(9) **Constitutional Interpretation by Non-Judicial Officials.** From Chief Justice Marshall’s reasoning that courts must interpret the Constitution as a necessary incident of their function of deciding cases, does it follow that other public officials have a similar responsibility to interpret the Constitution in discharging their functions?\(^{11}\) If so, won’t serious conflicts inevitably result? These questions are far more complex and various than their grammatical form might suggest. In assessing the following expressions of views, try to identify the precise question of constitutional responsibility that triggered their utterance.

(a) President Franklin D. Roosevelt began a much-quoted letter of July 6, 1935, to Congressman Samuel B. Hill concerning constitutional questions surrounding a bill to regulate the bituminous coal mining industry with a brief argument that the measure was in fact constitutional. See 4 Public Papers and Addresses of Franklin D. Roosevelt 297–98 (1938). The letter concluded:

\(^{11}\) See Engdahl, John Marshall’s “Jeffersonian” Concept of Judicial Review, 42 Duke L.J. 279 (1992) discussing early debates about the appropriateness of constitutional interpretation by non-judicial public officials and arguing that Justice Marshall’s opinion in Marbury was not intended to exclude other branches from constitutional interpretation. For a broader argument that the President’s interpretive responsibility encompasses determinations of whether to obey judicial decrees, see Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217 (1994).
"Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. A decision by the Supreme Court relative to this measure would be helpful as indicating, with increasing clarity, the constitutional limits within which this Government must operate. * * * I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."


(b) In justifying his veto of a bill to continue the Bank of the United States, President Andrew Jackson maintained that the Bank was unconstitutional, despite Supreme Court decisions favorable to its constitutionality. 2 Richardson, Messages and Papers of the Presidents 576, 582 (1896). In his message of July 10, 1832, Jackson said:

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. * * * Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

(c) In his first inaugural address, Abraham Lincoln rejected the position that the Dred Scott decision conclusively deprived the federal government of power to prohibit expansion of slavery into federal territories (6 id., at 5, 9):

"I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly
brought before them, and it is no fault of theirs if others seek to turn their decision to political purposes."

Following the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), a number of state legislatures enacted abortion-restricting measures, at least some of which seemed intended to provoke a reconsideration of Roe. Was it acceptable for legislators to act on the premise that Roe was constitutionally mistaken? See Wellington, Interpreting the Constitution 142–58 (1990). For public officials to resist school desegregation after Brown v. Board of Education, 347 U.S. 483 (1954)? For Lincoln to treat Dred Scott as binding on the parties but not as authoritatively resolving all of the constitutional issues that the decision addressed? What are the relevant differences, if any, among these cases?

See Wechsler, The Court and the Constitution, 65 Colum.L.Rev. 1001, 1008 (1965), building on the excerpt from Lincoln's First Inaugural quoted above: "[N]ote the purpose of the limitation [there] stated: to allow for the 'chance' that the decision 'may be overruled and never become a precedent for other cases.' When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation? The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue." See also Bickel, supra, at 254–72, and especially at 261.

(d) In Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court was asked to postpone the implementation of a court-approved desegregation program for Little Rock, Arkansas, because of extreme public hostility. Previously, the Governor had called out the National Guard to prevent black students from entering Little Rock Central High School and, though these troops were later withdrawn in response to a federal injunction against the Governor, black students were thereafter able to attend only under federal military protection. Though the School Board had been actively seeking to implement desegregation, it sought a two and one-half year postponement of the court-approved program. The District Court granted relief, but the Court of Appeals reversed. The Supreme Court affirmed, insisting that "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature" (p. 16).

The opinion of the Court, captioned in an extraordinary fashion with the names of all nine justices individually, continued (pp. 17–19):

"What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared 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 this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.' * * *

"* * * Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *.' United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases * * *.' Sterling v. Constantin, 287 U.S. 378, 397–398."

Cooper v. Aaron involved the integrity of a court order, and the Court's language and result are therefore consistent with President Lincoln's position, Paragraph (c), supra. Does Marbury support any broader position concerning the pre-eminence of the Court's power of constitutional exposition? Are any broader assertions warranted?

(e) In United States v. Nixon, 418 U.S. 683 (1974)(the "Watergate" tapes case, in which a subpoena directed to the President was upheld), the Court dealt with the contention that the President's claim of privilege was not subject to judicial review by saying (p. 703): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel * * * reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison * * * that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" The opinion then referred to a number of cases—admittedly none directly on point—in which the power of judicial review had been exercised, and concluded this part of its discussion (p. 705): "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case. Marbury v. Madison * * *.'"

Was Marbury a sufficient response to the contention? Would it have been inconsistent with Marbury for the Court to hold that a President's determination that certain material was privileged had to be accepted as conclusive by the courts? Recall that sometimes the Court accepts determinations by other branches as to compliance with procedures for the enactment of a statute or as

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12. The references included the steel seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Powell v. McCormack, 395 U.S. 486 (1969); and a series of cases interpreting congressional mem-

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CORRESPONDENCE OF THE JUSTICES (1793)\footnote{1}{The letters are respectively taken from 3 Correspondence and Public Papers of John Jay 486–89 (Johnston ed. 1891) and 15 The Papers of Alexander Hamilton 111 n. 1 (H. Syrett ed. 1969), and the questions from 10 Sparks, Writings of Washington 542–45 (1836).}

Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices:

Philadelphia, July 18, 1793.

Gentlemen:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,

Your most obedient and humble servant,


The following are some of the questions submitted by the President to the Justices:

1. Do the treaties between the United States and France give to France or her citizens a right, when at war with a power with whom the United States are at peace, to fit out originally in and from the ports of the United States vessels armed for war, with or without commission?

2. If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? If the latter, to what kinds does it extend?