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## ***Marbury and the Administrative State***

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*Marbury and the Administrative State*

Henry P. Monaghan\*

*Marbury v. Madison*'s<sup>1</sup> prominence as a constitutional decision has long deflected interest in examining its other implications. But prior to proclaiming judicial competence to invalidate an act of Congress, the Court sustained judicial authority to enforce the specific statutory duties of administrative officials.<sup>2</sup> Had the doctrine of separation of powers been understood from the beginning to bar any judicial control of administrative power, the constitutional scheme would have gone seriously awry at the outset. Congressional directives either would have been subordinated to the will of the executive department or would have generated collateral and unseemly struggles between the two branches of government.<sup>3</sup> Moreover, a conception of public administration free from judicial oversight would have damaged the fundamental political axiom of limited government and thus undermined in advance a principal buttress for the legitimacy of the modern "administrative state."<sup>4</sup> At least where private interests are sharply implicated, some measure of judicial review is a "necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."<sup>5</sup> These concerns seem to have been acknowledged even by those specialists in public administration most prominently associated with efforts to narrow the claims for judicial control in favor of an emphasis on hierarchically structured, intra-administrative accountability.<sup>6</sup>

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 168-73 (sanctioning such judicial control where necessary to protect "vested rights"). Much of the argument centered on the power of the courts to control executive officials. *Id.* at 138-48.

3. More focused contentions of exclusive presidential responsibility to secure official compliance with law stemming from the President's implied removal power and his express duty to "take Care that the Laws be faithfully executed," U.S. Const. art. 2, § 3, were decisively laid to rest in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838), particularly in Judge Cranch's opinion in the circuit court, 26 F. Cas. 702, 713-14, 745, 753 (C.C.D.C. 1837) (No. 15,517). See Grundstein, *Presidential Power, Administration and Administrative Law*, 18 *Geo. Wash. L. Rev.* 285, 309-21 (1950).

4. J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 3 (1978) ("This shift in the center of gravity of governmental powers has become so pronounced that contemporary political scientists, with increasing regularity, describe America as an administrative state."). I use the term administrative agency in the conventional sense, so as to include both the independent regulatory agencies and all parts of the executive branch administering congressional programs.

5. L. Jaffe, *Judicial Control of Administrative Action* 320 (1965).

6. See, e.g., F. Goodnow, *The Principles of the Administrative Law of the United States* bk. 6 (1905); Goodnow, *Private Rights and Administrative Discretion*, 6 *Ky. L.J.* 311 (1908). Compare the limited role assigned to judicial review in Freund, *The Law of the Administration in America*, 9 *Pol. Sci. Q.* 403 (1894), with the role suggested in L. Jaffe, *supra* note 5, at 475-83. See also Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 *Yale L.J.*

The existence of judicial review of administrative action leaves open a large question about its scope. *Marbury* has relevance here too, for it is among the Court's first encounters with the propriety of judicial deference to administrative interpretation of statutes. In determining whether Mr. Marbury was legally entitled to his commission, the Court asserted categorically that "[t]he question whether a right [to the commission] has vested or not is, in its nature, judicial, and must be tried by the judicial authority."<sup>7</sup> There is no hint of acquiescence in a reasonable but contrary administrative interpretation of the relevant congressional legislation<sup>8</sup> in *Marbury*'s much quoted pronouncement that "[i]t is emphatically the duty of the judicial department to say what the law is."<sup>9</sup> Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation, and taken at face value seemed to condemn the now entrenched practice of judicial deference to administrative construction of law. It is *Marbury*'s pertinence to this practice that I intend to examine in this Article.

### I. THE PROBLEM ELABORATED

Despite its landmark status in administrative law, *Marbury* had all but disappeared from sight amidst the amazing proliferation of twentieth-century administrative law cases. Its relevance on the question of the scope of review of administrative interpretation of law suddenly resurfaced, however, in the debates over Senator Dale Bumpers's crusade to curb judicial deference to statutory interpretation made by federal administrative agencies. In 1975, Senator Bumpers proposed to modify the Administrative Procedure Act to require, inter alia, that "the reviewing court shall de novo decide all relevant questions of law, [and] interpret constitutional and statutory provisions."<sup>10</sup> "The Bumpers amendment is simple," said Senator Exon, one of its supporters, "[i]t takes away the now court-recognized principle that a Federal agency's interpretation of Federal law is presumed to be correct."<sup>11</sup>

While the precise demands of the various forms of the Bumpers amendment have been viewed by many as anything but simple,<sup>12</sup> my concern is with

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739, 742-43 (1982) (suggesting open administrative procedures coupled with "oversight . . . by Congress, experts in various disciplines, and the public").

7. 5 U.S. (1 Cranch) at 167.

8. That the right did not vest until delivery of the commission was certainly a plausible view. *United States v. Smith*, 286 U.S. 6, 47 (1932) ("[T]he Executive Department has not always treated an appointment as complete upon the mere signing of a commission." (footnote omitted)).

9. 5 U.S. (1 Cranch) at 177.

10. S. 2408, 94th Cong., 1st Sess. (1975) (intended to amend 5 U.S.C. § 706). This requirement was joined with a prohibition against a judicial presumption "that any rule or regulation of any agency is valid."

11. 125 Cong. Rec. S12,165 (daily ed. Sept. 7, 1979). Senator Exon was referring to a slightly different version of the proposed amendment, appearing at *id.* at S12,145. See Levin, Report in Support of Recommendation 79-6, *Judicial Review and the Bumpers Amendment*, 1979 Recommendations & Repts., Admin. Conf. of the U.S. 565, 567.

12. The current form of the amendment appears as § 203 of H.R. 746, Regulatory Procedure Act of 1982, in H.R. Rep. No. 435, 97th Cong., 2d Sess. 10-11 (1982) [hereinafter cited as *Bumpers Amendment*]. See *infra* text accompanying notes 180-83. For an examination of the

its animating no-judicial-deference principle. Trumpeted as a necessary check upon federal bureaucratic insensitivity and unresponsiveness,<sup>13</sup> it was on occasion supported by references to *Marbury*. The “duty of the judicial department” there posited, it was insisted, prohibits any judicial deference to administrative interpretation of law.<sup>14</sup> As Senator Bumpers put it, “[u]nder this amendment, the judiciary will simply be required to carry out exactly what their duty is; that is, where they would have reached a different conclusion, it is their duty to reach a different conclusion.”<sup>15</sup>

While never more than a makeweight in the debates over the amendment, the *Marbury* argument is considerably more interesting than acknowledged by its somewhat perplexed opponents.<sup>16</sup> Thirty years ago Professor Henry Hart, also invoking *Marbury*, advanced a strikingly similar, albeit more limited, “no-deference” thesis as part of his “Dialogue” on congressional power to regulate the jurisdiction of the federal courts.<sup>17</sup> The Dialogue is widely and rightly praised, but its votaries pay no heed to the strictures Hart thought were required in judicial review of administrative construction of law; in fact, this strand of the Dialogue seems universally to have been ignored.

But the problem it addresses cannot be ignored. The propriety of judicial deference to agency interpretation of law is an issue of systemic importance to the theory and practice of administrative law.<sup>18</sup> The case law seems inconsistent. As in *Marbury*, the Court frequently proffers its own judgment on the meaning of the statute, considering the agency position simply as a relevant

Bumpers amendment in the form it was initially proposed, see McGowan, *Congress, Court and the Control of Delegated Powers*, 77 *Colum. L. Rev.* 1119, 1162–68 (1977); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 *Ad. L. Rev.* 329 (1979). On the various changes, see Levin, *supra* note 11, and O’Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 *U. Cin. L. Rev.* 739 (1980).

13. Amendment supporters reflected both business and grassroots opposition to what was perceived to be the excesses of the federal bureaucracy. In contrast, the amendment’s opponents have tended to be drawn from those, including academics and judges, still retaining confidence in a system of national policy making. O’Reilly, *supra* note 12, at 749–56.

14. E.g., 122 *Cong. Rec.* 22,012 (1976) (remarks of Sen. Bumpers). See also Levin, *supra* note 11, at 582.

15. 125 *Cong. Rec.* S12,148 (daily ed. Sept. 7, 1979).

16. E.g., Levin, *supra* note 11, at 582 n.76.

17. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362 (1953), *reprinted in* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler’s The Federal Courts and the Federal System* 330–60 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]. For convenience, citations to the Dialogue will be made to Hart & Wechsler.

18. There are, I recognize, those who deny that court-agency interaction can be helpfully understood in terms of such concepts as judicial deference to administrative interpretation of law. E.g., Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 *Colum. L. Rev.* 771, 780–81 (1975) (“The rules governing judicial review have no more substance at the core than a seedless grape . . .”). Some modern-day writers would, indeed, dismiss such an issue as simply masking the real determinant of judicial conduct: acceptability of result. Any such judicial conduct—and no one doubts that there is some, if not so much as the realists believe—is, however, normatively unacceptable. Whether in the hands of judges or scholars, such a result-oriented jurisprudence does not provide a theory of adjudication; in reducing the judicial role to that of another political organ, it does not tell us what judges should do if they are to be faithful to their commissions as judges.

“body of experience and informed judgment.”<sup>19</sup> On other occasions, however, the Court seems willing to be bound by the administrative interpretation, so long as it has a “reasonable basis in law,”<sup>20</sup> or “is not irrational.”<sup>21</sup>

In part, the apparently erratic pattern of the case law reflects the indeterminacy in the concepts of “law” and “deference.” Indeed, some commentators would insist that the term “law” cannot be adequately differentiated from related concepts, with the result that it cannot meaningfully serve as a vehicle for allocating functions between court and agency.<sup>22</sup> No doubt this epistemological skepticism has merit in emphasizing the difficulties endemic to our legal categories.<sup>23</sup> But these categories can be neither discarded as vestigial remains of primitive word magic, nor dissolved by appeals to epistemology, or, I might add, to literary theory.<sup>24</sup> They are practical constructs designed to systematize, order, and control certain forms of social experience.<sup>25</sup> The concept of a “legal question” is a centrally important ordering device for allocating and distributing regulative authority among the various actors in the legal system. That this concept does not explain or answer everything does not mean that it does not illuminate anything. I am not persuaded that it is so hazy that it should be discarded in thinking about judicial review of administrative action,<sup>26</sup> and I take comfort in the fact that, unless they are dissemblers, judges of the first rank are of a similar persuasion.<sup>27</sup>

The notion of deference is also troublesome. It is not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial

19. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Sometimes the agency view is scarcely mentioned. See, e.g., *Woelke & Romero Framing, Inc. v. NLRB*, 102 S. Ct. 2071, 2080 n. 12, 2082 n. 15 (1982).

20. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944), discussed *infra* text accompanying notes 162-79.

21. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

22. 4 K. Davis, *Administrative Law Treatise* §§ 30.03, 30.04 (1958), holds this view. But see L. Jaffe, *supra* note 5, at 592-93, who notes that the Davis argument is largely dependent upon the premise that courts must decide all questions of law.

23. “The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. . . . Nor do we yet know of any . . . rule or principle that will unerringly distinguish a factual finding from a legal conclusion.” *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789-90 (1982).

24. See E. Cassirer, *Language and Myth* 44-55 (Langer trans. 1946). See also Symposium, *Law and Literature*, 60 *Tex. L. Rev.* 373 (1982). In the field of constitutional law, we are witnessing a round of skeptical thinking inspired not by epistemology but by the “Deconstructionism” debate in literature. See, for example, the exchange between Fiss, *Objectivism and Interpretation*, 34 *Stan. L. Rev.* 739 (1982), and Brest, *Interpretation and Interest*, 34 *Stan. L. Rev.* 765 (1982).

25. See generally H.L.A. Hart, *The Concept of Law* (1961). I presuppose a non-Marxist approach to law here. Cf. H. Collins, *Marxism and Law* 10-16, 94-115 (1981) (from a Marxist perspective, concept of law not important).

26. For an enlightening discussion, see L. Jaffe, *supra* note 5, at 546-94.

While the concept of law is analytically relevant in determining judicial deference to administrative fact-finding, it is less helpful in determining how much judicial deference to give to a particular legal interpretation. As Part V of this Article argues, that determination must ultimately rest on the court’s view of legislative intention in allocating law-making power. See *infra* text accompanying notes 141-86.

27. For citations, see Bye, *Scope of Judicial Review in Informal Rulemaking*, 33 *Ad. L. Rev.* 183, 183, 193; Levin, *supra* note 11, at 580-81 & n.69.

approaches. Indeed, we are admonished to view deference as a complex phenomenon best understood “as a collection of rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case.”<sup>28</sup> For our purposes, however, more precision is necessary. As Professor Byse says, “[t]he question is not whether the agency’s interpretation shall be ‘considered’ or ‘taken into account.’ *The precise problem is the extent to which the agency’s interpretation shall affect or control the court’s interpretation.*”<sup>29</sup> Deference, to be meaningful, imports agency displacement of what might have been the judicial view *res nova*—in short, administrative displacement of judicial judgment. Where there is meaningful deference, the agency, not the court, supplies at least part of the meaning of the law. Deference in this sense includes judicial decisions purporting to accept “reasonable” agency statutory construction,<sup>30</sup> as well as judicial use of deference principles to resolve statutory “uncertainty”—a tie-breaker, so to speak—invoked when the court accepts the agency interpretation because it is satisfied that there is no one “correct” resolution of the statute’s meaning.<sup>31</sup> These formulations involve deference in a strong sense.

Statutes must, of course, be initially interpreted by the administrative officials charged with their enforcement. But, as Professor Vile says:

The difference between these interpretations and those of the judge, however, is the authoritative quality of the judicial interpretation, whereas those of other officials, although usually accepted as valid, are in principle subject to review. The importance of this distinction cannot be lost sight of in the constitutional system of government, . . . [otherwise] we should indeed live in a society in which the bureaucrat, however benevolent, had the last word.<sup>32</sup>

Our inquiry is the extent to which the Constitution controls the allocation of functions between court and administrative agency in statutory interpretation. Suppose, therefore, that Congress were to enact a reverse Bumpers amendment—making explicit that a court must accept every published administrative statutory interpretation so long as it has a “reasonable basis in law,” and, if you wish, so long as the “subjects fall within the agency’s jurisdiction.” Such a statute might constitute unwise policy and might on occasion offend some specific constitutional provision, such as the first or fifth amendments. But does *Marbury* stand as a *general* constitutional interdiction of such an appor-

28. See Woodward & Levin, *supra* note 12, at 333.

29. Byse, *supra* note 27, at 191 (emphasis added).

30. As Professor Byse puts it:

Closely related to the judicial practice of accepting the agency’s statutory interpretation unless it is irrational or unreasonable is the often stated formula that the reviewing court will accord “deference” or “great deference” to the agency’s interpretation. I believe that if these terms are to be given their ordinary or dictionary meanings, (and I see no reason why they should not be so understood), they . . . closely resemble the irrational or unreasonable formulae . . . .

*Id.* at 192 (footnotes omitted).

31. See *infra* text accompanying note 177.

32. M. Vile, *Constitutionalism and the Separation of Powers* 328 (1967).

tionment of functions? If it does, the legitimacy of much of the present structure of the American system of administrative law is called into question.

I think the *Marbury* argument fails, and an understanding of why that is so throws some light on the basic premises of our system of judicial review. My submission, in brief, is this: judicial review in both constitutional and administrative law involves textual *interpretation* by the courts. In constitutional adjudication,<sup>33</sup> *Marbury* indicates that the court's interpretational duty is that of supplying the full meaning of the relevant constitutional provisions (except for "political questions"). By contrast, judicial review of administrative action contains a question of the allocation of law-making competence in every case, given congressional power to delegate law-making authority to administrative agencies. The court's interpretational task is (enforcement of constitutional restrictions aside) to determine the boundaries of delegated authority. A statement that judicial deference is mandated to an administrative "interpretation" of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency. Where deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the meaning of the statute. By contrast, to the extent that the court interprets the statute to direct it to supply meaning, it interprets the statute to exclude delegated administrative law-making power. In this context, the agency view of what the statute means may persuade, but it cannot control, judicial judgment.

A road map for what follows may prove helpful. Part II emphasizes the pervasiveness of the requirement that the Court independently determine the meaning of the Constitution. The origins of this rule are traced to *Marbury's* premise that the judicial role in constitutional adjudication is not distinctive but simply an extrapolation from the traditional judicial role in nonconstitutional settings. Part III considers why the Court has not over time seen the "judicial duty" as inconsistent with deference to administrative construction of law. It suggests that the principal reason was the early emergence of a distinction between "public" and "private" rights. This distinction initially permitted claims against the government to be adjudicated in nonarticle III tribunals, and it was ultimately extended to permit administrative adjudication, at least initially, of all claims generated by the administrative state, even those between private parties. Several decisions indicated, however, that whenever an article III court was being asked to enforce governmentally prescribed duties against private parties the "judicial duty" requires indepen-

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33. I do not overlook the fact that the constitutional questions may arise outside the adjudicatory context—for example, where no plaintiff has standing, e.g., *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). This Article is concerned with the nature of the judicial duty. Moreover, while *Marbury* may be taken to have established that the Court's constitutional interpretation is final *as to the litigants*, it does not follow that other branches of government, particularly the coordinate branches of the national government, are obligated to treat it as authoritative. See G. Gunther, *Cases and Materials on Constitutional Law* 25-35 (10th ed. 1980). But the practical force of this latter point is greatly diminished by the role of *stare decisis* and by the explosion of class action litigation.

dent judicial determination of all questions of law. Part IV elaborates upon that latter theme, particularly in connection with Henry Hart's effort to frame the appropriateness of judicial deference as a function of a distinction between "enforcement courts" and article III courts acting in other contexts. Part IV concludes by criticizing the coherence and utility of Hart's distinction. Part V argues that once the delegation of law-making competence to administrative agencies is recognized as permissible, judicial deference to agency interpretation of law is simply one way of recognizing such a delegation. The Article concludes in Part VI by suggesting that the central constitutional problem is that of vindicating the values of limited government, that our tradition is that the court's role is simply to keep the administrative agencies within the boundaries of delegated power, and that in fact this circumscribed role is not unlike the judicial role in much constitutional adjudication as well.

## II. CONSTITUTIONAL ADJUDICATION AND THE INDEPENDENT JUDGMENT RULE

### A. *The Rule*

Marshall's emphasis on the law-declaring "duty of the judicial department" is a cornerstone of the American constitutional order.<sup>34</sup> The question is, what is the precise scope of that duty? In 1893, James Bradley Thayer, in the most influential essay ever written on American constitutional law,<sup>35</sup> argued for a narrow formulation. Stressing that the political organs were the primary addressees of the major constitutional provisions,<sup>36</sup> Thayer insisted that the constitutional design sanctioned only an "incidental and postponed [judicial] control."<sup>37</sup> Legislation is open to judicial condemnation, he insisted, only if Congress could be said to have made a "very clear [mistake],—so clear that it is not open to rational question."<sup>38</sup> Quite arguably, Thayer's concep-

34. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).

35. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893). Thayer's general theory that judicial review was intended to restrain only plainly ultra vires governmental action proved attractive to great judges. Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 *Vand. L. Rev.* 71 (1978); see also L. Hand, *The Bill of Rights* (1958). Cf. H. Hirsch, *The Enigma of Felix Frankfurter 128-32* (1981) (arguing that while Frankfurter, Holmes, and Brandeis all endorsed Thayer, each did so for different reasons and to differing degrees).

36. Thayer, *supra* note 35, at 135-36.

37. *Id.* at 136.

38. *Id.* at 144. Thayer conceded that different considerations might come into play when state legislation was involved. *Id.* at 154-55.

Thayer's general argument for limited review may need some additional fine tuning. In some situations, such as the sixth amendment, it is at least arguable that the courts themselves are the primary addressees of the constitutional mandate. Indeed, such an argument could be made with respect to the issue presented in *Marbury* itself. See Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law* (pt. 1), 69 *W. Va. L. Rev.* 111, 119-20 (1967). But a "defensive" theory of the judicial power established by *Marbury* seems to me question-begging on the facts of *Marbury* itself given the wide power over jurisdiction conferred on Congress by article III. In any event, it has never been developed to limit the judicial duty posited by *Marbury* in constitutional cases. See R. Berger, *Congress v. The Supreme Court 154-65* (1969).

tion reflected the common understanding of how judicial review would actually operate under the new Constitution; in pronouncing an act invalid, a court would simply be ratifying a legal conclusion readily apparent to everyone from the face of the Constitution,<sup>39</sup> as, for example, judicial invalidation of an act establishing a national church. Arguably too, Thayer's formula draws some support from early decisions of the Supreme Court.<sup>40</sup> But in the end it has proved too simplistic. Twentieth-century efforts to develop a stable, coherent body of constitutional doctrine have generated modes of reasoning and the elaboration of doctrinal distinctions that Thayer could not have countenanced or perhaps even have imagined.<sup>41</sup>

*Marbury* itself, our most important decision, cuts hard against Thayer's standard. In *Marbury*, it will be recalled, the Court invalidated section 13 of the 1789 Judiciary Act<sup>42</sup> as an impermissible attempt to enlarge the Court's original jurisdiction beyond the three categories specifically named in article III.<sup>43</sup> Powerful, and to my mind convincing, arguments can be made that the named categories stated only the irreducible minimum, not the maximum, of original jurisdiction.<sup>44</sup> Surely, at least, Congress could not be charged with a "clear mistake" on this issue.<sup>45</sup> But the Court did not posit "the duty of the judicial department" in such restricted terms. The question of congressional power to expand the original jurisdiction was a straightforwardly "legal" one, and the Court saw its duty as requiring independent judgment on the meaning of article III. There was no suggestion that this obligation could be discharged

39. See Thayer, *supra* note 35, at 133-34 (quoting Swift, *System of the Laws of Connecticut* 50 (1795), denying judicial review except of acts "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions"). See also R. Berger, *supra* note 38, at 335-46 (judicial review intended to reach only plain acts of unconstitutionality).

40. See, for example, *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819), both of which place great weight upon the contemporary interpretation given to the Constitution by other organs of government.

41. See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1970). Alexander Bickel rejected Thayer's standard when the meaning of specific constitutional limitations were at stake: such a standard, he argued, would empty the constitutional limitations of meaning. But, interestingly, he apparently endorsed Thayer's standard when the only issue was the reach of the affirmative powers of Congress. A. Bickel, *The Least Dangerous Branch* 35-45 (1962). See also J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980), arguing that in the latter circumstance there should be no judicial review. Choper's argument is criticized in Monaghan, *Book Review*, 94 Harv. L. Rev. 196 (1980).

42. 5 U.S. (1 Cranch) at 173-76. The strained character of the Court's reading of § 13 has, of course, been frequently noted. See, e.g., Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 14-16. Of course, § 13 was invalidated only to the extent that it purported to authorize an original writ of mandamus. *Ex parte Peru*, 318 U.S. 578, 582 (1943).

43. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl.2.

44. See Van Alstyne, *supra* note 42, at 30-33.

45. Perhaps the problem is more complicated than put in the text. Marshall himself may have thought that Congress had in fact made a clear mistake. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75. But Thayer does not so read the case, and surely the language of article III governing the original jurisdiction would bear alternative constructions. Moreover, nothing in the legislative history of article III was before the Court, and even if it had been, it would not have impelled any specific result.

by judicial deference to Congress simply because its interpretation had a "reasonable basis in law."

Viewed simply as a matter of logic, the judicial duty "to say what the law is" does not demand an independent judgment rule; it is in fact quite consistent with a clear-mistake standard. For example, the political question doctrine, such as it is,<sup>46</sup> most properly represents a judicial conclusion that the meaning of a constitutional provision has been allocated by the Constitution to another branch of government.<sup>47</sup> To be sure, this commitment-to-another-branch rationale necessitates some judicial interpretation, including a requirement that the Court specify the boundaries of what has been allocated elsewhere. But this process entails judicial interpretation of a limited order, and, more importantly, it acknowledges that some of the meaning of a constitutional provision can be authoritatively supplied by another branch of government. The point can be put more generally: the judicial duty "to say what the law is" is analytically empty. The judicial duty to decide demands nothing with respect to the *scope* of judicial review; it is, therefore, entirely consistent with such propositions as, "the Constitution means what Congress says it means, so long as the congressional determination is a reasonable one."<sup>48</sup>

But here, as elsewhere, Holmes's page of history is worth a volume of logic.<sup>49</sup> The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text,<sup>50</sup> and that specific conception of the judicial duty is now deeply engrained in our constitutional order.<sup>51</sup> Thus, when in *Katzenbach v. Morgan*<sup>52</sup> the Court, implicitly reviving Thayer, appar-

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46. One might question whether such a doctrine continued to exist after *Powell v. McCormack*, 395 U.S. 486 (1969), and *United States v. Nixon*, 418 U.S. 683 (1974). In any event, the doctrine's internal logic is subject to criticism. See Henkin, *Is There a "Political Question" Doctrine?*, 85 *Yale L.J.* 597 (1976). Nonetheless, the doctrine seems still alive. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (four justices found that the question of whether the President could terminate a treaty without the participation of Congress was a nonjusticiable political question).

47. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 7-8 (1959); Henkin, *supra* note 46, at 600-01, 606, 612. Compare G. Gunther, *supra* note 33, at 1688-96, arguing that the political question doctrine comprises more than simply, as Wechsler argues, textual commitments to other branches; it includes cases where there is a lack of judicially manageable standards. But even if this were true, the conclusion would be the same: the task of giving content to the meaning of the constitutional provisions has been committed to a nonjudicial organ.

48. See Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 *U. Chi. L. Rev.* 646, 658 n.77 (1982) ("[I]t would be quite consistent with a judicial duty to declare the law to find that the law commits to Congress the decision whether it has acted within its powers.")

Indeed, it is quite consistent with accepting the view that the Constitution means what a private party says. Some argue, for example, that what constitutes "religion" for purposes of the free exercise clause is wholly or substantially a matter of private interpretation. See, e.g., Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 *U. Chi. L. Rev.* 805 (1978).

49. Holmes's language appears in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

50. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2866-67 (1982) (plurality opinion).

51. See generally Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 *Va. L. Rev.* 333, 413-38 (1982).

52. 384 U.S. 641 (1966).

ently deferred to a "reasonable" congressional interpretation of the equal protection clause,<sup>53</sup> a dissenting opinion<sup>54</sup> and commentators<sup>55</sup> voiced objection and this aspect of *Morgan* simply withered.<sup>56</sup> Efforts by sponsors of the so-called "Human Life Statute"<sup>57</sup> to overturn *Roe v. Wade*<sup>58</sup> by ordinary legislation have encountered a similar condemnation. In discharging its duty to say what the law is, the Court had, it was noted, squarely held that a fetus was not a "person" within the meaning of the due process and equal protection clauses.<sup>59</sup> Legislative judgments to the contrary, however reasonable, are simply constitutionally out-of-bounds.<sup>60</sup>

Two concluding points concerning the judicial duty in constitutional adjudication bear emphasis in view of the discussion that follows. First, the judicial duty to supply all the relevant meaning of the constitutional text may, at first glance, seem attributable to the binary nature of the issues presented: either Congress can or it cannot enlarge the original jurisdiction, regulate the manufacturing process under the commerce clause, or reach private conduct under section 5 of the fourteenth amendment. With respect to issues of this character, it is hard to think of the Court as simply prescribing boundaries for the political branches, leaving to them the ultimate ordering of judicially approved criteria. But much of the Court's work in supplying the meaning of constitutional provisions does not involve simple binary choice. Consider, for

53. *Id.* at 656. ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of [the state statute] constituted an invidious discrimination in violation of the Equal Protection Clause.").

54. *Id.* at 665-71 (Harlan, J., dissenting) (arguing that § 5 of the fourteenth amendment does not give "Congress the power to define the substantive scope of the Amendment"). See also *Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part) (same).

55. See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rev. 81. See also Munzer & Nickel, *Does the Constitution Mean what It Always Meant?*, 77 Colum. L. Rev. 1029, 1047-48 (1977) (arguing that the framers of the fourteenth amendment did not intend, in the enforcement clause, to give Congress the power to define the substantive scope of the equal protection clause, and suggesting that the "wisdom of the Court's action may be doubted"). But see Cox, *supra* note 41, at 228-30.

56. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), *Morgan's* author, Justice Brennan, attempted to reformulate *Morgan* in terms of judicial deference to legislative fact finding. *Id.* at 248-49 (Brennan, J., dissenting in part). But see Note, *Congressional Power to Enforce Due Process Rights*, 80 Colum. L. Rev. 1265, 1270 n.37 (1980) (arguing that Justice Brennan's views concerning *Katzenbach v. Morgan* did not command a majority in *Oregon v. Mitchell*; and noting comments that *Oregon v. Mitchell* "says little about the scope of *Morgan* and § 5"). *Rome v. United States*, 446 U.S. 156 (1980), confirms the point in its discussion of congressional enforcement power under the fifteenth amendment. *Id.* at 172-78. In *Rome*, the Court made no reference to the "reasonable interpretation" language of *Morgan*.

57. S. 158, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981).

58. 410 U.S. 113 (1973).

59. *Id.* at 157-58.

60. See the sources collected in Estreicher, *supra* note 51, at 336-37 n.4; see also *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331, 3336 (1982). The most prominent defense of the proposed statute is S. Galebach, *The Human Life Review* 5 (1981), reprinted in 127 Cong. Rec. S289 (daily ed. Jan. 19, 1981), relying, *inter alia*, upon *Morgan's* assertion that Congress can pass on the "meaning" of the Constitution, and, alternatively, upon an assertion that the crucial issue turns not on the "meaning" of the Constitution, but on a question of legislative fact: when does life begin?

example, the diverse range of possible rules governing warrantless searches and seizures, procedural safeguards required by due process in the administrative context, media defamation, or state aid to parochial schools. Here, too, the Court has undertaken to specify the precise content of what is required by the Constitution.<sup>61</sup>

Second, there is no suggestion that the judicial duty of article III courts "to say what the law is" with regard to constitutional questions varies with the nature of the case in which the question arises. Thus, no one supposes that Congress could confine judicial inquiry into any such questions arising in, say, a case challenging the denial of a government benefit, to a determination whether Congress had made a clear mistake.<sup>62</sup> There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be "jurisdictionally" shut off from full consideration of the substantive constitutional issues, at least absent adequate opportunity for consideration of those claims in another article III tribunal.<sup>63</sup> Whether the court can be deprived of jurisdiction over the entire case is an entirely different matter.<sup>64</sup>

### B. Intellectual Origins

The origins of *Marbury's* independent judgment rule warrant elaboration. They will seem strange to many contemporary students of the American

61. Cf. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 18–26, 40–45 (1975) (arguing that many rules are constitutional common law, not true constitutional interpretation).

62. The classic judicial statement is by Justice Rutledge, dissenting in *Yakus v. United States*, 321 U.S. 414 (1944):

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements . . . [W]henver the judicial power is called into play, [the Court] is responsible directly to the fundamental law and no other authority can authorize the judicial body to disregard it.

*Id.* at 468. Hart refers to the "great and generating principle of this whole body of law—that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus." Hart & Wechsler, *supra* note 17, at 353. The point seems of general applicability. See *id.* at 316. Compare Hart's apparent view that a court's duty to provide independently the meaning of *statutes* that have been applied by administrative agencies may be narrower in cases challenging the denial of a government benefit than in cases in which the government is seeking to enforce the statutory duties of private parties. See *infra* text accompanying notes 119–40.

63. Hart & Wechsler, *supra* note 17, at 352–53. See also *id.* at 316. See generally Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wis. L. Rev. 1189, 1215–24. See *supra* text accompanying note 43.

64. The Court routinely reads apparently sweeping preclusion provisions as not embracing constitutional claims. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 366–74 (1974), holding that 38 U.S.C. § 211(a) (1976), which provides that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision," does not bar federal courts from deciding the constitutionality of veterans' benefit legislation). See also Hart & Wechsler, *supra* note 17, at 348–56. Cf. *California v. Grace Brethren Church*, 102 S. Ct. 2498 (1982) (reading the Tax Injunction Act, 28 U.S.C. § 1341 (1976), to deprive federal district courts of jurisdiction over constitutional challenges to state tax laws where there is a plain, speedy, and efficient remedy in the state courts).

political-constitutional order. Nonetheless, they reflect deeply held premises that profoundly affected nineteenth and early twentieth-century thinking about the nature of judicial review, and their impact is still apparent in the case law.<sup>65</sup>

In *Marbury*, Chief Justice Marshall makes no effort to defend judicial review in terms of the superior institutional capacity of courts to develop a coherent and stable corpus of constitutional doctrine.<sup>66</sup> Nor does he appear to view the substance of constitutional adjudication as special.<sup>67</sup> Rather, Marshall simply extrapolates the judicial role in constitutional cases from the "ordinary and humble judicial duty"<sup>68</sup> in conventional cases. Law interpretation is what courts "do":

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. 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, . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.<sup>69</sup>

Marshall's premise was widely shared. Hamilton, for example, had earlier defended judicial review in virtually identical terms:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.<sup>70</sup>

Thus, as Thayer noted, the argument for judicial review "went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations."<sup>71</sup> Judicial review is no more than "the mere and simple office of

65. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1365-68 (1973).

66. But cf. Hart & Wechsler, *supra* note 17, at 82 (emphasizing that the Court possesses advantages over political organs in terms of procedures for making and recording decisions).

67. Cf. F. Frankfurter & J. Landis, *The Business of the Supreme Court* 307 (1927) (constitutional adjudication differs from other litigation in "the content of the material, the nature of the interests, and the technique of adjudication"); Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976) (the object of much modern federal litigation is increasingly the vindication of constitutional or statutory rights rather than the settling of disputes between private parties about private rights).

68. Thayer, *supra* note 35, at 138.

69. 5 U.S. (1 Cranch) 137, 177-78 (1803). This statement follows the now little noted but exceedingly important conclusion that the Constitution is "law" to be noticed by the courts, not merely a direction to the political branches. Thayer, *supra* note 35, at 130.

70. *The Federalist* No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961). See generally R. Berger, *supra* note 38.

71. Thayer, *supra* note 35, at 139.

construing two writings . . . as two contracts or two statutes are construed and compared when they are said to conflict.’<sup>72</sup>

In this paradigm, the “meaning” of the relevant constitutional provision is, of course, assumed to be a crucial matter, just as is the meaning of any other controlling legal instrument. Meaning, in turn, is to be supplied entirely by the courts; and in the courthouse there is no room for a “reasonable” but “wrong” interpretation, or for a “no right answer” approach. Rather, as Thayer put it, the premise is that

the ultimate question . . . is one of the construction of a writing; that this sort of question is always a court’s question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and a wrong way of construing it, and only one right way; and that it is ultimately for the court to say what the right way is.<sup>73</sup>

Thus, Marshall’s justification for the existence of judicial review, drawn as it is from the ordinary workings of the common law courts, also determined its precise scope: independent judgment.<sup>74</sup>

Thayer decried the assimilation of constitutional to ordinary adjudication. He insisted that the courts too had quickly perceived the wide and evident dissimilarities between the two kinds of cases,<sup>75</sup> and as a result had rightly “supplemented” *Marbury*’s “simple precepts” with “a very significant rule of administration”<sup>76</sup>—the clear-mistake standard. But in Thayer’s hands emphasis on that standard constituted an attempt to restructure the institution of judicial review as it had evolved from its early nineteenth-century origins. Early expressions of the clear-mistake standard, and there were many,<sup>77</sup> assumed that courts would independently determine the “meaning” of the relevant constitutional text. By the time Thayer wrote, however, these conceptions connoted quite incompatible judicial roles in constitutional adjudication. In stressing the clear-mistake standard, Thayer sought to redirect the focus of judicial review from “meaning” to “validity.” “[T]he ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.”<sup>78</sup>

Thayer cuts very deep here. He separates, as Marshall did not, the existence of judicial review from its scope. The courts, Thayer insists, are

72. *Id.* at 138.

73. *Id.* at 150.

74. See Monaghan, *supra* note 65, at 1365–68 (emphasizing the importance of the analogy of constitutional to common law adjudication in shaping the case or controversy doctrine). Cf. Hart & Wechsler, *supra* note 17, at 14–16 (emergence of view that courts have a special function in constitutional cases not derivable as an incident of the judicial duty to decide cases).

75. Thayer was surprisingly unclear in specifying the dissimilarities. He seems largely to have focused upon the consequences of a declaration of unconstitutionality. See Thayer, *supra* note 35, at 144.

76. *Id.* at 139–40.

77. See *id.* at 140–42. See also Currie, *supra* note 48, at 664 & n.120. The origin of this rule of administration seems to be in judicial fears that the emerging institution of judicial review would meet popular resistance because it was “undemocratic.” See Thayer, *supra* note 35, at 144.

78. *Id.* at 150 (emphasis in original).

properly concerned only with whether the congressional conduct has a "reasonable basis in law." The clear-mistake standard

recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports.<sup>79</sup>

But Thayer's effort to divorce meaning from validity, however plausible, has not prevailed. Meaning and validity are joined, not separated, in our system of judicial review. And meaning is a matter for the "judicial department," not Congress.<sup>80</sup> (This, at least, is the formal doctrine, although, as I shall show in Part VI, it oversimplifies the complexities of constitutional adjudication.)

### III. *MARBURY*, PUBLIC ADMINISTRATION AND PRIVATE RIGHTS

*Marbury's* justification for judicial review, grounded as it is in the "ordinary and humble judicial duty" of the common law courts, seems necessarily to entail a general obligation of independent law-exposition by article III courts. This is what courts "do"; it is their "job." Thus it is part of the nondisclaimable "judicial power" of courts established under article III. Indeed, in view of *Marbury's* derivation of the right of judicial review from the workings of the courts in ordinary cases, judicial deference to agency interpretation of law is plainly anomalous. Applied systematically to the field of public administration, the essentially common-law conception of the judicial duty would have established a strong basis for judicial control of administrative law-interpretation. For, unlike the legislature, administrative agencies can never pretend to an unlimited power to select among goals; the universe of each agency is limited by the legislative specifications contained in its organic act.

But whatever the logic of the *Marbury* argument or the wisdom of strong judicial control of administrative law-making, the Marshall court itself gave early sanction to deference principles. *United States v. Vowell*<sup>81</sup> was a suit to enforce a bond given for custom duties owed on salt, and the case turned on when the duty had accrued. Chief Justice Marshall's one paragraph opinion for the Court noted that "[i]f the question had been doubtful, the court would

79. *Id.* at 144.

80. This is not to deny that the language of deference has rhetorical use. See *Rostker v. Goldberg*, 453 U.S. 57, 64-69 (1981). But the Court's "recognition" of a "healthy deference" to congressional judgment in *Rostker* was in the end directed to the issue of legislative fact finding, not the controlling legal standards. See *id.* at 69-71.

81. 9 U.S. (5 Cranch) 368 (1809).

have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.”<sup>82</sup>

*Marbury* is not mentioned in that opinion, nor is it mentioned in the other scattered deference opinions of the Marshall Court.<sup>83</sup> As the nineteenth century wore on, and public administration became a larger and larger component of the American governmental system, judicial expressions of deference increased.<sup>84</sup> *Marbury* proved no barrier to this development.

*Marbury*'s lack of impact on administrative interpretation of law seems, in significant measure, to be part of a much larger development construing narrowly the potential demands of article III.<sup>85</sup> Article III could have been read to require that, at least in the states if not the territories, Congress must assign all the adjudicatory business specified in article III to the courts established under its authority or to the state courts.<sup>86</sup> But the Court quickly concluded that some adjudication could take place outside of article III (or state) courts: “public rights”—claims by private individuals against the government and certain claims by the government against private parties for such matters as custom duties and, perhaps, taxes<sup>87</sup>—*could*, if Congress so chose, be left entirely to final administrative determination.<sup>88</sup> Summarizing these developments in *Ex parte Bakelite Corp.*,<sup>89</sup> the Court said:

[Nonarticle III legislative] courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, *which from their nature do not require judicial determination* [by an article III court] *and yet are susceptible* of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.<sup>90</sup>

This gloss on article III was by no means inevitable, but quite plainly it had fundamental significance for the future development of the administrative state, with its need for administrative adjudication, formal and informal, of a wide range of claims. And perhaps from the premise that disputes over public rights could be kept entirely from the article III (and state) courts, it seemed

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82. *Id.* at 372.

83. See *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833); *United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 39–40 (1832); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

84. For an extensive citation of the cases, see Annot., 73 L. Ed. 322, 325–29 (1928).

85. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1, cl.1.

86. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2882–83 (1982) (White, J., dissenting). Since the Framers quite clearly assumed that Congress need not have created any inferior courts, they must have assumed that state courts would enforce federal policy. See Hart & Wechsler, *supra* note 17, at 103–04 (1981 Supp.).

87. Hart & Wechsler, *supra* note 17, at 334 & n.7.

88. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), is the leading case.

89. 279 U.S. 438 (1929).

90. *Id.* at 451 (emphasis added) (footnote omitted).

but a small step to a conclusion that, where those courts were utilized, deference was permissible. Such an inference does not follow, however. There is, in principle, a clear difference between excluding the article III courts entirely from a case and restricting their law-declaring competence once "judicial power" is, in fact, brought to bear on a controversy.<sup>91</sup>

Be that as it may, throughout most of the nineteenth century there was, despite *Marbury*, only limited judicial control of administrative law-interpretation. Judicial control was at its maximum when coercive governmental conduct was involved, particularly where, as in the customs and tax areas, the judicial process itself was utilized to enforce the duties of private persons. To be sure, expressions of deference were common enough in this context, but they were of uncertain import. Often they amounted to little more than a statement that the administrative view should be taken into account. And although the administrative view seemed, on occasion, to tip the judicial scales, it seems fair to say that the cases fell well short of judicial acceptance of a clear-mistake standard.<sup>92</sup>

Judicial control of noncoercive government conduct, particularly administrative denial of government benefits, was another matter.<sup>93</sup> Judicial review could have been entirely excluded with respect to such claims,<sup>94</sup> and where it was available it was of a limited nature. Mandamus and injunction actions seeking to review administrative interpretation of law in connection with the denial of pensions, land grants, and other largesse were frequently barred by the rule that these remedies reached only the violation of plain, nondiscretionary administrative duties.<sup>95</sup> *Decatur v. Paulding*,<sup>96</sup> a suit for a pension, made plain that no such showing could be made where administrative discre-

91. See supra note 62.

92. See, e.g., *Robertson v. Downing*, 127 U.S. 607, 613 (1888) ("[the] construction of the department has been followed for many years"); *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 382 (1874) ("[the administrative construction,] though not controlling, is not without weight, and is entitled to respectful consideration"); *Peabody v. Stark*, 83 U.S. (16 Wall.) 240, 243-44 (1872) ("while we do not hold such ruling [of the administrative office] as in general obligatory upon us, we are content to adopt it in this case").

93. There was no statutory procedure for a private party to seek review of an unfavorable administrative order. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 *Geo. L.J.* 287, 295-97 (1948).

94. "[T]he United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts." *United States v. Babcock*, 250 U.S. 328, 331 (1919). See also supra notes 88 & 89. The absence of this obligation was particularly self-evident since nineteenth-century political and social thinking could neither absorb nor comprehend the premises of modern entitlement theory. Monaghan, *The Constitution Goes to Harvard*, 13 *Harv. C.R.-C.L. L. Rev.* 117, 128 (1978).

Sovereign immunity may have played a large role in the emergence of these deference principles. It cannot explain judicial deference completely, however, for "public rights" included certain claims by the government against private parties. E.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

95. Lee, supra note 93, at 296. See also L. Jaffe, supra note 5, at 337-38. The influences of these remedial concepts persisted well into the twentieth century. Lee, supra note 93, at 297 n.31. Cf. *id.* at 304 (discussing the Court's tendency after the turn of the century to defer to administrative fact-determination).

96. 39 U.S. (14 Pet.) 497, 514-16 (1840). The Court was late in coming to recognize that discretion has its boundaries, and that the crucial issue was the scope of agency discretion. See *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925).

tion extended to questions of law. Any other rule, the Court said, would sanction excessive judicial intrusion into the domain of public administration.<sup>97</sup>

History, if not logic, is thus squarely against the wide assertion of Bumpers amendment proponents that article III courts can never yield to administrative constructions of law. But there has always been in our traditions particular concern with the judicial role where governmental interference with the "private rights" of "liberty" and "property" was involved.<sup>98</sup> This linkage is reflected in *Marbury's* declaration that the "province of the Court is, *solely*, to decide on the rights of individuals,"<sup>99</sup> and it constituted a vital component in nineteenth- and early twentieth-century efforts at demarcating the permissible limits of administrative power. So long as public administration made few demands on private persons (apart from taxes and custom duties) no threat was posed to the "sacred" rights of liberty and property. But with the advent of the regulatory administrative state in the late nineteenth century,<sup>100</sup> judicial concern grew. It was a widely shared belief that disputes arising from the application of congressional regulatory power must ultimately be resolved in article III courts and thus could not be left for final administrative determination.<sup>101</sup> Judicial power and due process rationales were tightly joined here;<sup>102</sup> in fact, the first decision imposing due process constraints on the states required judicial review of a claim that administratively prescribed rates were confiscatory.<sup>103</sup>

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97. Justice Catron's elaborate concurring opinion disclaimed any judicial supervisions of claims "to pay money out of the treasury" on this ground, *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 518 (1840), and his concern was reflected in the majority opinion. "We can readily imagine," said Chief Justice Taney, "the confusion and disorder into which [more active judicial intervention] would throw the whole subject . . . ; which now forms so large a portion of the annual expenditure of government, and is distributed among such a multitude of individuals." *Id.* at 515.

Mr. Lee notes that between 1838 and 1880 the Court failed to order mandamus with respect to any executive action. Lee, *supra* note 87, at 295. Note, however, that even if direct review were not permissible, it appears that the legal issue could have been litigated in a private action where the court would not have been bound by prior administrative decisions on law. *Decatur*, 39 U.S. (14 Pet.) at 515. See also L. Jaffe, *supra* note 5, at 338.

98. Thus Professor Jaffe, in his plea for recognition of "public" actions, "categorically and arbitrarily assert[s] that the highest, the central, and the most realizable function of our courts is the protection and relief of the individual." L. Jaffe, *supra* note 5, at 475.

99. 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added). See also *id.* at 162-63, 167 (stressing judicial protection for vested rights). The linkage is, indeed, rooted in English history, L. Jaffe, *supra* note 5, at 330, and accepted by writers on public administration, see *supra* note 6.

100. While the federal administrative process existed in rudimentary form in 1789, it is "customary and appropriate to date the present federal [administrative] era from the creation of the Interstate Commerce Commission in 1887." L. Jaffe, *supra* note 5, at 9.

101. See Katz, *Federal Legislative Courts*, 43 *Harv. L. Rev.* 894, 912-17 (1930).

102. L. Jaffe, *supra* note 5, at 379-80. See also R. Berger, *supra* note 38, at 16-22 (discussing the historical background concerning protection of private rights); Katz, *supra* note 101, at 917 (same result under article III even if fifth amendment had never been adopted). As Professor Jaffe notes, a judicial power rationale is not theoretically confined to the protection of individual interests, but its use beyond that sphere raises separation-of-powers problems. L. Jaffe, *supra* note 5, at 380.

103. *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890). See A.N. Paul, *Conservative Crisis and the Rule of Law; Attitudes of Bar and Bench, 1887-1895*, at 39-45 (1960).

The tension between the demands of public administration and the judicial protection of private rights is reflected in *Crowell v. Benson*,<sup>104</sup> the most important modern decision. But *Crowell* recognized that it was now too late to cut back significantly the necessary apparatus of the modern state. It not only reconfirmed the public right cases, but it went still further, permitting, subject to limited judicial review, administrative adjudication of the duty of one private person to another arising out of governmental regulatory programs. *Crowell*, in sum, sanctioned a wide area for the operation of public administration, removing article III as a meaningful barrier to the use of administrative agencies to establish and enforce, at least initially, all the rights created by the administrative state.<sup>105</sup>

It bears noting that the complex opinions in last term's *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>106</sup> confirm *Crowell*. There the defendant successfully resisted an ordinary breach of contract suit brought in a nonarticle III bankruptcy court by a corporation in reorganization. A divided court concluded that the exercise of such jurisdiction violated article III because it "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Article III district court."<sup>107</sup> But the difficult plurality opinion not only purported to reaffirm the public rights cases,<sup>108</sup> but also emphasized,<sup>109</sup> as did the concurring opinion,<sup>110</sup> that the claim sued upon did not originate in federal statutory law. It appears, therefore, that common law rights must generally be litigated in either article III or state courts, and perhaps cases of governmental claims against private parties and claims of one individual against another arising under federal law constitutionally require the pattern of limited judicial review confirmed by *Crowell*.<sup>111</sup> Even so, the crucial point remains and warrants emphasis: administrative agencies can adjudicate, sometimes conclusively, claims created by the administrative state, by and against private persons.

But that fact simply underscores our inquiry. Whether required by the Constitution or not, our system of administrative law typically provides for

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104. 285 U.S. 22 (1932).

105. The seventh amendment has not proved to be a barrier to this development. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

106. 102 S. Ct. 2858 (1982).

107. *Id.* at 2879-80.

108. *Id.* at 2869-72.

109. *Id.* at 2875-78.

110. *Id.* at 2881-82.

111. But see *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62, 260 (1982) (interpreting *Northern Pipeline* as holding that the authority of legislative courts, even when the right being sued upon originates in a federal statute, "extends neither to interpreting the law nor to entering judgment; these "'essential attributes of the judicial power'" must remain with article III judges" (citation omitted)).

A footnote in the plurality opinion, *id.* at 2870 n.23, suggested that judicial review might be required even in cases of government largesse, a suggestion sharply at variance with the decided cases, see *supra* note 95, but one that draws some support from recent due process developments in the administrative context. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires evidentiary hearing before termination of welfare benefits, and may require judicial review).

judicial review of the application of administrative power insofar as it directly affects specific individuals. At least when called upon to enforce an administrative order against a private person, must an article III court, as in a constitutional case, independently supply all of the relevant law, or is it sufficient that the court simply determine whether the administrative construction is a reasonable one? In *Crowell*, Hughes and Brandeis disagreed on whether, "in order to maintain the essential attributes of the judicial power,"<sup>112</sup> an article III court must render independent judgment upon—indeed, perhaps independently find—all the "constitutional facts" underlying the administrative order.<sup>113</sup> But both judges stressed that the controlling statute reserved *all* questions of law, constitutional and nonconstitutional, for independent judicial determination.<sup>114</sup> Indeed, Brandeis subsequently asserted that "[t]he supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule was applied."<sup>115</sup> In *Yakus v. United States*,<sup>116</sup> to take another leading example, the Court sustained a bar to the jurisdiction of an article III court to consider questions of law in a criminal proceeding brought to punish violation of an administrative regulation, but only because full review of those issues had been located in another article III court.<sup>117</sup> To be sure, in these cases questions of substantive constitutional law were prominent on the surface, but the Justices did not indicate that they saw any difference in judicial duty between constitutional and conventional legal issues in considering the validity of the administrative orders they

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112. *Crowell*, 285 U.S. at 51.

113. Compare *id.* at 54–65 (the Court per Chief Justice Hughes holding that article III courts must independently determine all "constitutional facts"), with *id.* at 84–88 (Justice Brandeis arguing in dissent that "constitutional facts" may be determined "otherwise than judicially"). See generally Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. Rev. 223 (1968) (analyzing the role of the doctrine after *Crowell*).

114. 285 U.S. at 54 ("[A]nd the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."); *id.* at 88 (Brandeis, J., dissenting). See also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2854, 2876–77, 2878–79 (1982) (plurality opinion) (relying on *Crowell's* outline of the judicial function); L. Jaffe, *supra* note 5, at 88–89, 638, 643 (analyzing the significance of both the *Crowell* decision and the Hughes-Brandeis dispute).

115. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Brandeis, however, seems here to be referring to the requirements of due process, not to a judicial duty derived from article III. L. Jaffe, *supra* note 5, at 643–44. See generally White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 Duke L.J. 195, 223–32 (1974) (discussing *Crowell*).

116. 321 U.S. 414 (1944). Cf. *Lockerty v. Phillips*, 319 U.S. 182 (1943) (holding that Congress has the constitutional power to prescribe the equity jurisdiction of inferior federal courts as to enforcement of the Emergency Price Control Act).

117. *Yakus*, 321 U.S. at 444–45. The Court construed the law limiting its jurisdiction as authorizing the enforcement court to pass upon the constitutional validity of the limitation but precluding review of administrative regulations and orders. *Id.* at 429–31. See also *Bowles v. Willingham*, 321 U.S. 503 (1944) (reaching the same result in a suit brought by the government seeking to enjoin a proceeding in a state court to restrain administrative actions). Congress seems more and more inclined toward such limits on judicial review. See, e.g., *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289–90 (1978) (Powell, J., concurring). Cf. *McKinney v. Alabama*, 424 U.S. 669 (1976) (avoiding review of an obscenity decree in a state prosecution on the ground that the "in rem" proceeding in which the obscenity issue was determined did not sufficiently protect defendant's first and fourteenth amendment rights).

were asked to enforce. These cases thus could be read to support a constitutional interdiction of judicial deference to administrative law-interpretation, *at least where a private party was resisting coercive governmental action.*<sup>118</sup>

#### IV. THE DIALOGUE

##### A. *The Structure*

Retaining the traditional concern with the role of the courts in the protection of private interests, Hart's Dialogue is an effort to unpack the notion that a person has a right to invoke judicial aid in challenging illegal governmental conduct affecting him.<sup>119</sup> While Hart retains the general distinction between coercive and noncoercive governmental conduct, he introduces important refinements. His central innovation is an insistence that the article III courts have special responsibilities when they themselves are the medium for the application of coercive governmental power against private parties—when, in other words, they are being asked to enforce the governmentally prescribed duties of private parties.

Hart begins with the proposition that such an enforcement court can always examine the validity of any limitation on its law-declaring competence:

It's only a *limitation* on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks the limitation invalid, it's always in a position to say so, and either to ignore it or let the defendant go free. *Crowell v. Benson* and the *Yakus* case make that clear, don't they?<sup>120</sup>

And an enforcement court must make the examination not because of any specific constitutional guarantee (such as due process), but because that task is an essential attribute of the duty of the judicial department. "That's the reason, isn't it, why Hughes invokes Article III as well as the Fifth Amendment in *Crowell v. Benson*? As he says, the case was one 'where the question concerns the proper exercise of the judicial power in enforcing constitutional limitations'."<sup>121</sup>

The most neglected, and to my mind the most frustrating, part of the Dialogue is its discussion of the precise duties of an enforcement court. It seems to me incontrovertible that an enforcement court can and must examine

118. See L. Jaffe, *supra* note 5, at 385-89 (arguing that due process requires full judicial review of law wherever the government engages in coercive conduct—whether the coercion is as a result of judicial or administrative process).

119. See *supra* note 17.

120. Hart & Wechsler, *supra* note 17, at 336. Technically *Crowell* was not an enforcement proceeding but a suit by the employer to set aside an administrative order—in effect, a suit for a declaration of nonliability. But the result would have determined the employer's duties in a subsequent enforcement suit. Thus Hart rightly insists that the court was "in the position of an enforcement court," and he persuasively argues that as a matter of statutory construction, a court should, as it did in *Crowell*, permit a prospective defendant to raise in an advance challenge all issues that would be open to him in a subsequent enforcement proceeding. *Id.* at 337-38. My use of "enforcement court" includes both contexts.

121. *Id.* at 337.

the validity of any limitations on its law-declaring competence, and that some limitations might offend specific constitutional guarantees. But does the article III "duty of the judicial department" mandate the invalidity of every limitation on the *scope* of law-declaring competence of an enforcement court? Is deference always impermissible? Hart apparently believes so.<sup>122</sup> His emphasis, I want to stress, is on *Marbury* as well as *Crowell*:

Q. The *Crowell* case also has a dictum that questions of law, including the question of the existence of evidence to support the administrative decision, must be open to judicial consideration. And you quoted Brandeis as saying *that* was necessary to the supremacy of law. Have those statements stood up?

A. If I can speak broadly and loosely, I'll say yes—they *have* stood up.

Shutting off the courts from questions of law determinative of enforceable duties was one of the things *Yakus* assumed that Congress could *not* do. To be sure, that was a criminal case; but there's no reason to suppose the Court would have made a different assumption if the sanction had been civil.

.....  
Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. *When you do, I'm going back to re-think Marbury v. Madison.*

Q. You put a lot of weight on the point of whether an enforceable legal duty is involved, don't you?

A. Yes.<sup>123</sup>

The anti-deference thesis is, I recognize, somewhat ambiguously urged. Hart seems to require independent judicial determination of *all* questions of law, as is apparent from his discussion of criminal prosecutions like *Yakus*<sup>124</sup> and his visible consternation over use of the then emerging reasonable-basis-in-law standard of review in civil enforcement cases,<sup>125</sup> a matter to which I shall return. Still, less than complete precision inheres in such references as "shutting off the [enforcement] courts from questions of law," as having such questions "withdrawn" from those courts, or in stating (as a reviser's footnote adds) that "we find not a single clear-cut authority for unreviewability

122. Curiously, in an enforcement case Hart seems quite willing to accept without murmur judicial deference to administrative fact finding, *id.* at 338-39—a part of the otherwise "ordinary and humble" judicial task. The argument is not self-evident, as is indicated by the strained analysis in *Crowell v. Benson*, 285 U.S. 22 (1932); see also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2877 (1982) ("[W]hile *Crowell* . . . endorsed the proposition that Congress possesses broad discretion to assign fact-finding functions . . . to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition . . . that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress.")

123. Hart & Wechsler, *supra* note 17, at 340-41 (footnote omitted) (emphasis in last sentence of fourth paragraph added).

124. *Id.* at 341-44.

125. *Id.* at 340.

at the obligation end of the scale.’<sup>126</sup> The crucial question, however, is not the bare existence of judicial review on questions of law but its precise scope.<sup>127</sup> The Dialogue provides no basis for any halfway house for an enforcement court on “legal” questions; Hart’s thesis, as Jaffe paraphrases it, seems to demand that “insofar as the judicial power is invoked in the enforcement of [administrative] order[s], a court must apply all of the relevant law.”<sup>128</sup> If Hart’s position is in fact consistent with some measure of deference, his analysis is, at the very least, in need of very considerable clarification.

## B. Criticism

Hart contrasts enforcement proceedings with “denials” of jurisdiction to plaintiffs complaining of unfavorable administrative conduct. In the latter cases, the court is not being asked to establish and enforce the plaintiff’s own legal duties; rather, plaintiff seeks judicial assistance to redress unfavorable administrative action.<sup>129</sup> In denial of jurisdiction cases, unlike enforcement proceedings, the important questions are, Hart insists, whether there is a substantive right to judicial review<sup>130</sup>—a point on which the distinction between coercive<sup>131</sup> and noncoercive<sup>132</sup> administrative action may be important—and whether vindication of any such right may be confined by Congress to the state courts.<sup>133</sup>

There is intuitive appeal to this structure. The nature of the judicial duty of article III courts is made to vary with whether the court is hurting people,

126. *Id.* at 341 n.20 (quoting 4 K. Davis, *Administrative Law Treatise* 104 (1958)).

127. Professor Jaffe is guilty of eliding these different issues in his discussion of Hart. He cites Hart’s analysis for the proposition of a constitutional right to review without noting that Hart was concerned with the scope of review, see L. Jaffe, *supra* note 5, at 383–84.

128. L. Jaffe, *supra* note 5, at 384 (footnote omitted) (emphasis added).

129. Hart & Wechsler, *supra* note 17, at 344–59. As indicated in *supra* note 120, this category does not include cases where plaintiff’s suit anticipates a future enforcement proceeding against him.

130. The right may stem from the due process clause, or from the specific provisions of the bill of rights. See Monaghan, *First Amendment “Due Process,”* 83 *Harv. L. Rev.* 518, 520–24, 543–51 (1970). Or it might be thought to inhere in the constitutional provision concerning habeas corpus, U.S. Const. art. I, § 9, cl. 2. See Hart & Wechsler, *supra* note 17, at 357.

131. Hart & Wechsler, *supra* note 17, at 348–60.

132. *Id.* at 344–48. This includes, as a special case, *id.* at 344, cases where plaintiff seeks review of the denial of an administrative order that would impose duties on other private persons. Hart treats this issue as part of the larger issue of plaintiff right of access to courts to enforce the duties of other private parties. *Id.* at 344–46. But where that issue manifests itself as a denial of an administrative order, it is, as Hart observes generally, closely akin to the general problem of noncoercive administrative orders.

133. The denial of jurisdiction is not self-executing, wholly beyond judicial scrutiny. E.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). Hart remarks that “a necessary postulate of constitutional government” is a requirement that “a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained.” Hart & Wechsler, *supra* note 17, at 336. The source of this implication is not made clear. In any event, a right to judicial review does not automatically translate into access to the federal courts, since, as Hart recognizes, the state courts can discharge the requirement. *Id.* at 330, 359. Most discussions of congressional authority over jurisdiction center on the denial of review problem. See generally Sager, *The Supreme Court*, 1980

or simply refusing to help them.<sup>134</sup> Where an article III court is itself the medium for the application of coercive governmental power, the judicial duty is that of independent law exposition. Otherwise, the question is whether due process or some other provision of the Constitution grants a right of judicial access to some court, if not an article III court. But Hart's analysis is, I think, in the end unsatisfying even on its own terms. The distinction between enforcement and nonenforcement courts is not only incomplete, it rests upon an undefended and unpersuasive constitutional premise.

Hart's treatment of what he characterizes as "denial of jurisdiction" warrants close examination. Hart focuses upon complete denials of jurisdiction to challenges by private parties complaining of unfavorable administrative conduct.<sup>135</sup> Here the central problem has been the right to any judicial review, not the scope of review.<sup>136</sup> But the now far more common pattern is that of "restricted review." The court is given statutory jurisdiction to review an administrative order such as the denial of a government benefit, but one or more of its functions are restricted by a deference principle; for example, judicial review of facts may be confined to a substantial-basis-in-the-record standard, and judicial review of law limited to a determination whether the administrative order has a reasonable basis in law. Restricted review implicates not the right to judicial review, but its scope. The restricted court is like the enforcement court: each has jurisdiction; each has the function of law declaration restricted; and each "is always in the position to say [that the limitation is invalid]." Hart assumes without discussion<sup>137</sup> that where a complete denial of jurisdiction would be valid, *restricted* judicial review is also permissible. *But this is true only if we focus on coercion rather than judicial involvement in thinking about the nature of the judicial duty.* From the latter perspective, the matter looks quite different. In a denial of jurisdiction case,

Term—Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981).

134. Suppose that the employee in *Crowell* had lost and sought judicial review. Hart insists that this would not be an enforcement proceeding. "The employee in the supposed case simply failed to gain a hoped-for advantage." Hart & Wechsler, *supra* note 17, at 345. See also L. Jaffe, *supra* note 5, at 388 ("But if the agency sends the worker away empty-handed . . . [h]e is not the object of judicial enforcement.").

135. Hart & Wechsler, *supra* note 17, at 344–48. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), is an excellent modern example. A union was held to lack the authority to invoke general federal question jurisdiction to set aside a board order designating a rival union as the authorized collective bargaining representative. Hart argues that the complaining union "did not come under any enforceable duty *not* to bargain, . . . [a]ll it lost was the liberty to bargain with an employer free from an enforceable duty not to bargain with it." Hart & Wechsler, *supra* note 17, at 345.

136. Hart's "denial" discussion also includes cases where plaintiff seeks review of an administrative determination refusing to impose duties on another private party. The difficulty of finding a right to judicial review is substantial here. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1203 (1982). No analogous common law right could be drawn upon, *id.*, and remedial limitations inherent in both mandamus and injunctions recognized administrative discretion in construing the law. Adequate judicial control of administrative conduct in this area raises important issues in contemporary administrative law. *Id.* at 1204–20.

137. See Hart & Wechsler, *supra* note 17, at 348 ("Suppose, further, that [Congress] not only dispenses with judicial enforcement but either limits the jurisdiction of the federal courts to inquire into what the officials do or denies it altogether.").

the court plays no further role if the preclusion is valid; the parties are left where they were before entering the courthouse. In a restricted review case, as in an enforcement proceeding, "judicial power" is brought to bear to resolve the controversy in an authoritative manner.

Functionally, Hart's definition of an enforcement court exempts private suits *against* public officials to enforce their statutory duties from a demand that courts supply all the relevant law. But *so long as the court has general jurisdiction* to render a final judgment, why should the permissible limitations on the court's law-declaring competence vary with whether the private litigant is asserting rights rather than defenses? This is a particularly troublesome question given Hart's concession that the law-declaring competence of a nonenforcement court cannot be restricted on constitutional issues.<sup>138</sup> Moreover, it should be recalled that Hart cites both *Crowell* and *Marbury* in addressing the validity of limitations on enforcement courts with respect to conventional legal issues. But *Marbury*, of course, was itself a proceeding to enforce the duties of a public official.<sup>139</sup>

To my eye, the Dialogue leaves undefended the proposition that the nature of the judicial duty mandated by article III in cases in which the court has jurisdiction to enter a final judgment should turn on whether the individual's rights, duties or "interests" are at stake. Such a position cannot be derived from the language of article III, the thinking of the Framers, or the long history of judicial concern with the protection of private rights. Nor is the position functionally appealing, whether the judicial duty be viewed institutionally (law declaration is what courts "do") or in terms of the benefits supposedly conferred upon litigants by the independent article III tribunals.<sup>140</sup> It seems to me far more congruent with the premises of article III, as stated and as they have evolved in our legal tradition, to insist that exercises of "the judicial power of the United States" cannot vary with whether a private litigant is a plaintiff or a defendant, so long as the court is expected to enter a final judgment on the merits of the claim.

Further exploration of Hart's analysis can be pretermitted, however. A significant run of administrative law cases will fall into his enforcement court category, and we may take this as the strongest case for the proposition that the Constitution controls the degree of deference that article III courts may properly accord "reasonable" agency interpretations of statutory law. If it does not, Hart's emphasis on the special character of enforcement courts possesses no real utility insofar as it is directed to this issue.

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138. See *supra* notes 62 & 63.

139. *Marbury* might be explained as prefiguring the insight that "entitlements" can constitute "property," but if that rationale were adopted, it would sweep into the enforcement category much of the current judicial review of government largesse, to say nothing of the cases involving administrative coercion. *Marbury*, however, cannot be so contained. Whether or not the property label is affixed to the particular government largesse at issue, the object of a suit seeking to review its administrative denial can always be plausibly structured as an enforcement proceeding, an action to vindicate a legal duty against an otherwise unwilling public official.

140. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2864-66 (1982).

V. DELEGATION AND *MARBURY*

## A. Agency Law Making and the Judicial Function

The Lockean principle that the grant of legislative power is one "only to make laws, and not to make legislators"<sup>141</sup> has fallen before the inexorable momentum of the administrative state.<sup>142</sup> "Delegation of 'lawmaking' power is the dynamo of modern government,"<sup>143</sup> a fact underscored by the explosion of agency rule-making in the last two decades. *Fidelity Federal Savings & Loan Association v. De la Cuesta*<sup>144</sup> is only the most recent illustration that "legislation" is not a finished product when it leaves Congress. There, a Federal Home Loan Bank Board regulation, issued pursuant to the Board's power over the "operation" of federally chartered thrift institutions, was held to have pre-empted a state law restricting enforcement of due-on-sale clauses in mortgage loans. The Court disclaimed any authority to disturb " 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.' "<sup>145</sup> Rather, the Court said, "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."<sup>146</sup>

The current fashion is to decry the sweeping delegations of law-making authority conferred upon administrative agencies.<sup>147</sup> But *any* of the proposed formulae for limiting legislative delegations acknowledges that considerable law-making power could be properly conferred upon an administrative agency.<sup>148</sup> Once the propriety of agency law making is recognized, the analytic

141. J. Locke, Second Treatise On Civil Government § 141. On the controverted intellectual basis of the anti-delegation doctrine, see S. Barber, Constitutional Delegation and the Delegation of Congressional Power 11-51 (1975). For a recent survey of the cases, see Note, Rethinking the Nondelegation Doctrine, 62 B.U.L. Rev. 257 (1982).

142. But see *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 673-75 (1980) (Rehnquist, J., concurring).

143. L. Jaffe, *supra* note 5, at 33 (footnote omitted). Delegation is "the instrument through which the close fusion of executive and legislative functions required by the complex nature of modern government may be brought about under a constitution committed to the eighteenth-century doctrine of separation of powers." Wilse, *The Representative Function of Bureaucracy*, 35 Am. Pol. Sci. Rev. 510, 511 (1941), quoted in *Freedman*, *supra* note 4, at 281 n.24. See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977).

144. 102 S. Ct. 3014 (1982).

145. *Id.* at 3022 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

146. *Id.* (citation omitted).

147. See, e.g., *Freedman*, *supra* note 4, at 78-94; see also the sources cited in I K. Davis, *Administrative Law Treatise*, at 149-223 (1978); Note, *supra* note 141, at 257 n.3. It has been noted that the Framers feared legislative usurpation, not the bureaucracy. *Freedman*, *Book Review*, 43 U. Chi. L. Rev. 307, 308-09 (1976). But this is a weak point, since they gave no attention to, nor could they have envisaged, the dimensions of modern delegation. Cf. *Grundstein*, *supra* note 3, at 304 (anti-delegation principle limited to presidential delegations and wholly inapplicable to delegations to administrative agencies).

148. Dean *Freedman*, for example, would revive earlier suggestions that Congress must resolve "controverted" issues of policy. *Freedman*, *supra* note 4, at 80. Professor Barber also would require that Congress resolve "salient" policy issues. S. Barber, *supra* note 141, at 44, 49-51. Unless these terms are used in a Pickwickian sense, they entail considerable subsidiary administrative law-making authority.

problem is considerably simplified. *Judicial deference to agency "interpretation" of law is simply one way of recognizing a delegation of law-making authority to an agency.*<sup>149</sup> To take a very modest example, Congress may, within limits, expressly authorize an agency to define "employees" within the labor acts through the exercise of substantive rule-making power.<sup>150</sup> Precisely the same kind of law-making delegation is achieved if, instead, Congress mandates judicial deference on that issue to either an "interpretive" agency rule or to the results of agency adjudication having "a reasonable basis in law." In each instance, the crucial judicial question is the scope of the authority delegated to the agency. There is, therefore, no constitutional significance to the asserted distinction between substantive and interpretive rule making;<sup>151</sup> if interpretive rule making is coupled with a *Hearst*-like deference principle, it is, from a legal perspective at least, the functional equivalent of substantive rule-making authority.<sup>152</sup> Where deference is not given to an interpretive rule, the result is that norm elaboration authority has not been delegated to the administrative agency; the agency rule simply constitutes advice to the public as to the position which the agency is prepared to enforce and, ultimately, to defend in court.

It is in light of agency competence to make law that the "duty of the judicial department to say what the law is" must be evaluated. The question is put whether "the power of the Congress to define the law's content give[s] Congress unlimited discretion to allocate between the judiciary and the executive the power to interpret the law as it is enforced against the citizen's person or property?"<sup>153</sup> It may very well be that some specific constitutional provisions (such as the first, fifth, and sixth amendments) are relevant here as limitations.<sup>154</sup> And the nondelegation doctrine of article I could impose some limits at least at the margins, prohibiting, for example, a legislative scheme that is tantamount to making the agency interpretation of the reach of its statutory mandate wholly conclusive upon the courts.<sup>155</sup> But unless one is

149. That point seems to be recognized in *Santise v. Schweiker*, 676 F.2d 925, 933 n.21 (3d Cir. 1982). See also J. Landis, *The Administrative Process* 150-51 (1938).

150. See *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

151. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (contrasting substantive and interpretive regulations); see 2 K. Davis, *supra* note 147, at §§ 7.8-7.16 (1979), for an extensive discussion. As a matter of statutory interpretation, however, Congress's failure to grant substantive rule-making authority may well be read as a decision not to delegate law-making power. Deference would then be inappropriate. See *infra* notes 184-85.

152. The notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), should, therefore, apply. See 2 K. Davis, *supra* note 147, at 1-156 (1979). I recognize however that, dynamically viewed, both the agency and the court might be inclined to view their tasks as somewhat different in the two situations.

153. *Hart & Wechsler*, *supra* note 17, at 343 n.23.

154. E.g., *Monaghan*, *supra* note 130. No one, for example, believes that Congress could authorize direct administrative enforcement of criminal penalties. See *Palmore v. United States*, 411 U.S. 389 (1973).

155. This is unlikely to occur in fact. See, e.g., *Yakus v. United States*, 321 U.S. 414, 419-20 (1944) (sustaining grant of price-fixing authority where administrator is charged with effectuating general statutory objects such as price stabilization and where his regulations must "in his judgment . . . be generally fair and equitable"). See also *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 102 S. Ct. 3014 (1982), discussed *supra* text accompanying notes 144-46.

prepared to rethink fundamentally the role of public administration in our constitutional order, article III, standing alone, is not violated by judicial deference to administrative construction of law. Enforcement of other constitutional restrictions aside, the only judicial task is to determine what statutory authority has been conferred upon the administrative agency.<sup>156</sup> Once it has done so, the court has discharged its duty to say what the law is.<sup>157</sup> This is no novel perception. Robert Stern put it accurately long ago:

The duty of the courts in reviewing the administrative decision for error of law is to see that the agency has stayed within the bounds for the exercise of discretion fixed by Congress, and that it has applied the statutory standards and no others. As long as the agency does so, the courts are not to substitute their judgment . . . . [T]he function of the reviewing court in determining the "law" in this field is to search for legislative intention, which of course would include an intention to vest the administrator with discretionary power, and then to decide whether the administrative ruling is consistent with it.<sup>158</sup>

To say that the "court—not the agency—must decide what the statute means" seems to me potentially misleading, at least without elaboration.<sup>159</sup> To be sure, the court must interpret the statute; it must decide what has been committed to the agency. Frequently the court will (or should) understand the statutory mandate as directing it, not the agency, to supply all or most of the relevant meaning. In these circumstances, the agency view is a datum, a highly relevant one, but a datum only; "it is only one input in the interpretational equation."<sup>160</sup> On other occasions, to borrow from Brandeis, "the function of the courts is not one of review but essentially of control—the function of keeping [agencies] within their statutory authority."<sup>161</sup> The court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. In such an empowering arrangement, responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean. In this context, the court is not abdicating its constitu-

156. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested").

157. I do not see that any distinctive problems are involved if Congress authorizes an agency to issue rules and gives it, not the courts, authority to specify what the rules intended. *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 102 S. Ct. 3014, 3025 & n.13 (1982).

158. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 *Harv. L. Rev.* 70, 106-07 (1944). See also Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 *Sup. Ct. Rev.* 53, 67-70; Levin, *supra* note 11, at 588-90. See also W. Chase, *The American Law School and the Rise of Administrative Government* 60-63, 141 (1982).

159. Byse, *supra* note 27, at 191. Professor Byse accurately links his demand with keeping the agency within its statutory authority.

160. *Zuber v. Allen*, 396 U. S. 168, 192 (1969).

161. *Crowell v. Benson*, 285 U.S. 22, 89 (1932) (Brandeis, J., dissenting) (footnote omitted). See also L. Jaffe, *supra* note 5, at 569 (common law courts recognized the idea of a zone of administrative discretion).

tional duty to "say what the law is" by deferring to agency interpretations of law: it is simply applying the law as "made" by the authorized law-making entity. Indeed, it would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.

## B. Hearst Publications

The well-known case of *NLRB v. Hearst Publications*<sup>162</sup> is a paradigmatic illustration of the foregoing principles. *Hearst* involved the status of adult newsboys as "employees" under the National Labor Relations Act. The Court applied the reasonableness standard to this "specific [agency] application of a broad statutory term,"<sup>163</sup> but only after independently determining that the Act was not intended to incorporate either specific state law or a generally distilled common-law standard for distinguishing between employees and independent contractors.<sup>164</sup> Rather, the Court opined, the statute's content must be discerned "primarily from the history, terms and purposes of the legislation,"<sup>165</sup> upon which it expounded at considerable length.<sup>166</sup> The judicial duty was, in the end, not that of fully defining the meaning of "employees," but one of instructing the agency as to the boundaries of its law-making competence.<sup>167</sup>

Hart's description of *Hearst*, concededly an enforcement case, is worth examining:

Q. How do you explain cases like *Gray v. Powell*, and *National Labor Relations Board v. Hearst Publications, Inc.*? . . . Didn't these cases allow the agencies to make final determinations of questions of law?

A. That depends on how you define "law". I think Professor Davis is right in saying that the term "law" in the first sentence I quoted from Justice Brandeis has to be read "as excluding the body of rules and principles that grow out of the exercise of administrative discretion"—at least while the rules are in process of crystallizing. Davis, *Administrative Law* 34 (1941).

In recent years we've recognized increasingly a permissible range of administrative discretion in the shaping of judicially enforceable duties. How wide that discretion should be, and what are the appropriate ways to control it, are crucial questions in adminis-

162. 322 U.S. 111 (1944).

163. *Id.* at 131.

164. *Id.* at 120-24.

165. *Id.* at 124.

166. *Id.* at 124-29.

167. See also *NLRB v. Hendricks County Rural Electric Membership Corp.*, 102 S. Ct. 216 (1981). There the Court agreed with the Board that all confidential employees were not impliedly excluded from the Act's coverage. While extensively analyzing the Board's views and paying respect to its expertise, the Court quite plainly reserved this issue for its own independent judgment. *Id.* at 222-26. But the Court invoked *Hearst* in sustaining the board on a narrower issue—the implied exclusion of those employees possessing access to confidential labor relations information. It was enough, the Court said, that this aspect of the Board's conclusion had a "reasonable basis in law." *Id.* at 228.

trative law. But so long as the courts sit to answer the questions, the spirit of Brandeis' statement is maintained. And, since discretion by hypothesis is not law, the letter of it is not in question.<sup>168</sup>

This account is not satisfying. The opposition of "discretion" to "law" cannot dissolve Hart's problem.<sup>169</sup> Jaffe seems to me entirely correct in describing administrative discretion as the process of combining statutorily relevant factors into a decision. There can be "no determining rule for combining such factors,"<sup>170</sup> although a court could properly determine whether one or more factors had been given either excessive or insufficient weight.<sup>171</sup> But the result of the exercise of discretion is, as it was in *Hearst*, an administrative formulation of a rule of law.<sup>172</sup>

For constitutional purposes at least, the *Hearst* deference doctrine cannot plausibly be confined to cases of statutory "application" as opposed to statutory "construction," or to "mixed" rather than "pure" questions of law.<sup>173</sup> Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm.<sup>174</sup> In any event, distinctions between "construction" and "application" have never been em-

168. Hart & Wechsler, *supra* note 17, at 340 (citations omitted) (footnote omitted).

169. Hart seems to have viewed agency "discretion" much as Holmes viewed the jury, Holmes, *The Common Law* 125-26 (1881); L. Jaffe, *supra* note 5, at 553-54: as a preliminary facet of law making, a description of a process of experimentation.

170. L. Jaffe, *supra* note 5, at 556.

171. See *id.* at 555-56. Cf. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *Yale L.J.* 635, 641-49 (1982) (excessive judicial discretion at remedial stage threatens judicial legitimacy).

172. See also Charles D. Bonanno *Linen Service, Inc. v. NLRB*, 102 S. Ct. 720 (1982). The Court there sustained the Board's view that a bargaining impasse does not justify an employer's unilateral withdrawal from a multiemployer bargaining unit, concluding that the Board had "confined itself within the zone of discretion entrusted to it by Congress," *id.* at 727. The Court added that the dissent "is quite right that this case turns in major part on the extent to which the courts should defer to the Board's judgment with respect to the critical factors involved." *Id.*

173. If such lines were viable it might be argued that such limited judicial deference to administrative construction of law does not involve according agencies law-making power in any significant sense. Analogy might be made to the distribution of functions between judge and jury on the "application" of statutory norms to facts. That issue, it is contended, cannot be resolved *ex ante* by appeal to intrinsic differences between questions of law and of fact, but instead must be decided functionally, on a statute-by-statute basis. H. Hart and A. Sacks, *supra* note 119, at 369-85. Whether the judge should reserve the issue for himself as one of "law" depends upon an assessment, albeit often intuitively made, of such factors as how much more norm elaboration can be meaningfully provided, how fact-dependent the specific problem is, and how importunately the situation disclosed by the evidence calls for certainty and predictability. A similar condition obtains in the allocation of functions between court and agency in the administrative law context, it could be argued. L. Jaffe, *supra* note 5, at 576. But even so, this parallel is not illuminated by the judge-jury analogy. Speaking generally, but I think accurately, little significant norm elaboration is left to the jury, and such as there is entirely swallowed up in the *ad hoc* character of the jury's verdict. By contrast, the deference standard, in anything but a very weak form, suggests *significant* agency discretion in elaboration of the statutory norm, even accepting the premise that the agency is confined to employing judicially approved criteria. Presumably, an agency decision could go either way, and would be sustained by a reviewing court. Such a power to choose authoritatively (and, unlike a jury, with precedential effect) among significantly different modes of conduct seems to me, as it has to others, to constitute agency law making, *id.* at 575-76, with the court accepting the administrative version of the statute's content.

174. See the discussion in L. Jaffe, *supra* note 5, at 562-64, and sources cited in Levin, *supra* note 11, at 337-38 & 339.

ployed to measure what law-declaring authority Congress can confer upon an administrative agency. The substantive rule-making cases make that plain.<sup>175</sup>

*Hearst* sheds considerable light on two other problem areas. First, deference concepts are frequently invoked when the court seems uncertain that there is one correct interpretation of the statute.<sup>176</sup> Why a feeling of uncertainty should generate a conclusion of deference is not clear.<sup>177</sup> My preference is to view these cases as, in principle, reducible to *Hearst*: the agency has been invested with authority to fill in the meaning of the statute, so long as its formulation has a "reasonable basis in law." Second, there is talk, particularly in substantive rule-making cases where deference notions are particularly strong, that, loosely read, might suggest that the central issue for the reviewing court is whether the administrative interpretation of the statute is "not irrational" or "sufficiently reasonable."<sup>178</sup> That is misleading, unless it is understood to rest, as in *Hearst*, upon an anterior judicial conclusion that the agency is acting within the zone committed to it. The case law can be rationalized on such a basis—whether or not all cases were in fact decided with such a perception clearly in mind.<sup>179</sup>

175. See, e.g., *Batterton v. Francis*, 432 U.S. 416, 425–26 (1977).

176. Some decisions seem to reflect such an "uncertainty principle." For example, in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), the Court acknowledged that whether a state variance procedure in an implementation plan under the Clean Air Act was a "revision" or a "postponement" presented a "question [that] does not admit of an easy answer." *Id.* at 75. In sustaining the agency view, the Court noted, "[w]ithout going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted," that "[the agency's construction] was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." *Id.* Compare *United States v. Vogel Fertilizer Co.*, 102 S. Ct. 821, 828 (1982) (Commissioner's view "is not a reasonable statutory interpretation"), with *Peabody v. Stark*, 83 U.S. (16 Wall.) 240, 243 (1872) ("In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner . . .").

177. I must confess that I have never understood why judicial doubt should produce a conclusion of deference. The argument from the comparative expertise of the agency seems to me no stronger here than elsewhere. *L. Jaffe*, *supra* note 5, at 576–85. But see *Levin*, *supra* note 11, at 579. More importantly, to the extent that the deference suggestion is grounded upon a general no-right-answer epistemology, it encounters fundamental systemic difficulties. *Ex ante* it may be that no one conclusion as to what a statute means is ineluctable. Nonetheless there is, in our system, no room for the Scottish verdict of "not proved" on questions of law. The presupposition of the entire legal system is that the court must choose and what it chooses is correct. Thus the Court, for example, continuously chooses between plausible statutory interpretations. The cases in which courts defer in the face of uncertainty must be understood as simply delegations to the agency of a norm-elaboration function.

178. E.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 102 S. Ct. 38, 46 (1981).

179. Two decisions in the last term are illustrative. In *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 102 S. Ct. 38 (1981), the Court took that view of the statute, saying:

Hence, in determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

*Id.* at 46 (citations omitted). But the Court framed the issue in these terms only after rejecting the court of appeals's conclusion that the agency's view contradicted the "plain language" of the

### C. *The Present*

It is worth noting that the fundamental insight of the *Hearst* case seems to be reflected in the current version of the Bumpers amendment.<sup>180</sup> Once again, the proposed amendment requires that the reviewing court shall “independently” decide “all relevant questions of law, [and] interpret . . . statutory provisions.”<sup>181</sup> But it adds that, in so doing, the court shall “take into account the discretionary authority provided to the agency by law.”<sup>182</sup> And it requires that the court independently determine “whether the agency’s action is within the scope of the agency’s jurisdiction.”<sup>183</sup> Considered as a whole these provisions seem to me to capture the right point: the judicial task is to confine the agency within the zone of authority committed to it. But neither the new version of the Bumpers amendment nor *Hearst* does more than frame the issue of central concern to administrative lawyers: when, in discharging its duty to interpret the statute, is the court, rather than the agency, expected to supply the meaning of a statute? At the day-to-day working level, judicial review of administrative law interpretation contains divergent elements in need of a unifying theory. Of course, much necessarily will turn on the particular statutory configuration.<sup>184</sup> But can one fashion any general working principles that will at least point to the proper allocation?<sup>185</sup> That is a subject for another day.<sup>186</sup>

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statute, *id.* at 42–44, and after engaging in an elaborate review of the policy of the Act and its legislative history, *id.* at 44–46. Similarly, *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 102 S. Ct. 3014 (1982), contained an elaborate review of the relevant legislative history, *id.* at 3025–29.

180. See *supra* note 12.

181. Bumpers Amendment, *supra* note 12, § 203(a).

182. *Id.* § 203(c).

183. *Id.*

184. Analytically, the degree of deference that a court should give any agency interpretation of law is properly, within broad constitutional limits, entirely a matter of legislative intent. Recognizing that fact, however, will not generally prove very helpful, for legislatures do not often provide much evidence of their intention to delegate law-making power. Consequently, rules tying the degree of deference to be accorded agency action to the type of agency action involved may become necessary. But see *supra* note 152. Any such rules, however, remain residual rules: they may not trump evidence of a contrary legislative intent.

185. Some obvious elements of the theory are whether the agency has substantive rule making authority, and the precise form in which the agency construction occurred. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), for example, the Court did not face the issue of deference in the context of review of an agency decision, but rather in a suit between private parties. One might suggest that the agency view was thus too informally reached to be given deference. See also *Morton v. Ruiz*, 415 U.S. 199 (1974). But the Court has refused deference even where the agency view was expressly in the context of an adjudicatory proceeding. See, for example, *Woelke & Romero Framing, Inc. v. NLRB*, 102 S. Ct. 2071 (1982), where the Court sustained the Board’s construction of an exemption provision in § 8(e) of the Act, without even a nod to the Board’s expertise, let alone a mention of *Hearst*.

186. The Court’s brief *per curiam* at the end of last term in *Board of Education of Rogers v. McCluskey*, 102 S. Ct. 3469 (1982), is an interesting illustration of the problem in the federalism context. The Supreme Court held that in a § 1983 action the federal courts were not authorized to substitute their interpretation of a local school board’s policies for that of the board itself, at least if the board’s interpretation was reasonable. *Id.* at 3472 (relying on *Wood v. Strickland*, 420 U.S. 308, 326 (1975)). The Court gave no consideration either to abstention principles or to whether the state courts would have deferred to the board in these circumstances.

## VI. JUDICIAL DEFERENCE AND BOUNDARIES

A. *Limited Government*

*Marbury* proceeds, at least in part, upon an apparently unified conception of the judicial function: as the authoritative expositors of law, courts are required to make an independent judicial judgment on the content of the applicable law, whether the legal question is constitutional or statutory. Any line of attack on this position might seem to require a strong separation between constitutional and nonconstitutional adjudication, a separation made tenable once the fact of administrative law-making competence is recognized. But positing such a separation invites one to think further about *Marbury* itself. Why the separation? What is the justification for a denial of direct congressional law-making authority in interpreting the meaning of the Constitution itself? Why not judicial deference here too, as Thayer contended, particularly if judicial review is analogized not to common law adjudication but to the role of courts reviewing administrative action?

*Marbury* itself provides a basis for thinking about this question, and for a unification of theories of judicial review in constitutional and administrative law cases. There is much more in that complex opinion than its reliance on the common law mode of adjudication. Indeed, the suggestion that judicial review can be derived from the "ordinary and humble judicial duty" of the common law courts has little resonance in the late twentieth century. What has endured, however, is *Marbury's* repeated emphasis that a written constitution imposes limits on every organ of government.<sup>187</sup> *Marbury* welded judicial review to the political axiom of limited government. That emphasis was no accident. "Limited government," particularly a fear of legislative usurpation, was the common bond uniting late eighteenth-century political discussion about the meaning of such diverse concepts as a written constitution, fundamental law, social contract, separation of powers, and federalism.<sup>188</sup> We have increasingly come to emphasize the view that the courts have a special function, that of enforcing constitutional limits, a function that cannot be reduced to or meaningfully illuminated by the workings of the ordinary courts. The judicial "duty" to declare the meaning of the Constitution is best viewed as an aspect of this conception of the role of the courts. If not an ineluctable inference from the concept of limited government, it is nonetheless a role to which history has given its sanction, and one around which expectations of the body politic have come to depend in myriad ways.

Judicial review of administrative action is also concerned with limited government. "[T]here is in our society," as Professor Jaffe says, "a pro-

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187. 5 U.S. (1 Cranch) 137, 176-77 (1803). At the end of the nineteenth century, judicial emphasis on enforcing constitutional limits to achieve limited government was commonplace. E.g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

188. Monaghan, *supra* note 65, at 1371 n.47 (1973). It should be noted that however frequently limited government and the protection of private rights were joined, eighteenth-century thinkers did not believe that the protection of private rights exhausted the justification for the enforcement of constitutional limits. *Id.* at 1370-71. Nonetheless, the Court continues to struggle with such a linkage. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752 (1982).

found, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures."<sup>189</sup> But judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally. In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.

### B. *Boundary-Setting in Constitutional Adjudication*

What is striking, in the end, is that there is far less discontinuity between the role of judicial review in administrative law and constitutional law than one might suspect given the formal demands of the independent judgment rule. A conception of the judicial role as restraining only ultra vires administrative action in fact characterizes much of the Court's role in constitutional adjudication. Wherever the rationality test obtains, *Marbury's* demand of independent judicial judgment is a weak one, functionally equivalent to deference, with the judicial role confined to policing boundaries. Congress, for example, is empowered to spend for the "general welfare"<sup>190</sup> and to take property for a "public use."<sup>191</sup> The Court must determine what these words mean. In so doing, it could, for example, hold that spending to relieve the economic dislocations caused by the modern industrial order is not among the goals included in spending for the "general welfare," or that takings that do not result in wide public use of the taken property are not for a "public use." Congress would, in turn, be bound by such conclusions. But once the Court has determined, as it now has, that Congress can spend and take to achieve a virtually unlimited range of goals, the constitutional standard recedes into a deep background with the result that the political branches are empowered to supply much of the operational content of the constitutional clauses.<sup>192</sup> The Court, in short, simply determines whether Congress has exceeded the outer boundaries of a very wide domain for choice. The same analysis holds true, of course, where the rational basis test governs substantive review under the due process or equal protection clauses. The standard is virtually empty because its

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189. L. Jaffe, *supra* note 5, at 321. See also Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Supreme Court*, 96 *Harv. L. Rev.* 4, 59-60 (1982).

190. U.S. Const. art. I, § 8.

191. U.S. Const. amend. V.

192. E.g., *Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("There is a middle ground or certainly a penumbra in which discretion is at large. . . . The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.") For other citations and discussions in connection with this section, see Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353, 369-72 (1981).

premises postulate a virtually indefinite number of permissible legislative goals.<sup>193</sup>

Technically, the Court is, in the foregoing examples, supplying the meaning of the constitutional text: it holds, as a matter of constitutional interpretation, that the political branches are empowered to achieve a broad range of goals. The legislative choice among possible goals is supportable so long as it advances some plausible conception of the public good, a determination that the courts lack the institutional capacity to second-guess except at the margins. The standard of review is thus necessarily weak, and in its application, the Court's task is operationally akin to its role in *Hearst*: setting the boundaries and annulling "clear mistakes."<sup>194</sup>

More meaningful operation of the independent judgment rule exists where the rationality standard is not the controlling legal standard. Even here, however, it is an oversimplification to think that the independent judgment rule results in the Supreme Court's supplying *all* the meaning of the constitutional provision. Constitutional decisions by the Supreme Court are often only a step in a continuous dialogue by the Court with other decision-makers in the constitutional-political system, as the exclusionary rule and eighth amendment cases illustrate.<sup>195</sup> The reactions of Congress, state legislatures, and state courts often have a decided impact on the Court's elaborations of constitutional doctrine. To be sure, independent judgment is reserved to the Court, but its decision as to meaning often reflects the input of other units of government. *Marbury's* demand for independent judgment, in sum, while accurate, does not capture the complexities of constitutional adjudication.<sup>196</sup>

193. See, e.g., *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980) (Congress can sort out railroad employees claiming retirement benefits on the basis of who has a greater equitable claim). For a rare illustration of an invalid end, see *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (legislative purpose to hurt "hippies"). See also *Zobel v. Williams*, 102 S. Ct. 2309, 2315 (1982) (state's scheme of distributing excess dividends from natural resources that favored established residents over new residents was constitutionally unacceptable).

194. Notice also the large role given Congress where the decisive issue turns not on language but on "legislative facts." Compare *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981) (deference to legislative fact finding in federalism challenge), with *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-44 (1978) (no deference to state legislative fact finding in first amendment challenge). See generally Cox, *supra* note 41. The court's deference is particularly significant given the difficulty of separating legal from factual questions. E.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981). See also L. Tribe, *American Constitutional Law 5-14*, at 271 (1978) (law and fact not distinct categories); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1233 (1978) (unrealistic to isolate fact-finding from constitutional decisionmaking).

195. See *Coker v. Georgia*, 433 U.S. 584 (1977) (upholding the death penalty, noting legislative responses to *Furman v. Georgia*, 408 U.S. 238 (1972)); *Gregg v. Georgia*, 428 U.S. 153 (1976) (same); *Mapp v. Ohio*, 367 U.S. 643 (1961) (relying on developments in state courts).

196. I am indebted to a wide range of people for their helpful comments on this paper, but I am particularly indebted to Ira Lupu and Bruce Ackerman for their comments on this section.