over time, the American legal system has accepted Marshall's opinion in *Marbury* as the classic statement of the justification and need for the courts to be able to review the actions of the political branches and to hold those actions unconstitutional when they conflict with the Constitution. One reason for *Marbury*'s acceptance is the facial reasonableness of Marshall's opinion. It is difficult to find a fault in the propositions that the courts exist to interpret the law and that the Constitution has greater legal weight than a statute.[44] Another reason is that we have come to accept judicial review as being criti-

42. *Id.* at 43.

43. *Id.* at 43–44; *see* Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 806 (1999) ("The decision was so subtle and so oblique that most people did not see its implications. The Republicans actually liked the decision better than the Federalists. They thought that if Marshall wanted to circumscribe the original jurisdiction of his Court, then he had every right to do so. Even Jefferson conceded the right of the Court to interpret the Constitution in matters pertaining to the judiciary, but he continued to believe that the executive and the Congress retained equal authority to interpret the Constitution. In his *Marbury* decision Marshall did not explicitly disagree with Jefferson's position. Marshall in 1803 was not embarking on a crusade for judicial supremacy. His aim was to isolate the judiciary from partisan politics as much as possible.").

44. That being said, Marshall's opinion is susceptible to several obvious criticisms. For example, Marshall does not address the question whether the joint decision of Congress and the President to pass a federal law should be deemed conclusive proof of its constitutionality since members of Congress and the President take the same oath to uphold the Constitution that is demanded of federal judges. *See* U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3. Moreover, President Adams sought to appoint Marbury as a Justice of the Peace in the District of Columbia, a position that lacked the attributes of an Article III court. The result was that Marshall was not entitled to hold office during "good Behaviour," *id.* art. III, § 1, rather than for a term of years or to serve at the pleasure of the President. *See* Amar, *supra* note 7, at 445. Accordingly, Jefferson's decision not to convey Marbury's commission to him therefore could have been deemed tantamount to a decision to remove Marbury. Various scholars have found Marshall's opinion unpersuasive. *See, e.g.*, BICKEL, *supra* note 2, at 2 ("'It will not bear scrutiny,' said the late Judge Learned Hand."); *id.* ("Not only are the props it provides weak, and hence dangerous; they also support a structure that is not quite the one we see today. Marshall's proofs are not only frail, they are too strong; they prove too much. *Marbury v. Madison* in essence begs the question. What is more, it begs the wrong question."); *id.* at 3–33 (criticizing Marshall's reasoning); THE DOCTRINE OF JUDICIAL REVIEW, *supra* note 7, at 3–17; CURRIE, *supra* note 7, at 71–74; Thayer, *supra* note 7, at 130 ("So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized.").

cal to the American concept of the rule of law. Whatever the reason, the *Marbury* decision has become so deeply ingrained into our legal and political culture that, initially justified or not, the institution of judicial review has become a bedrock element of the polity chartered in 1789.[45]

Of course, neither Congress nor the President may agree with the Supreme Court's assumption of role of Chief Constitutional Magistrate. Yet, by refusing to order Madison and Jefferson to do anything in that case, Marshall literally left Jefferson unable to undo Marshall's asserted claim of judicial primacy in the interpretation of the law. Over time the public has accepted what Marshall wrote about the Court's power of judicial review to the point that it may as well have been written into the constitutional text itself.[46] *Marbury* is "justly celebrated" for its contribution to the rule of law and American constitutional theory, yet the ultimate, and delightful, irony of the case is that "not the least of its virtues is the fact that it is somewhat beside the point."[47] Marshall could have been channeling Paul in the masterful way that he handled America's bedrock case in constitutional law.[48] All that leads up to this question: Were Paul and

45. *See, e.g.*, MCCLOSKEY, *supra* note 29, at 17 ("[I]nsofar as the charge is that the nation was unwise to delegate this duty to the judges (or allow them to assume it), it may be right, but is also perilously near to irrelevance. For this amounts to saying that America was unwise to be the nation that it was. The American mind conceived a dichotomy between the willed law of legislative enactment and the discovered or pronounced law of the Constitution, and 'judicial review' was, as we have seen, one result. . . . Historical accident and bad logic may explain the inception of judicial review, but by now the American nation has lived with the consequences for more than 150 years."). *See also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 381 (4th ed. 1873) ("The universal sense of America has decided that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State governments, so far as they are capable of being made the subject of judicial controversy.") (footnote omitted).

46. For an example of another constitutional precept that, over time, has also assumed canonical statue, consider Justice Chase's statement that the *Ex Post Facto* Clauses, U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, apply only to retrospective criminal statutes. *See* Calder v. Bull, 3 U.S. 386, 388 (1798) (opinion of Chase, J.). The text of Article I does not exclude civil laws, but the Supreme Court has accepted Justice Chase's limiting construction for more than two centuries. *See, e.g.*, Peugh v. United States, 133 S. Ct. 2072, 2081 (2013); Collins v. Youngblood, 497 U.S. 37, 41 (1990).

47. MCCLOSKEY, *supra* note 29, at 43.

48. *Marbury* was not the last time that the Court has used the mechanism of dramatically declaring that it possessed plenary decision-making power that it then humbly declined to exercise in the case at hand. Consider a different Marshall opinion, this one by Justice Thurgood Marshall, for the Court in *United States v. Munoz-Flores*, 495 U.S. 385 (1990). *Munoz-Flores* involved a challenge to the Victims of Crime Act of 1984, Section 1405(a) of Title II of the Com-

Marshall right to approach their tasks in the way that each one did?

III.

Said differently, what lesson should we take away from the practice of saying one thing, but doing another? Is it that sometimes what people say is more important than what they do? Perhaps that is occasionally true, but it is especially true when the legitimacy of an enterprise rests on the analytical reasoning, rhetorical skills, and intellectual honesty of the officeholder, characteristics that fit the job description of a judge far better than any other government office. We know that politics today is a contest of interest groups competing for different slices of the pie and that politicians will bend toward the interests of one group or another. We want politicians to meet *our* demands and generally don't care how they do it.[49] By contrast, we expect more from judges. We demand that judges always decide cases impartially based on the facts and law, that judges should never favor

prehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2174 (1984) (codified at 18 U.S.C. § 3013 (2012), and 42 U.S.C. § 10601-03 (2012)), which requires district courts to impose a $50 special assessment on defendants convicted of certain federal offenses. Munoz-Flores argued that the assessment imposed on him was unconstitutional because the Victims of Crime Act was a "Bill for raising Revenue," which, under the Origination Clause of the Constitution, must originate in the House of Representatives, and that act was born in the Senate. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."). The Court rejected Munoz-Flores's claim on the merits, concluding that the Victims of Crime Act was not a revenue bill. *See Munoz-Flores*, 495 U.S. at 397–401. At the same time, the Court squarely rejected the government's threshold argument that Origination Clause claims are nonjusticiable political questions, ruling that the Court is as competent to adjudicate claims resting on that clause as ones raised by any other type of separation of powers dispute. *See id.* at 389–97.

We may see the Origination Clause return to the Supreme Court in the near future. In *National Federation of Independent Business v. Sebelius*, the Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), on the ground that the statute was a valid exercise of Congress's power to raise revenue through taxes. 132 S. Ct. 2566 (2012). *See* U.S. CONST. art. I, § 8, cl. 1 (Congress has the power to "lay and collect Taxes."). By deeming the PPACA a "tax," the Court effectively invited parties to challenge the constitutionality of that law under the Origination Clause. Some already have done so, albeit without success. *See*, *e.g.*, Ass'n of Am. Physicians & Surgeons v. Sebelius, 746 F.3d 468, 469–71 (D.C. Cir. 2014) (rejecting as waived an Origination Clause challenge to the PPACA). *See also* Sissel v. HHS, 951 F. Supp. 2d 159 (D.D.C. 2013) (rejecting on the merits an Origination Clause challenge to the PPACA), *aff'd*, 760 F.3d 1 (D.C. Cir. 2012); Hotze v. Sebelius, 991 F. Supp. 2d 864 (S.D. Tex. 2014) (same).

49. *See* P.J. O'ROURKE, PARLIAMENT OF WHORES (1991).

any particular group or class,[50] that judges should never rest their decisions on the basis of "their own value systems or preferences for one or another social policy,"[51] and that, above all else, judges must always be honest about what they do and why they do it.

Politics is the work of politicians and sometimes apostles and judges participate in that enterprise through letters and opinions.[52] Apostles are private parties, of course, so we do not need to be concerned with their potential abuse of government power. But federal judges, especially Justices of the Supreme Court, most certainly are government officials,[53] for life in fact,[54] so we should be deeply concerned with the judgments they enter and why. Ordinarily, we can learn the reasons for their judgments by reading their opinions because the opinion should explain why the court entered judgment in favor of one party rather than another. But if a court is engaged in a "policy-making" function, instead of an "orthodox judicial function,"[55] the court may be reluctant to be forthcoming about its mo-

50. NELSON, *supra* note 5, at 116.

51. *Id.*; *see id.* at 115 (describing that position as "the classical legal convention of judicial neutrality").

52. Some judges and scholars certainly think so. *See, e.g.*, Arthur L. Corbin, *Politics and the Constitution in the History of the United States*, 62 YALE L.J. 1137, 1139 (1953) (reviewing 1–2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953)) ("It is no new discovery that the Supreme Court is aware of 'election returns,' or that its decisions have reflected the opinions and desires of the appointing power."). *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Belknap Press 2009) (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."); MCCLOSKEY, *supra* note 29, at 20 ("For the fascinating thing about the Supreme Court has been that it blends orthodox judicial functions with policy-making functions in a complex mixture . . . . Because that law [i.e., the Constitution] was initially stated in ambiguous terms, it has been the duty of the Court to make 'policy decisions' about it, that is, to decide what it means in the circumstances existing when the question is presented."). *But cf.* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

53. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .").

54. Federal judges hold office "during good Behavior," *id.* art. III, § 1, which effectively allows them to remain in that office for life if they so choose.

55. A judge's opinion also helps us to distinguish a court's "orthodox judicial functions" from its "policy-making functions." MCCLOSKEY, *supra* note 29, at 20.

tives.

That risk reaches its zenith when the courts override the actions of the political branches and chip away at the principle of popular sovereignty. The Constitution contains no Judicial Review Clause. Marshall had to rely on substantive provisions of the Constitution such as the Bill of Attainder, Ex Post Facto, and Treason Clauses of Articles I and III,[56] as well as cognate provisions of the Constitution such as the Supremacy and the Oath or Affirmation Clauses of Article VI,[57] in order to reason his way to the conclusion that the Constitution authorizes the Supreme Court to hold unconstitutional an act of Congress.[58] Add in the prospect that the Court may order the government or public to take, or refrain from taking, an action widely deemed necessary to protect public safety or to enjoy our accepted quality of life and you have the risk that the government and public might thumb its nose at the Court's order. That is not an imaginary possibility. There have been "several instances where Supreme Court decisions were ignored or disobeyed, where the president's or public's acceptance of Court's decisions was seriously in doubt," demonstrating that "public acceptance is not automatic and cannot be taken for granted."[59]

Has the Supreme Court ever knuckled under to actual or anticipated political pressure or avoided facing off against Congress, the President, and the public? It's likely. Let's be honest: Does anyone really believe that the Supreme Court would have ruled on December 8, 1941, rather than February 25, 1946, that the federal government could not impose martial law on Hawaii in the aftermath of the

56. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

57. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.); *id.* cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

58. *See* Marbury v. Madison, 5 U.S. 137, 179–80 (1803).

59. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW xii–xiii (2010).

attack on Pearl Harbor?[60] Or that the Supreme Court would have ruled on September 12, 2001, rather than on June 12, 2008, that the federal government could not foreclose suspected terrorists from challenging their detention via habeas corpus?[61] Want proof? Ask yourself: What is the likelihood that the Supreme Court would have ruled in July 1942 that the federal government could not try before a military tribunal the German saboteurs who landed along the New Jersey and Florida coasts one month earlier?[62] Equally important, does anyone believe that President Franklin Roosevelt would have paid any attention to such a Supreme Court order? Two of his predecessors, Presidents Jackson and Lincoln, certainly felt no such obligation when confronted with similar commands.[63] If a court believes that the popular and political reaction to its judgment or to an honest expression of its reasoning will defeat the effect of its judgment and damage its institutional role, the court may decide to delay the effect of its judgment, or, if it cannot, to dissemble, to issue an opinion that fudges the court's true rationale in the hope that a feigned explanation will allow the opinion to slide by and ultimately be forgotten while the judgment is implemented today. The result is that a court's

60. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

61. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

62. *See Ex parte* Quirin, 317 U.S. 1 (1942). Consider the timeline of that case. Eight German saboteurs landed on June 13, 1942, on Long Island, New York, and on June 17 in Florida. They were arrested shortly thereafter. On July 2, President Roosevelt ordered them to be tried before a military commission. Trial began on July 8 and continued until August 8, when all eight men were found guilty. The saboteurs sought habeas corpus relief from the federal district court in Washington, D.C., on the ground that they were entitled to be tried in civilian court, not a military tribunal. Just before the trial concluded, on July 28, the federal district court denied the saboteurs' habeas corpus petition. On July 29 and 30, the Supreme Court heard oral argument in the case. The following day, July 31, the Court issued a one-paragraph opinion granting the saboteurs' petition for a writ of certiorari to review the district court's order, but denying them habeas corpus relief. The per curiam opinion said that the Court would issue a longer decision at a later date, which turned out to be October 29. On August 8, more than two months before the Court released its opinion justifying the military trial, six of the eight saboteurs were executed, while the other two were sentenced to imprisonment for cooperating with the government. What is the chance that the Supreme Court, in its October 29 opinion, would have said, "Oops, we were wrong. The saboteurs must be tried in a civilian court." Or that the Court would have told President Roosevelt in July 1942—barely one month after the German army had routed the British at Tobruk, four months before the U.S. Army landed in Morocco to begin the American offensive in North Africa, and nearly two years before the Allies landed on the beaches at Normandy—that he could not bring the saboteurs before a military tribunal?

63. *See* BREYER, *supra* note 58, at 27–30; WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 32–39 (1998).

written decision may not actually mean what it says because it does not honestly represent the Court's actual justification for what it did.

That prospect is one reason why we must carefully scrutinize judicial opinions. Law students learn to distinguish the holding in a case from the reasoning that justifies that holding, as well as from the dicta that often litter an opinion, perhaps added by the author in an effort to garner the votes necessary for a majority[64] or perhaps inserted as a marker to be taken advantage of in future cases.[65] Law professors also emphasize that students must critically evaluate the reasons that courts offer for their decisions, not always, but sometimes because those reasons are so unpersuasive that it can be difficult to believe that the Court was being honest with us. But lay members of the public never receive that training, and most do not find that shortcoming troublesome. Most people regard legal analysis as too professorial (if not downright Jesuitical) to be of any practical concern for them in their daily affairs.

Perhaps, the public, by and large, is right. Maybe what politicians and judges say makes far less of a difference in their lives than what their employers, family, friends, neighbors, and favorite athletes or celebrities do and say. Maybe, therefore, we should ignore the reasons that government officials give to justify their actions and look just to the bottom line, because what they say does not matter. Maybe the public has become so accustomed to being lied to by government officials that it now treats politicians and judges alike and entirely discounts whatever any of them may say.

Consider the repeated statements that President Obama made before and after passage of the Patient Protection and Affordable Care Act[66] that the law would cause no one to lose insurance coverage. For example in June 2009 the president told this to the American Medical Association:

> So let me begin by saying this to you and to the American people: I know that there are millions of Americans who are content with their health care coverage—they like their plan and, most importantly, they value their relationship with their doctor. They trust

64. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 808 (1982).

65. *See infra* text accompanying notes 77–88.

66. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

> you. And that means that no matter how we reform health care, we will keep this promise to the American people: If you like your doctor, you will be able to keep your doctor, period. If you like your health care plan, you'll be able to keep your health care plan, period. No one will take it away, no matter what. My view is that health care reform should be guided by a simple principle: Fix what's broken and build on what works. And that's what we intend to do.[67]

Yet, as insured parties began to lose their health care plans in 2012 and 2013,[68] it became undeniable that the President's assurances, to be polite, were fibs.[69] The public likely shares that conclusion,

67. *Remarks by the President at the Annual Conference of the American Medical Association*, Hyatt Regency Chicago, Chicago, IL, (June 15, 2009, 11:13 AM), http://www.whitehouse.gov/the-press-office/remarks-president-annual-conference-american-medical-association (last visited Oct. 31, 2014). *See*, *e.g.*, *Insurance Fight: What Obama Has Said on "You Can Keep It,"* WALL ST. J. (Oct. 30, 2013, 7:42 PM), *available at* http://blogs.wsj.com/washwire/2013/10/30/transcript-obama-addresses-you-keep-it-criticism/ (collecting the President's statements to that effect).

68. *See*, *e.g.*, Colleen McCain Nelson & Peter Nicholas, *Obama Recalibrates "Keep Your Insurance" Pledge*, WALL ST. J. (Nov. 5, 2013, 7:34 PM), *available at* http://online.wsj.com/news/articles/SB10001424052702303661404579180251662058412?mod=WSJ_HealthLaw_LeftTopNews (last visited Oct. 31, 2014). *See also* Colleen McCain Nelson & Peter Nicholas, *Obama Tempers Insurance Pledge as Health Fight Rages*, WALL ST. J. (Oct. 30, 2013, 7:56 PM), http://online.wsj.com/news/articles/SB10001424052702303843104579168141838969798?mod=WSJ_HealthLaw_LeftTopNews (last visited Oct. 31, 2014); Marc A. Thiessen, *Obama's Non-Apology on Obamacare*, WASH. POST (Nov. 11, 2013), *available at* http://www.washingtonpost.com/opinions/marc-thiessen-obamas-non-apology-on-obamacare/2013/11/11/28f207ce-4ad0-11e3-ac54-aa84301ced81_story.html; Karen Tumulty, *Obama's Health-Care Promise That People Can Keep Their Insurance Comes Back to Haunt*, WASH. POST (Oct. 30, 2013), *available at* http://www.washingtonpost.com/politics/obamas-health-care-promise-that-people-can-keep-their-insurance-comes-back-to-haunt/2013/10/30/2748aaee-4185-11e3-8b74-d89d714ca4dd_story.html; George Will, *How a Presidency Unravels*, WASH. POST, Nov. 22, 2013 ("After Obama's semi-demi-apology for millions of canceled insurance policies — an intended and predictable consequence of his crusade to liberate Americans from their childish choices of "substandard" policies sold by "bad apple" insurers—Scalise said Obama is like someone who burns down your house. Then shows up with an empty water bucket. Then lectures you about how defective the house was."), *available at* http://www.washingtonpost.com/opinions/george-will-obamas-presidency-unravels-through-chaos-and-crisis/2013/11/22/57132e74-52de-11e3-a7f0-b790929232e1_story.html?hpid=z7.

69. *See* Clarence Page, *The Truth? Obama Told a Whopper*, CHI. TRIB. (Nov. 6, 2013) ("I don't feel good about calling out the president's whopper, since I support most of his policies and programs. But in this instance, he would have to be delusional to think he was telling the truth . . . . Sometimes straight talk can be a bitter pill for voters to swallow, but it's better than snake oil."), *available at* http://articles.chicagotribune.com/2013-11-06/news/ct-oped-1106-page-20131106_1_new-minimum-standards-health-care-plan-president-barack-obama; Kathleen Parker, *The Sinking Ship of Obamacare*, WASH. POST (Nov. 15, 2013) ("Let's recap: If you like your insurance policy, you can keep it. No, wait. If you liked your policy, it was probably worthless anyway. Scratch that. If your junk policy was canceled and you still want it, you can

even if most people believe that it is an impolitic point to make out loud.[70] In fact, after dissembling at first[71] even President Obama eventually admitted—in what was surely the understatement of 2013—that Obamacare has not worked out precisely in the manner that he repeatedly assured the public it would. In President Obama's own words, "[t]here is no doubt that the way I put that forward unequivocally ended up not being accurate." The response from most of the public likely was, "Tell me something I don't know."[72]

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keep it. Err, get it back. [¶] Whatever."), *available at* http://www.washingtonpost.com/opinions/kathleen-parker-the-sinking-ship-of-obamacare/2013/11/15/9ee0eaaa-4e3a-11e3-ac54-aa84301ced81_story.html. *See, e.g.*, *id.* ("Finally, Democrats incessantly seize upon their prize trophy: The U.S. Supreme Court validated Obamacare. True-ish. The high court didn't endorse Obamacare as a good idea. It didn't even find the individual mandate constitutional. It ruled that the mandate/penalty is constitutional only *if* the penalty is viewed as a 'tax.' If one were to examine this gift horse's mouth, one would have to note that, funny, but throughout the health-care debate and oral arguments, and even now, Democrats have insisted that the penalty is *not* a tax. Paging George Orwell.").

70. *See, e.g.*, Andrew Rosenthal, *Obama's Health Care Promise*, N.Y. TIMES, Nov. 14, 2013 ("Hovering over the press conference at the White House today was the question of whether Mr. Obama lied—whether he deliberately said what he knew not to be true with the intention of deceiving people—when he said repeatedly that Americans who like their policies would be able to keep them."), *available at* http://takingnote.blogs.nytimes.com/2013/11/14/obamas-health-care-promise/?_r=0.

71. *See* Angie Drobnic Holan, *Lie of the Year: "If you like your health care plan, you can keep it,"* POLITIFACT (Dec. 12, 2013):

> "Initially, Obama and his team didn't budge.
>
> First, they tried to shift the blame to insurers. 'FACT: Nothing in #Obamacare forces people out of their health care plans,' said Valerie Jarret, a top advisor to Obama on Oct. 28. [¶] PolitiFact rated her representations False. The restrictions on grandfathering were part of the law, and they were driving cancellations.
>
> Then, they tried to change the subject. 'It's important to remember that before the ACA was ever even a gleam in anybody's eye, let alone passed into law, that insurance companies were doing this all of the time, especially in the individual market because it was lightly regulated and the incentives were so skewed,' said White House Press Secretary Jay Carney.
>
> But what really set everyone off was when Obama tried to rewrite his slogan, telling political supporters on Nov. 4, 'Now, if you have or had one of these programs before the Affordable Care Act came into law, and you really liked that plan, what we said was that you can keep it if is hasn't changed since the law was passed.'
>
> Pants on fire! PolitiFact counted 37 times when he'd included no caveats, such as a high-profile speech to the American Medical Association in 2009: 'If you like your health care plan, you'll be able to keep your health care plan, period. No one will take it away, no matter what.'
>
> Even Obama's staunchest allies cried foul."

Available at http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/.

72. *See* Holan, *supra* note 70 ("PolitiFact has named 'If you like your health care plan, you can keep it,' the Lie of the Year for 2013. Readers in a separate online poll overwhelmingly

Tolerating politicians' lies is always a mistake, but it is a particularly egregious error where judges are concerned. What ostensibly distinguishes judges from elected officials is their duty to offer an objective, legitimate, and honest explanation for the result they reach. We expect legislators to act out of expediency. We want judges to avoid those considerations and rely on precedent, logic, and policy. We demand that judges explain their decisions in order to prove that they are not politicians. We take as a given that the courts who enforce the rule of law on the political branches will abide by it themselves. Just as it would be difficult to find someone to argue that judges may ignore whatever provisions in the Constitution get in their way of making our society more just,[73] it would be difficult to find someone to defend the propositions that judges may dissemble or prevaricate and that judicial opinion-writing is but a charade designed to euchre the public into believing that judges are not legislators. Scholars may disagree over the frequency by which that happens,[74] but there should be universal agreement that, whenever it does happen, the system has gone awry. Complete candor in judicial decision making should be a universally accepted prerequisite for that job.

To be sure, Paul and John Marshall were not completely forthright about what they were doing and why they did it. Even they would agree with that conclusion today. But the cases that they had to resolve were exceptional. Slavery was and is an odious practice, so we can and should praise Paul's verbal skillfulness and dissembling in avoiding a risk of prosecution for encouraging Philemon to extend Onesimus mercy for his misdeeds and to grant him freedom. If Paul

agreed with the choice."). Of course, President Obama is not the only politician to be guilty of fibbing or of uttering examples of the modern-day phenomenon called "truthiness," statements that have "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." DICTIONARY.COM, *Truthiness*, *available at* http://dictionary.reference.com/browse/truthiness?s=t (last visited Oct. 31, 2014). *See*, *e.g.*, Bill Clinton, *I did not have sexual relations with that woman*, YOUTUBE (Jan. 26, 1998), http://www.youtube.com/watch?v=KiIP_KDQmXs (last visited Oct. 31, 2014); Richard Nixon, *I'm not a crook*, YOUTUBE (Nov. 17, 1973), http://www.youtube.com/watch?v=sh163n1lJ4M (last visited Oct. 31, 2014).

73. Difficult, but not impossible. *See*, *e.g.*, LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012).

74. *Compare*, *e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005), *with*, *e.g.*, KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006).

needed to make a fleeting assertion of authority in order to be able to persuade Philemon to take the moral high road, so be it. Paul was a private citizen seeking to have a slave released and held harmless for desertion. We can give Paul a pass if he claimed to be acting pursuant to authority that he did not possess as part of his plan to achieve freedom and safety for Onesimus.

By contrast, Marshall was not a private citizen. As Chief Justice of the United States, he was not merely a government official, but the nation's highest judicial officer—symbolically equivalent to the President. We therefore can demand more of Marshall than of Paul. But we can also conclude that Marshall passed that higher threshold because his action, whether or not legally justified, ironically embedded the rule of law into the American legal framework. We therefore can laud Marshall's asserted right to order other government officials to comply with legal dictates as a vital component of the rule of law, even if he played a little fast-and-loose with that principle himself in *Marbury*. Refusing to order President Jefferson to award a judicial commission to Marbury denied the latter his rights under law, and refusing candidly to explain why he used the dodge of perhaps needlessly holding an act of Congress unconstitutional to achieve that result deprived Marshall's contemporaries of the ability to decide for themselves whether judicial review was a technique worth valuing. But by acting more as a politician than as a judge, Marshall may have preserved the Supreme Court as an institution dedicated to preserving the rule of law for others ever since 1803.

Those two incidents, however, are extraordinary. Democratic self-rule is hardly the same vile institution as slavery. Unlike *Marbury*, few cases involve bedrock principles of constitutional government. And unjustified assertions by government officials of authority, or the consequences of their exercise of government power, are not the same type of white lies that Paul uttered or that Marshall invoked. Accordingly, we should not automatically extend the admiration that we display for Paul's and Marshall's political skills to other government officials when they use the same technique.

That is especially true in the case of judges. The public treats courts with a respect and deference not afforded the political branches. The public assumes that judges are dedicated to resolving legal disputes and dispensing justice without regard to the grimy deal-making, half-truths, and outright lies that are part of the warp and

woof of politics. Judges draw a large degree of their legitimacy from reliance on precedent as authority. Precedent is a valuable basis on which to rest a claim of judicial power not only because it helps a judge decide a case correctly and preserves stability in the law, but also because it helps avoid the ever-present risk that the public will—unfortunately, but sometimes correctly—discern no legitimate basis for a court's diktat other than "Because I'm the Daddy." If the public ever comes to believe that judges are just politicians in black robes, we will have lost not only the necessary respect for the valuable institution of judicial review that the courts have built up ever since John Marshall wrote *Marbury* in 1803, but also an integral part of what has made the American experiment in constitutional self-government the successful and honorable enterprise it has proved to be for more than two centuries.

That does not mean that courts should shy away from responsibly exercising their power of judicial review. Judges properly deserve our praise when they enforce the law regardless of potential political fallout that their judgments may bring.[75] Yet, we should always be skeptical of assertions of authority that have no immediate consequences for judges. The aggressive claim that "I have the power to do *X*" when followed by the passive declination "But I will not do *X* in this case" can be less an exercise in judicial restraint than a disguised assertion of judicial overreach. If so, that disguise, like the Guy Fawkes mask sometimes worn by protestors, should be exposed for what it is. Otherwise, we run the risk that we can become so accustomed to hearing such naked assertions of authority that we accept them as law even though they enjoy no textual support in the Constitution and the only precedent that could be said to exist resides in the opinions containing the court's own prior assertions.[76]

75. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding unconstitutional a state law making it a crime to burn an American flag as part of a political protest). *See also* United States v. Nixon, 418 U.S. 683 (1974) (ordering President Nixon to turn over to the special prosecutor tapes of Oval Office conversations); Cooper v. Aaron, 358 U.S. 1 (1958) (ordering state officials to comply with a desegregation decree); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding unconstitutional state laws requiring racial segregation in public schooling).

76. *See* MCCLOSKEY, *supra* note 29, at 33–34 ("In several other [pre-*Marbury*] cases, decided by the Supreme Court, the justices quite evidently assumed in their opinions that they *could* set unconstitutional state or federal laws aside, but they elected in these circumstances not to do so. This approach had the double advantage of disarming critics concerned with the outcome of the immediate cause and at the same time adding a brick or two to the edifice of precedent on which the judicial future would depend.").

Consider in this regard the Supreme Court's decision in *Trop v. Dulles*.[77] Albert Trop was a soldier in the Army in 1944 stationed in French Morocco. He escaped from the stockade where he was being held for misconduct and was convicted in a court-martial of wartime desertion. Trop later lost his American citizenship under a federal law punishing that crime with forfeiture of citizenship. A plurality of the Court, in an opinion by Chief Justice Earl Warren, concluded that denationalization was a cruel and unusual punishment, in violation of the Eighth Amendment.[78] In so ruling the plurality wrote that although the Court had not defined the scope of the phrase "cruel and unusual punishment" in detail, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," so the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[79] Describing those remarks—viz., the constitutionality of a punishment must be considered in light of "the evolving standards of decency that mark the progress of a maturing society"—as *ipse dixit* gives them far more weight than they deserve.

To start with, the relevant text of the Eighth Amendment is concerned, not with "dignity," but with "punishment," which ordinarily is not dignified—intentionally so in order to bolster its deterrent effect. Just ask any inmate in one of the nation's prisons. The history of the clause also is bereft of the notion that punishment cannot be undignified and, more specifically, that denationalization is "cruel and unusual." The background to the clause reveals that it prohibits hideously painful sanctions such as boiling an offender in oil, penalties not authorized by positive law, and punishments that are grossly disproportionate to the severity of the offense.[80] That should have ended the discussion. Indeed, the *Trop* plurality confessed three facts that a reasonable person would have concluded dictated that Trop should lose: Congress expressly authorized the punishment of denationaliza-

77. Trop v. Dulles, 356 U.S. 86 (1958).

78. *Id.* at 98–104 (plurality opinion).

79. *Id.* at 99–101.

80. *See*., Harmelin v. Michigan, 501 U.S. 957, 967–73 & n.4, 979–85 (1991) (opinion of Scalia, J.); Gregg v. Georgia, 428 U.S. 153, 169–70 n.17 (1976) (lead opinion); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

tion for wartime desertion[81]—and had authorized that sanction in one form or another since the Civil War.[82] Desertion in wartime was a capital offense, so "there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."[83] And denationalization "involved no physical mistreatment" and "no primitive torture."[84] That should have been three strikes for Trop.

But Chief Justice Warren nevertheless concluded that denationalization was unconstitutionally barbaric. Why? Well, denationalization amounts to "the total destruction of the individual's status in organized society"[85] and results in the supposedly intolerable situation in which "the expatriate has lost the right to have rights."[86] Of course, the plurality did not bother to explain why, if it was unquestionably constitutional to *execute* a wartime deserter—which, as a matter of biology, would irreversibly strip him of "the right to have rights"—it was nonetheless unconstitutional merely to *denationalize* him. Perhaps Chief Justice Warren offered no answer to that question because there is none.

In sum, neither the text of the Cruel and Unusual Punishments Clause, the history explaining why that clause was adopted, nor simple logic supported the plurality's conclusion that denationalization was an unconstitutional punishment; and the plurality made no effort to ground its "evolving standards of decency" maxim in any of those sources of law (or even in the Court's precedents). In those circumstances, a reasonable person ordinarily would believe that the *Trop* dictum would become, in Justice Frankfurter's felicitous phrase, "a derelict on the waters of the law."[87] If so, that person would be wrong. The Supreme Court has reiterated the "evolving standards of decency" passage on so many occasions that its frequency probably rivals that of Cicero's famous admonition "Delenda est Carthago"—"Carthage must be destroyed"—which Cicero uttered in every speech that he gave in the Senate during the Punic Wars.[88] The Supreme

81. *Trop*, 358 U.S. at 88 & n.1 (plurality opinion).

82. *Id.* at 88–91 & nn. 2–7.

83. *Id.* at 99.

84. *Id.* at 101.

85. *Id.*

86. *Id.* at 102

87. Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

88. *See*, Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); Graham v. Florida, 560 U.S. 48, 58 (2010); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Roper v. Simmons, 543 U.S.

Court's decision in *Trop* proves that pure rhetoric can become reality. No engineer would pretend to construct a building on a mirage, but politicians, lawyers, and, yes, even judges do it all the time. Why?—because we let them get away with it.

IV.

The lesson, then, is that we always should be wary when a government official makes the claim that he or she possesses authority that cannot be justified on the basis of positive law, that he or she possesses such authority but declines to use it, or that, when he or she later exercises it, only laudable outcomes will follow. Precedent has a legitimate role in legal and policy decision making because it justifiably should cause us to be skeptical of abandoning a settled rule of law in favor of a theory that has never before been endorsed or examined and runs counter to a longstanding, settled, widely-endorsed principle. That type of humility—the recognition that we could be wrong or lack the power to take some action that we fervently believe will only benefit mankind—is one that policymakers seldom express. Yet it is precisely because we may have become so accustomed to having government officials lie to us that we may no longer have the ability to separate the wheat from the chaff, or may have just given up trying, so that we allow groundless assertions to accumulate and to serve as precedent for tomorrow's version of those claims.

That risk requires us to be especially vigilant today, given the massive size and complexity of our government, which makes knowledge of the metes and bounds of government authority utterly incomprehensible to most attorneys, let alone to non-lawyers.[89] We need to step back whenever government officials tell us that they can make the world a better place if we only ignore the fact that they lack the constitutional authority to carry out what they have promised. We need to demand that government officials justify their asserted exercise of power on a ground other than their own ukase-like directives. We need to recognize that, in an era when even instant gratifi-

551, 561 (2005); Ingraham v. Wright, 430 U.S. 651, 668 n.36 (1977); Gregg v. Georgia, 428 U.S. 153, 171, 173 (1976) (lead opinion); Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring).

89. *See, e.g.*, ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013).

cation is not fast enough for some, promised utopian solutions could have infernal consequences that take an eternity to undo. If we do not, if we fail to recognize what we are hearing, if we fail to demand a justification in law for whatever a government official claims the power to do, if we fail to say that the emperor has no clothes when he is standing there buck naked—if all that happens, we will have only ourselves to blame.[90]

90. The remarks that Robert Bolt attributed to Sir Thomas More make the point far more eloquently than I can:

> **Alice**: Arrest him!
> **Margaret**: Father, that man's bad!
> **More**: There is no law against that.
> **Roper**: There is! God's law!
> **More**: Then God can arrest him.
> **Roper**: Sophistication upon sophistication.
> **More**: No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.
> **Roper**: Then you set Man's law above God's!
> **More**: No far below; but let me draw your attention to a fact — I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. I doubt if there's a man alive who could follow me there, thank God . . . .
> **Alice**: While you talk, he's gone!
> **More**: And go he should if he was the Devil himself until he broke the law!
> **Roper**: So now you'd give the Devil benefit of law!
> **More**: Yes. What would you do? Cut a great road through the law to get after the Devil?
> **Roper**: I'd cut down every law in England to do that!
> **More**: Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

ROBERT BOLT, A MAN FOR ALL SEASONS, Act I, at 146–47 (Three Plays, Heinemann ed., 1967).