"It is really true what philosophy tells us, that life must be understood backwards. But with this, one forgets the second proposition, that it must be lived forwards. A proposition which, the more it is subjected to careful thought, the more it ends up concluding precisely that life at any given moment cannot really ever be fully understood; exactly because there is no single moment where time stops completely in order for me to take position [to do this]: going backwards.”

---Søren Kierkegaard

What is true of understanding our own lives life in general is, of course, true also of understanding in real time the institutions under which we live, including constitutional orders. There is not only the stunning suggestion, usually attributed to Zhou en-Lai, that it is “too early to tell” what the consequences of the French Revolution have been, given that we are still living under its shadow and thus subject to whatever revised understandings the future will bring. But it is also the case that as historians—to whatever degree law professors choose to embrace that role—we should try to look at the world as much as possible as it likely appeared to the objects of our historical inquiries. We have the benefit of knowing, if not the completion of the story, at least what acts two, three, and even four might look like, whereas the would-be founders of any

1 W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin; Visiting Professor of Law, Harvard Law School, Fall 2017. This is a draft prepared for delivery and discussion at the University of Chicago Law School on October 13, 21017, at a conference “From Parchment to Practice: Implementing New Constitutions.” I am extremely grateful to Tom Ginsburg and Aziz Huq for inviting me, not least because my own work is far from being either “large-n” or even particularly empirically sophisticated with regard to the “small-n” that I focus on. In any event, I will be grateful for any responses and suggestions for improvement, which can be sent to me at slevinson@law.utexas.edu As is always the case, I am grateful to Mark Graber for comments on an earlier draft.

constitutional order are painstakingly trying to set down Act One, Scene One, with the hope that it will cohere enough (and, perhaps, receive enough support from the political equivalents of financial angels, editors, or whoever must be appeased) to move on to Scene Two and then, with inspiration and good fortune, to further acts.

I take it that one topic of our conference is the degree to which constitutions can be successful at all in their presumed purposes. This presupposes, of course, that we can establish what the purposes are and then “grade” a given constitution against them. Indeed, my wife and I have just published a book, directed primarily at a teen-age audience, called *Fault Lines in the Constitution*, and we emphasize the value of looking closely at the Preamble in order to grasp the aspirations of the Constitution; then, at the end of the book, we grade the Constitution, as of 2017, with regard to achieving the goals set out. We give the Constitution a C+, which may in fact be generous! But, frankly, this presumes that the purpose of the Constitution was to be disruptive of at least some important aspects of the status quo, similar, perhaps, to the Indian Constitution as notably described by Gary Jacobsohn in his book the role that eliminating at least some aspects of the caste system was central to the aspirations, and therefore constitutional identity, of Indians who drafted that country’s constitution in 1947. As acerbic critics of the U.S. Constitution noted at the time, there is a potentially fatal contradiction between the aim of “establishing Justice” and entrenching slavery, even if that word was never actually used. And we continue to debate whether the drafters genuinely believed that slavery was a declining institution or, as argued by Charles Pinckney, among others, a thriving part of both the Southern ethos and economy.

If, as I believe was the case, William Lloyd Garrison was basically correct in describing the Constitution as a “covenant with Death and an Agreement with Hell,” then one might grade the Constitution by reference to the degree that it lived up to that agreement. From this perspective, cases like *Prigg v. Pennsylvania* and even *Dred Scott* are far from aberrational; instead, they represent entirely good-faith efforts to live up to the dreadful bargain struck in 1787, to prevent the Fugitive Slave Clause, for example, from becoming a mere partment barrier that would not in fact serve to protect the rights of slaveowners. That bargain required not disruption of the status quo in favor of radical visions of equal rights, nowhere spelled out in the Constitution however important they might have been to the Declaration of Independence,
but, rather, the maintenance of an uncertain and unsteady alliance among thirteen quite disparate colonies-become-states.

It is important, therefore, to try to imagine, to the degree we can, what were the central concerns of those framing the Constitution in 1787. It is certainly thinkable that the central concern was simply whether the new Constitution was likely to survive any longer than America’s “first constitution,” the basically forgotten (or, in a Freudian sense, “repressed”) Articles of Confederation. In a jurisprudential version of the Oedipal drama, perhaps, that first constitution was decisively slain by the Framers of 1787 because it was viewed, correctly or not, as having established an “imbecilic” form of government that would not in fact provide the basis for an enduring United States of America. As a culture we prefer not to dwell on this primal act of juridical violence, unlike, say, the more heroic and unambiguous violence attached to the secession of the colonies from the British Empire in 1776-1783. But surely every single delegate in Philadelphia was aware that the Articles, drafted in 1777 and declared operative in 1781, with the ratification by Maryland, were being eviscerated after a grand total of six years. Moreover, it is likely that at least the New England delegates were aware that the New Hampshire constitution of 1776 had been replaced in 1784, and one of the most interesting features of that Constitution—which I confess I deeply wish had become part of the U.S. Constitution—was the ability of the New Hampshire electorate at then-seven-year intervals to vote whether to have a new state constitutional convention. There was no good reason to believe that the 1784 constitution would “stick.” One of the more intriguing features of New Hampshire constitutional politics is that there have in fact been seventeen such conventions, which have successfully proposed many amendments to the constitution, but as a notional matter the state continues to operate under the 1784 constitution. Pennsylvania would not junk its radical constitution of 1776, which among other things was unicameral, until 1790, but again the savants of Philadelphia were undoubtedly aware of the harsh criticisms directed at it and could not have been surprised that it suffered the same ignoble fate as the Articles.

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So if one imagines lives looking forward, there was no particular reason for members of the Framing generation to be particularly optimistic that their handiwork would survive even nineteen years, the time-span of the “typical” constitution established by the backword-looking analysis of Ginsburg, Elkins, and Melton. What they knew, as Publius asserted in the first paragraph of Federalist 1, was that the existing government was “inefficacious”—only later would he substitute “imbecilic”—and something had to be done, immediately, if the wobbling new nation was to survive.

But even general agreement that something needed to be done did not establish necessary agreement on the particulars. Politics did not stop simply because of a shared sense of urgency. Any doubt on this score should be dispelled by reading Michael Klarman’s magnificent reconstruction of the process of constitutional formation.⁴ So one important aspect of the history of ’87 is the compromises that were necessary to achieve the overarching goal, which was not to “establish Justice” but, rather, to get agreement of the thirteen states to establish at least some kind of new, far more “consolidated,” government in lieu of the “imbecilic” status quo that appeared destined for failure. And such failure would likely result in the dissolution of the ostensible “perpetual Union” into two or three contentious new countries along the Atlantic coast, with attendant prospects of European-like endless warfare (not least because of the incentive of those European powers to seek alliances with one of the new countries, whether New England, Mid-Atlantica, or Dixie, against the others.⁵ One cannot possibly understand the Federalist, especially its early essays, without acknowledging the beat of potential war drums in the background and the raw fear of what a disunited United States would portend. Publius expressed no confidence that the country would survive in the absence of accepting the radically new constitutional order that had been designed in Philadelphia. The new Constitution would give us quite literally a fighting chance, but one could not feel truly secure about the long-term prospects for survival.

But, as already indicated, that new order was scarcely the result of a Rawlsian-like process of the disinterested “reflection and choice” valorized in Federalist 1. John Roche

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famously referred to the Convention as a “reform caucus in action,” with the kinds of sausage-like compromises necessary to achieve political goals. I have several times quoted Roche, a notable political scientist of the mid-20th century, for what I am sure I heard him say at a gathering of the American Political Science Association: “Power corrupts, and the prospect of losing power corrupts absolutely.” So one must understand the Convention, and then constitutional politics thereafter, in terms of those most fearful of losing their power and the threats they could make against those who wanted to take it away. In Philadelphia itself, the chief threat was simply to walk out and torpedo the project of constitutional reform, as illustrated especially by Delaware. (Rhode Island, of course, had simply refused to show up, given their delusionary belief that they would automatically be able to retain the veto power granted by Article XIII of the Articles that required unanimous consent of all state legislatures to any proposed changes in the Articles.)

The chief compromises that made the Constitution possible concerned both slavery and the allocation of voting power in the Senate. The latter is often described as the “Great Compromise,” though that title is rarely used with regard to the three-fifths rule that gave slave-owning states a significant bonus in the House of Representatives and, therefore, the electoral college and, because of presidential ability to name judges, the judiciary as well. But Madison detested the “Great Compromise,” describing it in Federalist 62 only as a “lesser evil” than dissolution of the Union. Obviously, the same could be said of the compromises with slavery. The lesson is that one must sometimes make pacts with the devil because the perceived alternative, at least for lives being lived forward and, therefore, being perceived only through a glass darkly, appears worse. From our vantage point, we can assess the validity of what was seen earlier. That is the advantage that those of us looking backward have, but we should, at the least, be charitable toward those who enjoyed no such possibilities.

We can, of course, adopt a Kantian posture and declare that it is simply illegitimate ever to make compromises that we know are, in at least some sense, “evil,” but that is to reject the wisdom of Michael Walzer, Max Weber (and, perhaps Machiavelli) about the difference between living in a distinctly political world of “dirty hands” and a very different world where one can think only of ultimate values and ends. And one is most likely to dirty one’s hands when one fears the adverse consequences of not doing so. After all, if one is not simply a sociopath, why would one ever consciously dirty one’s hands if no perceived gains were viewed to follow?
Perhaps the calculation will turn out to be a mistake, but at this point we get into the world of prophylactic decisionmaking and the precautionary principle, both of which are necessarily relevant to constitutional designers and then those charged afterward with giving concrete meaning to the words on the page.

It may be worth noting, though, that raw compromises reached as the result of bargaining rather than as the outcome of a genuinely deliberative process in which a genuine consensus is reached as to what is desirable are likely to be particularly unstable. After all, even if one has written down the terms of the compromise in, say, the Fugivie Slave Clause, what reason is there not to believe that it will indeed turn out to be simply a “parchment barrier” that states antagonistic to slavery will feel altogether free to ignore the moment the balance of practical power has shifted in their favor?

So if one begins by emphasizing the anxieties that were pervasive in 1787-88 about the very survival of the young nation, when is it plausible to believe that those anxieties came to an end, with attendant consequences for the enterprise of constitutional interpretation or, especially at the state level, significant constitutional amendment, if not outright replacement, by a new constitution? Although much understudied and undertaught, the pre-Marshall period of American constitutionalism certainly manifests some of the relevant anxieties. The first great Supreme Court decision, after all, was Chisholm v. Georgia, in which four of the five justices held, I believe altogether correctly, that Georgia had no immunity from being brought before a federal court to defend itself against a charge that it owed an estate a debt for services rendered during the Revolutionary War. Chief Justice Jay and Justice Wilson in particular both emphasized that the idea of “state sovereignty” was simply a chimera, that there was no sovereign in the United States other than “We the People.” Although there is some dispute about the magnitude of the response to Chisholm, there can be no doubt that sufficient political resources were found to elicit the Eleventh Amendment in order to negate Chisholm and underscore the unhappiness of at least three-quarters of the states with what they obviously viewed as the heretical rejection of their sovereign status. And by 1798, with the Kentucky and Virginia Resolutions, one saw a more fully elaborated theory of state sovereignty via the “Compact Theory,” but also the threats to at least one version of the constitutional order posed by nullification.
The Resolutions are vivid examples of “the Constitution outside the courts,” but no less important for that. After all, their basic claim, beyond the Compact Argument, was that the Federalist Congress had indeed treated the First Amendment as a mere parchment barrier in its zeal to criminalize the Jeffersonian opposition. (This is, of course, most memorably instantiated in the fact that it was a criminal offense to case the President (John Adams), but not the Vice President (Thomas Jefferson) into disrepute. One might also mention in this context the Whiskey Rebellion that took place over 1791-1794, very near the beginning of the new constitutional order. At the time, it forced George Washington quite literally to get back on his horse and to become a very concrete Commander-in-Chief of U.S. forces putting down a traitorous rebellion. Perhaps no one really believed that it threatened the survival of the regime, but we’ll never know what would have happened had the forces not been called out. Interestingly enough, Washington illustrated both his magnanimity and political good sense in using his pardon power to erase the death sentences imposed on John Mitchell and Philip Wigle. The most interesting defense offered of the Pardon power by Publius, in *Federalist 72* was a *realpolitik* analysis of the wisdom of giving to the President the power to pardon even acknowledged traitors or rebels in order to demonstrate mercy and reintegrate them and their followers back into the political order rather than create martyrs and sullen devotees of their memories. To put it mildly, the Whiskey Rebellion plays little role in the way legal academics, at last, teach American constitutional development, but that is precisely because we have the luxury of looking backward and being able, rightly or not, to dismiss any genuine light it might cast on the constitutional enterprise.

For most members of the legal academy, it is John Marshall and his cases, quite literally as well as figuratively, that frame the first great period American constitutional development. But what if we imaginatively try to look at this period from a forward-looking perspective? In this context, I want to look at two great cases—or chestnuts—indelibly linked with Marshall Court, *Marbury v. Madison* and *McCulloch v. Maryland*. Although it will be necessary, at least at points, to refer to doctrines they may be thought to stand for, I am more interested in what they might tell us about constitutional decisionmaking when one is (or is not) worried about regime (or even institutional) survival. And, as already illustrated by reference to Kentucky and Virginia Resolutions and the Whiskey Rebellion, it is advisable to keep looking beyond the
judiciary if we are to grapple with the full panoply of threats to the constitutional order and how, at least until 1861, they were surmounted.

Rightly or wrongly, I have developed a certain amount of notoriety for my failure to teach Marbury v. Madison. In an article defending my practice, based primarily on the opportunity costs involved in taking the time to teach Marbury to students who are unlikely to have adequate grounding in the relevant American history, I explicitly noted that I taught the case at the Central European University in Budapest to a variety of representatives from what was then called “the region,” which extended well into the former Soviet Union. More to the point, the reason that these individuals, some law students and some, as I recall, practicing judges, might well find the case interesting is not in the least the inherent interest of whether Congress has the authority to add to the original jurisdiction of the Supreme Court, an issue that almost no serious adult could really care about. Rather, the case can easily be interpreted in the context both of regime and institutional maintenance. Both are of obvious interest to anyone from Central Europe.

Indeed, at the time one of the front-page issues was the willingness of Serbs in the region of Republikia Srpsks, notionally within the country of Bosnia-Herzegovina, to obey decisions of the Bosnian Constitutional Court. Perhaps it is worth noting in this context that two of the tribunals nine members are selected by the National Assembly of the Republic of Srpska, while four are selected by the House of Representatives of the Federation of Bosnia and Herzegovina. The remaining three members are selected by the President of the European Court of Justice in consultation with the president of Bosnia-Herzegovina, but they cannot be citizens of the country of adjoining state. Establishing and maintaining new national institutions is scarcely a topic of merely academic institutions to anyone in “the region,” whereas it is a question of surprisingly little interest to most academic lawyers in the United States.

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6 See Sanford Levinson, Why I Don’t Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either, 38 WAKE FOREST LAW REVIEW 553 (2003). See also Jack Balkin and Sanford Levinson, What are the Facts of Marbury?, 20 CONSTITUTIONAL COMMENTARY 255 (2004).
One other thing I rarely do in my teaching is ask students to “state the facts of the case,” finding it, generally speaking, to waste valuable time. But when I taught *Marbury*, I would make an exception, for a very simple reason. The question is a trap to which no correct answer can be given. If a diligent student sticks to the narrative offered by Marshall in the text of the opinion, there will obviously be no notice taken of the overhang of the 1800 election and the Midnight Judges imposed on the country in literally the waning days of the Adams Administration (including, of course, Marshall’s chief justiceship itself). As with many important Supreme Court cases, one literally cannot understand what it is about by remaining within the four corners of the text. Judges can be notoriously unreliable narrators. On the other hand, if an historically aware student places *Marbury* within the context of the election and its aftermath (including the attempt to impeach Justice Samuel Chase), then one can ask where she got those facts from and whether it is her (or our) general practice to go outside the text in order to determine what the case is “really” about. The answer may well be (or should be) yes, but to adopt this as a general practice would make hash of almost all current casebooks, among other things.

In any event, if one does take the time to teach *Marbury*, then students should be made aware that those living their lives in 1800 could not be completely confident that the United States would survive its first encounter with the patent deficiency and dysfunctionality of the electoral college as a means of selecting the President of the United States. The stupidity of the Democratic-Republicans led them, unlike the Federalists, to ignore the necessity of making sure that their “genuine” champion, Thomas Jefferson, received at least one more electoral vote than his running mate, Aaron Burr. This created the tie vote, which required the intervention of the House of Representatives, on a one-state/one-vote basis to break the tie. This was finally done on the 36th ballot when Delaware’s sole Federalist representative, James Bayard, agreed to vote for Jefferson. Perhaps he simply acquiesced to the fervent opposition against Burr by Alexander Hamilton. But it is possible as well that he was all too aware that the governors of both Pennsylvania and Virginia had threatened to call out their state militias and to march on the brand new national capital of Washington, D.C., in order to assure Jefferson’s selection. We know, looking backward, that the United States would successfully weather the dispute. Students might even learn about the Twelfth Amendment, which was designed not only to make impossible a repetition of the particular kind of tie vote received in 1800, but also, and perhaps more importantly, implicitly to recognize the reality of political parties (and, therefore, of
“tickets” running together for the separate offices of president and vice-president. Mark Graber has argued that from one perspective, this could be said to represent the conclusion of the constitutional order of 1787, based, however implausibly, on the hope to tame “faction” by the mechanisms of an “extended republic” and reliance on public-spirited and virtuous Publians. At the very least, the Twelfth Amendment is not a merely “technical” tweak; it represents a fundamental shift in the way our constitutional order would be governed. Among other things, the reality, with some exceptions, is that almost no serious person in the future would regard vice presidents as in fact the set of second-most-capable persons in the country to enter the White House. They would, with rare exceptions, be picked to “balance” tickets and appeal to given constituencies.

As it happened, Thomas Jefferson as President Indeed presided over the doubling of the size of the new country with the Louisiana Purchase of 1803, which was far more significant in every conceivable way than Marbury (though I believe that the University of Texas Law School was unique in observing the bicentennial of the former instead of the latter in 2003). I believe that our casebook is unique in including the story of the Purchase and, more to the point, the fact that Jefferson firmly doubted that he had the constitutional authority to engage in it, not least because by any reckoning it fundamentally transformed every aspect of the United States as a social, economic, political, and constitutional order—and, ultimately, led quite directly to the dissolution of the Union in 1861.

Marshall in 1802-1803 could scarcely have been confident of an entirely happy ending to the issues roiling America at the time, beginning with his own survival as Chief Justice against potential attempts at impeachment. And, of course, there was the little matter of the Jeffersonian purge of the entirety of the intermediate federal judiciary that was created as part of the 1801 Judiciary Act. The Act was a magnificent, though ill-fated, farewell gift by the Federalist lame-duck Congress to the repudiated John Adams, who promptly appointed sixteen Federalists to fill the newly created six circuits. Not surprisingly, at least to anyone with a political sensibility, the Act did not stand. The Judiciary Act of 1802 retained “circuit courts,” but there were no “circuit judges” as such. Instead, circuit courts would consist of a given Supreme Court justice “riding circuit” and district judges from the locality. This purge was upheld in a case decided a week after Marbury, Stuart v. Laird. Except to the legal professoriate and their students, it is by almost any account more important than Marbury with regard to the central concerns of this
conference. One reason, perhaps, for the general ignorance of the case is that it is one of the relatively few constitutional cases that Marshall assigned to others, in this case Justice William Patterson, who wrote a perfunctory and near-opaque opinion explaining why the purge raised no constitutional problems. It appears that there may have been internal dissents within the Court and that at least one justice suggested the equivalent of a “strike” with regard to the onerous duties of circuit riding. None of this happened, of course, because prudence suggested that angry Jeffersonians would not be likely to accept such a challenge to their authority with equanimity.

There are surely interesting passages in *Marbury* about the difference between ministerial duty and discretionary authority, the status of written constitutions, and the role of the judiciary. But, as my mentor Robert McCloskey suggested long ago in his almost breathless encomium to Marshall in *The American Supreme Court*, what is most significant about the decision is the abject failure of Marshall in fact to issue an order to James Madison (or Thomas Jefferson) that would quite likely be ignored. The Supreme Court, most definitely looking backward, might have exclaimed in the 1958 Cooper v. Aaron that *Marbury* established “the basic principle that the Federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system,” but this is patently incorrect as a forward-looking statement in 1803. Indeed, it is worth mentioning that one reason for the whistling-past-the-graveyard tone of *Cooper* is precisely that the Court in 1958 could be no more truly certain about its own survival as the “supreme expositor of the Constitution,” though Eisenhower’s support, however reluctant, for *Brown v. Board of Education* was surely reassuring. In any event, *Marbury* is, above all, exemplary of the “passive virtues,” even if we amend that notion by adopting Mark Graber’s description of Marshall as often exhibiting the “passive-aggressive” virtues. As Gerald Gunther, no fan of Bickel’s concept, denounced those virtues as the patent interjection of raw politics into the sacrosanct temple of legal reasoning. As he so memorably put it, Bickel was advocating that the Court be 100% principled, but only 20% of the time.

But does our response to the jibe depend on our reading of the historical record and our own evaluation of the empirical circumstances facing the court—or anyone else claiming to be acting under the imprimatur of constitutional authority? Should conscientious constitutionalists, whether on the Court or in the White House (or anywhere else) be like captains of great vessels prepared to go down with their ships in the name of abstract constitutional principles, or should
they be instead prepared to do whatever it takes to save the “ship of state,” even if this necessarily includes disregarding some constitutional principles and treating them indeed as mere “parchment barriers”? And, incidentally, does the answer to this question depend on the substantive importance of the principles at stake? With regard to the relatively few parts of the Constitution that are explicitly devoted to “establishing justice,” perhaps one might believe that they merit obedience even at high costs. We could transform the negative image of the Constitution as a “suicide pact” into one that requires, like other religious texts, the willingness of adherents to martyr themselves (and their communities) in behalf of basic principles. But why would anyone believe, for example, that adherence to baroque features of the separation of power—or even adherence to the principle of fixed elections in the midst of war—would constitute such a principle?

What we can say, looking backward, is that Marshall navigated the problems presented by 1800 and its aftermath with great skill (and, perhaps, some raw luck). But could this necessarily have been predicted in 1803? One thing we do know is that Marshall never directly confronted presidential authority, save in the very odd case of Little v. Barreme,7 where the overreaching president in question was the now-retired (and defeated) John Adams. Perhaps Jefferson believed that he was the “real” target, but there is no caselaw to support this.

McCulloch v. Maryland, about which I endlessly obsess, is altogether different from Marbury. If the latter exemplifies the passive virtues, then McCulloch is almost strident in its invocation of both judicial and national power. One might analyze it entirely internally, with regard to its “fidelity,” or lack of same, to the 1787 Constitution, but that is really beside the point. One might well agree, for example, with James Boyd White, who both described McCulloch as an “amendment” rather than a truly good-faith “interpretation” of the pre-existing Constitution, and then went on to say that he doesn’t mean that as a criticism. Perhaps we should put this in the context of the famous mid-19th century diarist, George Templeton Strong, who said of Abraham Lincoln that if he felt it necessary to violate the Constitution in order to maintain the Union, then all the better for Lincoln. I have come to agree with Felix Frankfurter that the most important single sentence in the canon is Marshall’s statement never to forget “that it is a constitution we are expounding,” but only if that is combined with a statement several

7 6 U.S. 170 (1804).
paragraphs letter that if one wishes the Constitution to “endure,” then it “must be adapted to the various crises of human affairs.” Constitutions that cannot be so adapted, or regimes who are led by persons too rigid to engage in necessary adaptation, will fail. So, inevitably, the metaquestion hanging over a conference like ours is the success, or failure, of sufficient constitutional adaptation in given countries that has allowed (or will allow in the future) the overall maintenance of the constitutional order even if not some particular version of “the Constitution” in all of its pristine glory. And under what circumstances do we regard “adaptations” as signaling the conclusion of one constitutional order and the replacement by a new one. After all, as Ginsburg et al. freely admit, it is no easy matter to decide exactly how long a given constitution “endures” in the absence of certain formal criteria that may rarely be present.

So what does McCulloch do, performatively? Consider only the truly remarkable first paragraph, which I always have my students read aloud, with frequent interruptions in order to try to understands Marshall’s rhetorical strategies:

In the case now to be determined, the defendant, a **sovereign State**, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. **But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.** (emphasis added)

Surely one must ask what possessed Marshall to begin his opinion by referring to Maryland as a “sovereign state,” a term, incidentally, nowhere used within the text of the Constitution itself. I always ask students to define the term “sovereign state.” Most of them, I think it’s fair to say, have not thought deeply (or at all) about the term prior to coming to law school. But perhaps the most standard meaning of “sovereignty” has to do with the notion of unrestrained power. This is not surprising if one accepts, for example, Carl Schmitt’s notion that
the modern “state” is simply a secularized version of an older divine order featuring a sometimes terrifyingly all-powerful God. In a course I’ve taught at both Harvard Law School and the University of Texas Law School called “Aspects of Sovereignty,” I begin with the Abraham-Isaac story from Genesis, go on to the Book of Job, and then take up some materials from both Christianity and Islam, all emphasizing the duty to submit without question to God’s sovereignty. I’ve already alluded to the first great constitutional opinion delivered by the Supreme Court, *Chisholm v. Georgia*, which thoroughly rejects the very possibility of Marshall’s later description of Maryland.

*Chisholm*, of course, was written before one of the most important aspects of the Marshallian revolution, which was the displacement of the British custom of seriatim opinions with an “Opinion of the Court,” preferably, at for Marshall, without dissent (and written by himself). But consider only the words of Justice James Wilson, by any account one of the most important figures at the Philadelphia Convention and the Pennsylvania ratifying convention afterward and the author of the first great American book on law in a democratic republic: “To the Constitution of the United States,” wrote Wilson,

> the term SOVEREIGN, is totally unknown….They might have announced themselves “SOVEREIGN” people of the United States. But serenely conscious of the fact, they avoided the ostentatious declaration…. In one sense, the term “sovereign” has for its correlative “subject.” In this sense, the term can receive no application, for it has no object in the Constitution of the United states. Under that Constitution, there are citizens, but no subjects….As a citizen, I know the government of [Georgia] to be republican; and my short definition of such a government is one constructed on this principle—that the supreme power resides in the body of the people…. As to the purposes of the Union, therefore, Georgia is NOT a sovereign state…. [capitalization in original]

So, we might ask, why did Marshall choose to open the Pandora’s box of “state sovereignty” within an opinion that thoroughly rejects the notion, whether as a theory of constitutional formation—see paragraphs 7-11, where he attempts to rebut the Jefferson-Madison “compact theory” of constitutional ontology—or practical interpretation, as in the second part of the opinion ruthlessly limiting the power of Maryland to invoke its taxing power against the Bank of the United States? Is this a tip of the Marshallian hat to a post-1793 constitutional culture that he recognizes now includes the concept of “state sovereignty,” whatever his own
views of the matter? Or is it a tacit recognition of the implications of the Treaty of Paris of 1783 that formally ended the secessionist struggle between the American colonies and the British Empire? Article One of that Treaty reads as follows: “His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent states, that he treats with them as such. . . .” Federalist 39 appears to accept the notion that the states even within the Articles of Confederation maintained their “sovereignty.”

There is a reason, after all, that the original United States was deemed a confederation; Pufendorf and Montesquieu indeed recognized that sovereign states could agree to place limited aspects of their powers into, say, a military alliance. But the point is that confederations were indeed “limited governments” with only very narrow assigned powers, as was the notorious case with the Articles—and explained the perception that the government created by them was “imbecilic.” The Constitution did create a brand new, decidedly non-confederal form of government, as Marshall both realized and celebrated. But that only underscores the oddity of his beginning the opinion the way he does. Was Homer nodding, or was there some ascertainable purpose to it? I frankly have no real idea.

But perhaps it is worth taking time to dwell on the beginning of the second emphasized portion of Marshall’s opening paragraph, which alludes to the background conditions of the decision. Nothing, of course, is spelled out—yet another problem when teaching students who are basically ignorant about American history—but presumably we who are teaching the case are aware that 1819 is the year of the great debate over the admission of Missouri to the Union. What William Freehling has accurately denominated the “Midwest Purchase,” insofar as Louisiana turned out to be a relatively trivial part of the vast new lands incorporated within the United States in 1803, was beginning to reveal its full complexities. As much as anything, of course, it was Jefferson’s decision in 1803 to accept the remarkable deal offered by Napoleon, almost infinitely more far reaching than the modest hopes of America’s negotiators simply to procure New Orleans and a bit of surrounding territory, that sent us on our inexorable course to civil war. Putting one’s views about the morality of slavery to one’s side, it is easily possible to imagine a stable equilibrium with regard to the original territory of the United States even
including the addition of Louisiana alone. The House Divided would stand, at least so long as the benefits of Union were recognizable and the political structures established by the Constitution of 1787 guaranteed the maintenance of what Graber has called bi-sectionality, i.e., the inability of either North or South to impose its wishes on the other. But 1803 in its actual domain changed everything, even if not immediately. By 1819, though, it was becoming obvious that the equilibrium of 1787 and the addition of both the “Northwest states” that we now call the American mid-West and the “Southwest states” carved out of Virginia, North Carolina, and Georgia was open to what Joseph Schumpeter might have called “disruption,” whether or not “creative.”

Marshall was necessarily living his life forward. In 1803, this counseled abject capitulation to the Jeffersonian critics of the Midnight judges in Marbury and Stuart. By 1819, perhaps he shared the backward-looking perception that he was living in a “Era of Good Feelings,” but the first paragraph suggests a more complex reality. There was the possibility of “hostility” of a more serious nature than simple litigation and angry editorials in the partisan press. Was he being sensationalist or even paranoid? Looking backward, we answer yes at our peril. 750,000 Americans (depending on how one classifies those who fought for the Confederacy) would die within a half-century, after all. Perhaps what is most amazing, even bizarre, is his claim, offered without the slightest substantiation by way of ordinary evidence, that “by this tribunal alone can the decision be made” and that “the Constitution of our country devolved this important duty” upon the Supreme Court. If one is maximally uncharitable, one might hear echoes of a later Donald Trump proclaiming that “I alone” can save the country from its presumptively dangerous situation.

But I most certainly do not mean to equate the Republican statesman John Marshall with the unhinged and demagogic Donald Trump. One must assume that Marshall genuinely thought that the country was at risk of potential hostilities and even dissolution. 1819 was thirty years removed from Washington’s inauguration; he didn’t need to read Ginsburg et al. to know that constitutional endurance was a contingent and not a necessary reality. Things could easily have gone the other way in 1800-1803. Perhaps the country was more stable in 1819; it had, after all, seemingly “won” the War of 1812 (which necessitated chartering a Second Bank of the United States in 1816) and established itself more certainly as a genuinely independent nation that could
hold its own with the British hegemon. But one suspects that Marshall was aware of the Hartford Convention and the rumors that at least some of the New Englanders were muttering about secession, given that their attempts to “nullify” the Jeffersonian Embargo was unsuccessful. And there is the cautionary note at the very beginning of the opinion. We should not take our good fortune for granted. The Supreme Court, instead of acting passively as in Marbury, should step up and help “adapt” the Constitution to make national endurance more likely than it might otherwise be.

This required an open-ended reading of the Necessary and Proper Clause, coupled with reinining in the power of Maryland, the so-called “sovereign state,” to tax the Bank. Madison was appalled by the reasoning in the opinion; as Eric Lazaroff has shown, Madisonian support in 1816 for rechartering the Bank was based on its connection with Congress’s assigned power over “coinage,” an argument totally unrecognized by Marshall in 1819. But, as is usually the case, results were more important than reasoning, and most national elites accepted the desirability of the Bank by 1819. However, Ohio, another would-be “sovereign state” did not go gently into the new Marshallian world. It, too, tried to cripple by Bank by seizing the assets of the branch located in Chillicothe, and it was not clear that Ohio would peacefully submit to the doctrine enunciated in McCulloch. Looking backward, we know what the answer was; Osborne v. Bank of the United States was a stinging defeat for Ohioans who hoped to generate a reconsideration—and reversal—of McCulloch. Still, Marshall had at least some reason to be anxious, even as he asserted the prerogatives of the Supreme Court. This doesn’t really explain some of his rhetorical maneuvers. I am inclined to believe that he viewed the Union as sturdy enough in 1819, even given the drama surrounding Missouri, to believe that this was a good time to reinforce the joint notion of de-facto national plenary power that would be legitimized, as Charles Black argued decades ago, by a highly deferential Supreme Court that would, at the same time, give evidence of its increasing willingness to monitor overreaching by so-called “sovereign states” within the Union.

Can we say that the Ship of State was fully operating and a good bet to remain so into the indefinite future as of 1820? Andrew Jackson submitted with what in context is relatively good grace to the election of 1824, where had had clearly been the first-past-the-post winner, but failed to get a majority of the electoral vote and then lost in the House of Representatives. One
suspects that Donald Trump, who professes to admire Jackson, would not have submitted in such fashion. But if living well is the best revenge, then Old Hickory’s subsequent two terms in the White House must have been very satisfying indeed, as was his ability to wreck the Bank of the United States and, in his veto message, acerbically suggest that Supreme Court opinions were entitled only to so much deference “as the force of their reasoning may deserve.” This makes hash of the notion of stare decisis, let alone judicial supremacy, both of which rest on claims of deference even when one believes that they are “in fact” mistaken in their readings of the law (whatever one believes the term “in fact” means jurisprudentially).

A key event in Jackson’s presidency, of course, was South Carolina’s attempt to nullify the 1828 tariff, and the potential threat of civil war that was forestalled by a combination of Jacksonian resolve and the de facto willingness to compromise over the precise terms of the tariff. More to the point, perhaps, was that the Nullification Crisis provoked former Vice President John C. Calhoun to write his Fort Hill Address that set out the theory not only of nullification but also, and more importantly, the logic of secession that would prove telling some three decades later. One might think that most major constitutional controversies thereafter were considered against the background of this possibility. Could the constitutional order endure without yet more “adaptation,” including that of the Supreme Court?

So the final case worth considering in this context is the 1842 decision in Prigg v. Pennsylvania, which I have publicly declared to be a candidate as the worst decision in our history.8 Doctrinally, it is even more of an “implied powers” interpretation of the Constitution than is McCulloch. Its invalidation of Pennsylvania’s personal liberty law, which in modern terms can be viewed as analogous to a “sanctuary state” law designed to make sure that any ostensible fugitive slaves are really and truly such, rather than the mere object of self-serving allegations by professional slave-catchers, is at least as much a limit on state “sovereignty” as is Marshall’s invalidation of the tax levied on the Bank of the United States. But that is not my

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primary interest today. Instead, we should ask, or speculate, why Joseph Story thought it necessary to write such an execrable opinion.

As Paul Finkelman argues in a forthcoming book on Justices Marshall, Story, and Taney, Story was notable among Supreme Court justices in having been a truly vigorous critic of slavery. Indeed, he appears to have been slightly chastised by Marshall, in the latter’s opinion in *The Antelope*, for his passionate critique, which might have violated Marshall’s distinction expressed in that case between the “jurist” and the “moralist.” (As I tell my students, in any such distinction, especially when proffered by a judge, one knows which will be treated as privileged.) So did Story, who was never an Abolitionist, develop a new perspective on the merits of slavery by 1842? The answer is clearly not. As Finkelman argues, what most likely happened is that Story became ever more nationalist and convinced that accommodations had to be made to the “slavocracy” if the Union were to endure. After all, that was the justification for the three-fifths compromise in 1787. If one is willing to endorse the Constitution in 1787—and the compromises necessary to bring it into being—then why not accept the perceived “necessity” in 1842 to reassure ever-more-restive slave states that their interests would in fact be protected by the Supreme Court? Story emphasized that no general theory of constitutional interpretation underlay his analysis other than, one might say, the Marshallian emphasis that endurance required adaptation. And adaptation *Prigg* surely was.

We will never know, of course, what the consequences would have been of a contrary decision establishing the legitimacy of Pennsylvania as a de-facto “sanctuary state.” Hovering over the issue of Pennsylvania’s “sovereign” powers was the duty of that state (or, more to the point, Ohio) to offer peaceful “transit” through the state to slaveowners (or slavedealers) bringing slaves from, say, Virginia to Missouri and passing through the purported “free state” of Ohio. In any event, by 1842, we are within two decades of the collapse of the Constitution of 1787 and its replacement, after the conflagration of 1861-65, of a quite different Constitution of 1868, at least with regard to potential (and even actual) national power and further limitations on the rights of “sovereign” states. Once more, if we imagine Joseph Story “looking forward,” as it were, unable to know exactly what the future would bring, *Prigg* might seem an acceptable price.

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to pay for maintaining the Union. If we are critics of Prigg, as I am, is it because we disagree with the “empirics” of such an argument, which requires dismissing the Southern secessionists, at least as of 1842, as simply a hot-headed minority, of no more political significance than the Abolitionists who were proclaiming “No Union With Slaveholders”? Even if we defend “pacts with the devil,” after all, it requires agreement that the circumstances are sufficiently dire to require such awful deals. Or, perhaps, we object to Prigg because it reveals, in many ways even more so than Dred Scott, the true horrors of chattel slavery inasmuch as Margaret Morgan and, without doubt, her children, were likely not fugitive slaves at all but were nonetheless “sent South” because of Story’s holding that the Constitution required recognizing “self-help repossession” as part of the property right attached to owning other human beings.

Prigg, more than any other single case, forces us to look backwards and forward at the same instant. As already suggested, might Story be correct that acceptance of the Compromise of 1787 entails, both logically and politically, the willingness to continue appeasing slaveowners who can make credible threats to bring the entire system down should their interests not be recognized (and reinforced, as with the Fugitive Slave Act of 1850, described by Freehling as part of the “Armistice of 1850”)? And, looking forward, does it at least call into question Abraham Lincoln’s obdurate unwillingness to compromise over the near-theoretical issue of expanding slavery into the American territories bought in 1803 and then conquered in 1847. Where do we draw lines about permissible and impermissible “adaptations” of patches of parchment once we commit ourselves to the overarching goal of constitutional “endurance”?

My friend Mark Graber, in his indispensable book Dred Scott and the Problem of Constitutional Evil makes the case that the preferable candidate in the 1860 presidential race was John Bell, the “centrist” who was willing to seek accommodation with Southern secessionists. The electoral college, however, made his election de facto impossible; indeed, only true specialists can now identify who he is. Lincoln, of course, was elected with 39.8 percent of the popular vote, though a majority of the electoral vote. If one celebrates that, in part because his election (far more than Dred Scott) triggered the Civil War (and 750,000 lost lives), then that obviously raises questions as to the desirability of the original 1787 compromise and other efforts to maintain the Union that required accommodation (or appeasement) of slave interests. Why should the United States Constitution have endured even to 1860, assuming one believes
that there was in fact a singular constitution between 1789 and the time of Lincoln’s election? But if one believes in the telos of endurance, then why isn’t Graber correct in his near-lament of Lincoln’s election? Would our answer be different, incidentally, if the Southerners, who also could only look through the glass darkly toward future possibilities, had accepted Lincoln’s heartfelt offer for compensated emancipation that would in fact not be finalized until, say, 1900?