Judicial Supremacy and Our Two Constitutions: Reflections on the Historical Record

Report Courts

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Summary

The U.S. Supreme Court is now widely regarded to be the ultimate authority on constitutional questions in the United States. It has eclipsed the other branches of the national government in this role through development of the power of judicial review. The cornerstone of American judicial review is the case of Marbury v. Madison (1803), in which the Court first invalidated a provision in a congressional act on constitutional grounds. Though the conception of constitutional judicial review embodied in Marbury was a very narrow one, reflecting Founding era notions about the scope of the judicial function, the case has subsequently been developed as a basis for the more aggressive form of constitutional review usually referred to as "judicial supremacy." Judicial supremacy, by collapsing the crucial distinction between "constitution" and "constitutional law," has led to the development of the so-called "living constitution," in which the constitutional law expounded by the Supreme Court has effectively supplanted the Founders' written constitution. Abandoning judicial supremacy would not bring about the dire consequences often predicted by its champions. On the contrary, giving up constitutional judicial supremacy would restore the American people and their representatives to their proper place in the constitutional order.

Key Takeaways

America's founders and the early Supreme Court prescribed how judicial power should be exercised and spoke clearly about its proper scope and limits.

Judicial supremacy, which generated the modern-day "living constitution" theory, is incompatible with the Founders' Constitution and early Supreme Court precedents.

The living constitution theory transfers by stealth authority from Congress and the President to unaccountable judges and bureaucrats.

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Introduction: Our Two Constitutions

Most people believe that the United States is governed by the Constitution of 1787, periodically adjusted or updated to accommodate new circumstances. Although this may be formally correct, the periodic adjustments and updates accomplished during the past century have carried us so far from the framework handed down by the Founding Fathers as to suggest that we are in fact being governed by an altogether different constitution. The contemporary constitution, often referred to as the "living constitution," was initiated by the progressives in the early 20th century, and has been advanced aggressively by the U. S. Supreme Court since the 1950s. The living constitution is viewed by most people as merely an interpretive extension of the Founders' Constitution, coexisting more-or-less comfortably with the original document. This pretension makes it possible for us to feel that we are not only suitably modern, but are at the same time in full continuity with a venerable republican tradition.

This essay challenges this common belief. I argue that the pretended continuity of the living constitution with the original constitution is really an historical fiction similar to that defined by the English philosopher Jeremy Bentham as "a wilful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it, and but for the delusion thus produced could not exercise it."REF This fiction has enabled the proponents of the living constitution to pretend that it has developed from the original constitution by a natural process of evolution. The transformation of the original constitution into the living constitution is in fact revolutionary, not evolutionary. It was deliberately launched by political actors bent on undermining the Founders' Constitution.REF Constitutions are about development, and since the living constitution develops in an entirely different way than the original constitution, the two constitutions should be regarded as essentially distinct.

The Founders' Constitution develops according to a carefully constructed constitutional amendment process that is designed to ensure a wide consensus in support of any proposed constitutional change. This process is spelled out in Article V, and requires extensive participation of both Houses of Congress as well as the legislatures or special conventions in the states. This means that the Founders regarded constitutional development as a profoundly democratic process, involving more—and a wider range of—decision makers than are required for ordinary legislative, executive, administrative, or judicial acts. Proponents of the living constitution, on the other hand, advocate constitutional

change brought about by executive, administrative, and judicial bodies, especially the federal courts, even in the absence of—and sometimes in opposition to—wide public consensus.

Thus the Article V amendment process has been effectively supplanted. It has been replaced by a Supreme Court functioning as something very much like the constitutional revision council that was explicitly rejected by the Founders at the Philadelphia Convention.REF The checks and balances system has also been eroded to the point at which the Constitution's original power structure has been substantially altered. Instead of the powerful Congress, the energetic but carefully checked executive, and the "least dangerous branch" envisioned by the Framers,REF we now have a weak (if not dysfunctional) Congress, a powerful and relatively unchecked executive, and a Court that claims for itself final, ultimate, and exclusive authority to determine the scope and range of power possessed by the other branches of government.

American democracy itself has been seriously compromised, because the living constitution is elitist, not republican. The agency of government at farthest remove from the democratic process now holds ultimate constitutional authority, and the agency most closely tied to the democracy holds least. At the same time, administrative agencies consisting of largely invisible bureaucrats have assumed ever-greater policymaking responsibility due to over-delegation of legislative authority. All of this has had the effect of placing more constitutional and policymaking authority in the hands of officials less accountable to the public. Finally, the revolutionary transformation of the original constitution into the modern living constitution has provided a conduit through which values and principles that contradict historic American traditions have been subtly imposed on the public.

The original constitution springs from a theistically-based natural law/natural rights philosophy.REF The living constitution springs from a secularist progressivism that denies the very existence of natural law and natural rights.REF The original constitution presumes a healthy regard for the private institutions that comprise civil society and serves to insulate the individual from the more egregious machinations of the state. The living constitution allows continual erosion of these institutions and encourages government encroachment on the liberties of individuals. The original constitution presupposes a healthy respect for the principle of subsidiarity, allowing decisions to be taken by the most local organ of government or non-governmental organization capable of rendering those decisions. The living constitution tends to consolidate decision-making authority at the highest and most remote levels, eroding the federal system and leading to bad policymaking and alienation of the citizenry. Classic examples of this tendency can be observed in the continued encroachment of the national government on state and local governments in a multitude of policy arenas.

This essay will examine a crucial feature of the above-described constitutional transformation, focusing on the role of the Supreme Court and its use of Marbury v. Madison (1803) in the ongoing historical transfer of constitutional authority from the American people to the federal courts and largely unaccountable federal agencies. A second important feature concerns the philosophical basis and impact of this transfer upon public policy and historic American values and traditions. It is

generally acknowledged that many people who support the living constitution do so because they desire particular policy outcomes that would be either impossible or at least very difficult to obtain under the Founders' Constitution. It is less generally acknowledged that many of the policy outcomes desired by proponents of the living constitution reflect an underlying world view diametrically opposed to that of the Framers—and, I believe, to most American citizens today.

By maintaining the fiction that the living constitution is merely an interpretive outgrowth of the Founders' Constitution, we allow—and even encourage—the subtle importation of a value system inimical to the ordered liberty envisioned by the Framers.REF The process of importation is not yet complete. However, events such as the Supreme Court's dramatic decision in Obergefell v. Hodges, in which the Court ruled that state laws defining marriage as a bond between one man and one woman violated the Fourteenth Amendment,REF suggest an escalating pace of change. As Chief Justice Roberts ominously warned in his Obergefell dissent, despite the many things that might be celebrated in the decision, one should not "celebrate the Constitution, [for] [i]t had nothing to do with it."REF Here, the Chief Justice of the United States declares that his Court has just made a world-historic constitutional decision that has nothing to do with the Constitution! As the number of judicial decisions that may plausibly be described by such a statement continues to rise, the question of how we got from the Founders' Constitution to Obergefell becomes ever more urgent.

The Rise of Modern Judicial Supremacy

Some years ago, while on my way to the airport en route to Washington, D.C., to testify at a House Judiciary Committee hearing on Congress's role in constitutional interpretation, I shared a limousine ride with a noted anthropologist from my university. When I told her about the subject of the hearing, she queried: "What role? Isn't it the Supreme Court's job to interpret the Constitution?" I remember being somewhat surprised at this reaction at the time, but after my subsequent experience at the hearing, at which quite a few members of the House of Representatives expressed a similar attitude, her response seemed more understandable.

If anything, the deferential attitude of the American citizenry and its political leadership toward the Supreme Court is even greater now than it was then. Nowadays, any discussion of a constitutional issue necessarily begins and ends with a discussion of the Supreme Court. The Court's relation to the Constitution is widely viewed as a kind of ownership, symbolized in phrases like "guardian of the fundamental law," "final interpreter of the Constitution," or "umpire of the federal system." Statements like these reflect the truth of former Supreme Court Chief Justice Charles Evans Hughes's now-famous remark—more prophetic than observant at the time it was uttered—that the Constitution is "what the Court says it is."REF This theme is echoed in scholarly and popular books and articles, in the ever-expanding casebooks we use to train lawyers, in the American government textbooks we use to educate citizens, in the councils of government, and even in the streets.

This was not always the case. For most of our country's history, the Court did not claim to possess such a power to make final pronouncements on the meaning of the Constitution. Nor did the other

branches of the government think that the Court had such power. In the early days of the American republic, for example, the Court was widely considered the "least dangerous branch" of government, our representatives in Congress conducted great debates on virtually all important constitutional questions, and the presidential veto power was exercised primarily on constitutional grounds.REF

Our present conception of judicial supremacy is a recent development in American constitutional history. It is a conception built almost entirely on Gilded Age foundations, and has been fully developed only in the past few decades. Its incipient beginnings may be found in a handful of late-19th century legal commentaries in which the now iconic case of Marbury v. Madison (1803) was raised from an earlier obscurity, re-interpreted and used to lay a foundation for modern judicial supremacy.REF The practical result of this development is a "judicialized" constitutionalism in which ever-larger arenas of public decision-making are settled by the courts. Almost three decades ago, Prof. Robert F. Nagel noted the alarming, unprecedented pace of advancing judicial control. Referring to a number of decisions indicating "the Court's continuing insistence that almost no public issue should be excluded from judicial oversight," Nagel concluded that "[h]eavy reliance on the judiciary—in various ideological directions—is fast becoming an ingrained part of the American system; already it is difficult for many...even to imagine any alternative."REF

Few would dispute that the trend observed by Nagel three decades ago is now well established. The ever-growing list of judicial intrusions into areas of activity historically governed by other institutions makes it clear that it is no longer possible to question the observation that we are governed by judges in many of the most vital aspects of life in the American polity.REF This is the result of society's apparent acceptance of the Court's claim that its constitutional readings are conclusive and thus always binding on other organs of government. In short, we have come to equate the Court with the Constitution. And as judicial nomination hearings from Bork to Kavanaugh have amply demonstrated, constitutional judicialization has turned virtually all discussions about the Constitution into discussions about the role of judges in its interpretation.REF

However widespread its acceptance, judicial supremacy is incorrect. It collapses the crucial distinction between the Constitution—conceived as a written instrument distinct from what judges say it is—and the constitutional law that is developed from it by interpretation.REF This distinction embodies one of the fundamental tensions upon which our constitutionalism is built. Indeed, the survival and health of any constitutional system built on a written constitutional instrument requires that the tension between Constitution and constitutional law be preserved, not eliminated. Because judicial supremacy destroys this tension by collapsing the distinction between Constitution and constitutional law, it will sooner or later bring a constitutional polity face-to-face with the question whether to give up judicial supremacy or give up the Constitution. Though the American polity seems to be moving ever-more-closely to this point, it is perhaps not too late to suggest that giving up judicial supremacy would be the better course.

Constitutional Interpretation in American History

During the antebellum period, constitutional interpretation was performed continuously by all three

branches of the federal government, as well as by the states—whose officers also swear an oath to uphold the Constitution. The great debates in Congress during this period were arguments over the meaning of constitutional provisions. The congressional record is permeated by assertions of legislative duty to interpret the Constitution in accordance with accepted canons of construction. In the 1790s, debates in Congress on the meaning of key provisions in Articles I, II, and III shaped the contours of the federal government as it was to exist for a century-and-a-half subsequently.REF At the same time, during the first half-century of the republic, presidential vetoes of congressional acts were exercised almost solely on constitutional grounds, and most of these were accompanied by explicit, uncontested assertions of executive authority to interpret the fundamental law.REF

The constitutional activities of the political branches during the early period strongly suggest a widely-acknowledged Founding era understanding that constitutional meaning was not a monopoly of the courts, but was to be supplied by all three branches of the government. Constitutional development in the United States was very much a "departmental" affair, involving not only the political branches and the administration of the national government, but the states as well.REF Perhaps most tellingly, the Supreme Court itself did not claim that its constitutional decisions were "final," "ultimate," or "conclusive" until 1958.REF Nor did the Court assert any power to control the boundaries of constitutional authority assigned to other branches of government until the late 19th century, except in "cases of a judiciary nature."REF

Thus the historical record unequivocally establishes that the origin of modern judicial supremacy in constitutional law can be found neither in the Constitution itself nor in its early judicial application. Rather, it originated in the polemics of legal academicians and commentators in the late 19th century,REF emerging in full flower only in the 1950s.REF During earlier periods, questions about constitutional meaning were not generally regarded as solely, or even primarily, judicial. Tocqueville's famous aphorism according to which all political questions sooner or later developed into judicial ones described a feared tendency rather than a reality, as had the earlier arguments of the Antifederalist Brutus.REF When Jeffersonian Republicans and Jacksonian Democrats launched early attacks on the Court, they did so on the basis of a widespread belief that congressional and/or presidential interpretations of the Constitution were entitled to as much respect as those of the judiciary.REF

During the past six decades, the Court has pressed its claim to be the primary organ of constitutional interpretation in the United States with increasing frequency, intensity, and success. The Court's first assertion of constitutional guardianship came in 1958. In that year the Court decided Cooper v. Aaron,REF in which the Court was confronted with an effort by state officials in Arkansas to resist federally-mandated desegregation of a Little Rock high school in accordance with the Court's earlier decisions in Brown v. Board of Education I and II.REF The Court ruled that, since Article VI declares the supremacy of national over state law, state officials were without authority to evade or obstruct implementation of desegregation orders issued by federal courts pursuant to the Brown decisions. The matter should have been allowed to rest there, but instead the Court went further, claiming, for the first time in American constitutional history, judicial "finality" for its own readings of the Constitution.

This claim effectively equated the Court's own constitutional interpretations with the Constitution itself. The legal peg allegedly supporting the maneuver was the Court's assertion that its own constitutional rulings possessed Article VI "supreme law" status, along with constitutional provisions, national laws pursuant to the Constitution, and federal treaties. In another first, the Cooper Court wrongly cited Marbury v. Madison as precedential for its newly-discovered ultimate interpretive authority.REF

Since the Cooper decision, many have come to believe that, in Marbury, the Supreme Court had declared itself to be the primary organ of constitutional interpretation.REF This belief—which I call the Marbury Myth—is a useful fiction for a Court bent on establishing its own constitutional hegemony, since it allows the justices to claim the support of John Marshall, the "Great Chief Justice," as the father of judicial supremacy and the authority for their assertions of power. This is exactly the kind of doctrinal support that is essential in a legal system with common law roots and stare decisis pretensions. It is another Benthamite fiction whose definition bears repeating: "a willful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it, and but for the delusion thus produced could not exercise it."REF This fiction has allowed courts to do things that would have been unthinkable for any judge in the early republic, such as creating new rights without sufficient constitutional justification, marginalizing religion in the public square, and overturning time-honored legal traditions on the basis of ephemeral contemporary fashions and shoddy moral philosophizing.REF

Yet the Court's own record demonstrates that this conception of American constitutional history is wrong. A limited form of judicial review was already established by 1800, but only as to cases in which the constitutional violation by the legislature or the executive could not be seriously doubted.REF Obvious cases presenting such clear constitutional violations might include, for example, Congress levying a tax on cotton exported from the port of New York (clear violation of Article I, Section 9), or establishing the Anglican Church as the official religion of the United States (clear violation of the First Amendment). No such clear violation of a constitutional provision occurred during the period between the adoption of the Constitution and the decision of Marbury v. Madison in 1803. In any event. Marbury did not alter this "clear" or "doubtful" case rule, but rather established a precedent for the Court's power to disregard congressional laws in another type of case, cases "of a judiciary nature"—cases in which judicial functions would be threatened if the Court were forced to apply a questionable statutory provision that could not be reconciled with the Constitution.

This authority had been previously illustrated as early as 1792 in Hayburn's Case, during the era in which Supreme Court justices were required to "ride the circuit" and sit with a circuit court in the trial of cases. In Hayburn, five out of six of the then-current Supreme Court justices, who were also sitting on three circuit courts, refused to enforce a law requiring federal judges to arbitrate disputes over government pensions and then vested appeals from their decisions in the legislative and executive branches. According to the justices, such duties were non-judicial in nature and thus could not constitutionally be imposed on the courts.REF It, thus, merely recognized that the Court, like the other

branches of the government, possessed the authority to interpret the Constitution in cases in which it is appropriately involved. By the same logic, the executive is entitled to interpret the Constitution in cases in which its legitimate constitutional authority is questioned, and Congress is entitled to do the same. Marbury established only that the judiciary would play an important role in constitutional interpretation in individual cases, not that it would be the exclusive or ultimate constitutional interpreter, sitting in final judgment on the constitutional authority of the other branches of government. Aptly put by Prof. Michael Stokes Paulsen: "Jurisdiction to decide cases does not entail special guardianship over the Constitution."REF

Marbury v. Madison

Marbury v. Madison (1803) is generally regarded by legal scholars as the leading precedent for U.S. Supreme Court authority to disregard acts of Congress that violate the Constitution: the power of constitutional judicial review. In Marbury, the Court, for the first time in a unanimous, fully-reasoned opinion, refused to enforce an act of Congress because of constitutional problems in the act.REF

The case arose in 1801 when William Marbury and three others who had been appointed justices-of-the-peace in the District of Columbia by outgoing President John Adams failed to receive their commissions on the eve of Thomas Jefferson's inauguration. The new Administration refused delivery of the commissions, and the four would-be judges sued for writs of mandamus in the Supreme Court to force newly-appointed Secretary of State James Madison to deliver them. Political infighting developed over these and other eleventh-hour Federalist judicial appointments in the months after Jefferson assumed office. Among other things, this infighting led to the Republican-controlled Senate's refusal to produce records of the confirmations, and to congressional suspension of the Court's 1802 terms, causing Marbury's case not to be tried until 1803.

In its Marbury opinion, the Court (per Chief Justice John Marshall) ruled that Section 13 of the Judiciary Act of 1789, by empowering the Court to issue writs of mandamus in original (trial) jurisdiction to any "persons holding office under the authority of the United States" (1 Stat. 73, at 81), had impermissibly enlarged the Court's jurisdiction beyond the terms of Article III, which restricts the Court's original jurisdiction to cases involving ambassadors, public ministers, consuls, or states (U.S. Const., Art. III, Sec. 2). This meant that, although Marbury had a legal right to his commission that was violated by Madison's failure to perform a ministerial duty,REF the Court could not provide the requested relief because the congressional act upon which Marbury relied was unconstitutional.

In the final pages of his Marbury opinion, Chief Justice Marshall justified the Court's constitutional analysis, arguing that the courts must "say what the law is," that the Constitution is "superior," "paramount" law, and that a legislative act in conflict with the Constitution is void. After establishing the principle that unconstitutional legislative acts are void, Marshall carefully restricted the Court's power to invalidate such acts to cases in which the Court is forced to ignore either the Constitution or the statute in order to decide the case before it. Such cases are of two kinds.

The first encompasses cases in which the legislature or executive has interfered with judicial functions in some way—i.e., cases "of a judiciary nature." Marbury is such a case because there the Court was forced either to exercise trial jurisdiction outside the jurisdictional restrictions of Article III (thereby ignoring the Constitution), or enforce the restrictions of Article III (thereby ignoring Section 13 of the Judiciary Act of 1789). Hayburn's Case is also exemplary of this type, as there the act in question attempted to force the courts to perform administrative duties in violation of the separation of powers, according to which all executive power is vested in the President and his subordinates in the executive branch by Article II of the Constitution.REF Thus the Court was forced to follow the law (disregarding the Constitution) or follow the Constitution (disregarding the law).

The second kind of case in which the Court is forced to ignore either the Constitution or the law is one in which a constitutional provision has been so clearly violated by a law or executive action that there could be no doubt of the violation among reasonable persons.REF If Congress, for example, were to enact a law making it a crime for newspaper editors to endorse candidates for public office, or to publish anything with "hateful" content, these would be clear, indubitable violations of the First Amendment's prohibition of laws abridging the freedom of press. The Court would thus be forced to disregard either the Constitution or the statute in order to decide the case. On the other hand, a case in which Congress enacts a law forbidding intentional desecration of the American flag, for instance, is not on the same footing. In that instance, since the question whether flag-desecration is protected by the First Amendment (or by any other constitutional provision) is subject to serious doubt among reasonable people, the Court should enforce the law because it does not clearly and indubitably violate the Constitution.REF In the Founders' juridical lexicon, the approach embodied in the distinction between the hypothetical cases just described has been referred to as the "doubtful case" rule, as noted in the previous section of this essay.REF This rule was widely-acknowledged in the Founding era and was often employed by judges in the pre-Marbury era. The rule distinguishes between laws that unarguably violate the Constitution and laws for which the alleged constitutional violation is in doubt. Only unarguable violations are subject to invalidation by courts. Supreme Court justices cited the rule as dispositive in the three cases of the 1790s in which legislation was challenged on constitutional grounds.

Justice William Paterson, in Cooper v. Telfair (1800)REF declared that "to authorize the Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication." Likewise, Justice Samuel Chase in Hylton v. United States (1796)REF declared that "I will never exercise [the power of review] but in a very clear case." And Justice James Iredell in Calder v. Bull (1798)REF declared that "The Court will never resort to [its] authority [over legislation] but in a clear and urgent case." Thus it is plain that a consensus had been established among the justices in the pre-Marbury period affirming the extremely limited scope of the Court's power to invalidate laws in cases not of a judiciary nature. This consensus effectively narrowed that power to cases presenting unarguable constitutional violations.

It is difficult for people nowadays to comprehend such a consensus because we tend to think that

nothing whatever is unarguable. But we must remember that the justices of the early Supreme Court, unencumbered by the legal positivism and radical skepticism of modern times, were under no such illusion. They were devotees of natural law who believed in the authority of reason and common law legal tradition. They viewed their constitutional responsibility as an effort to discover and articulate pre-existing law—including constitutional law. That pre-existing law was the will of the lawgiver, the objective public meaning of which was revealed by careful examination of the historical record, combined with personal knowledge on the part of many of the early judges. Its application required the use of widely-acknowledged rules of interpretation derived from the common law and other sources in the legal tradition. The consensus on the scope of judicial power that emerged from this environment among early American lawyers and judges included the principle that the only justification for the Court's interference with the will of the American people as expressed through their national legislature was a constitutional violation so plain as not to allow for reasonable disagreement. It did not seem likely that Congress would ever commit such a violation—and in fact the Court found none prior to 1857, when it decided Dred Scott v. Sanford, the first time an act of Congress was invalidated in a case not of a judiciary nature. Since recovering the original public meaning of the Constitution requires attending to the beliefs of the framers and ratifiers about what the Constitution means, and to the practices of early American lawyers and judges about how it should be read and applied, we must avoid imagining that those framers, ratifiers, lawyers, and judges saw the jurisprudential world as we have since come to see it.REF

Certain cases may also combine these two kinds—that is, cases of a judiciary nature that also involve clear, indubitable constitutional violations, such as the enactment of bills of attainders or ex post facto laws in clear violation of Article I, Section 9. In addition to being straightforward constitutional violations, such laws usurp judicial functions in different ways. Bills of attainder are deliberate attempts by legislatures to impose penalties on particular individuals, thereby circumventing via avoidance or bypass regular judicial processes. Retroactive criminal laws are attempts to force courts to impose penalties on individuals for committing acts that were not criminal when committed. In both instances, legitimate judicial functions are seriously implicated, necessitating judicial resort to constitutional review.

In sum, Marbury-style, Founding-era judicial review is strictly limited in its scope and range, restricting judicial power to invalidate laws to cases of a judiciary nature and cases in which the constitutional violation is manifestly clear. This restrictiveness is undoubtedly the reason why the Marbury case was largely ignored by courts and legal commentators until the late-19th century.

Beyond Marbury v. Madison

In the late-19th century, after nearly a century of relative obscurity, Marbury began its rise to prominence as a symbol in the progressive-era controversy over the constitutional role of the courts. It was also during this era that the Court began to invalidate acts of Congress with greater frequency, and so found Marbury's case a useful precedent. Since that time, the case has become an icon of American constitutional law. Throughout the 20th century, the case has been cited not only more frequently, but

often in support of sweeping declarations of judicial supremacy that contrast sharply with the more modest Marbury of John Marshall's Court.

After Marbury, the Court would not invalidate another act of Congress until the Dred Scott case in 1857, and even then, it did not invoke Marbury.REF In fact, Marbury was not cited as authority for any kind of constitutional judicial review until the 1887 case of Mugler v. Kansas,REF and not in support of the broad-gauged review characteristic of modern times until Cooper v. Aaron in 1958.REF

Since its decision in Cooper v. Aaron, the Court has used Marbury to support its constitutional hegemony on multiple occasions. One of the more important of these occurred in the 1997 case of City of Boerne v. Flores.REF There, the Court invalidated a provision of the Religious Freedom Restoration Act of 1993 (RFRA), in which Congress had attempted to widen the scope of religious expression in free exercise cases.REF In promulgating RFRA, Congress relied on its authority to "enforce, by appropriate legislation," the provisions of the Fourteenth Amendment which, by judicial ruling, applies the First Amendment's Free Exercise Clause to the states. But the Court held in City of Boerne that the congressional enforcement authority is only "remedial," not "substantive;" and thus that Congress is forbidden to determine "the substance of the Fourteenth Amendment's restrictions on the States," or to enact legislation which "alters the meaning of the Free Exercise Clause" by determining "what constitutes a constitutional violation."REF

It is difficult to see how Congress can "enforce" the Constitution without being able to "determine what constitutes a constitutional violation," and one should remember that the only reason why RFRA could have been thought to have altered the meaning of the Free Exercise Clause in the first place is that, in Cooper v. Aaron, the Court had put its own understandings of constitutional meaning (its "interpretations") on par with the Constitution itself. In other words, according to the logic of Cooper, the Court's decision in Employment Division v. Smith about the meaning of the Free Exercise Clause is the Free Exercise Clause. Not content, however, to rest upon this claim alone in City of Boerne, the Court denied the authority of Congress to interpret the Constitution conclusively or to define its own powers in accordance with it.REF So far as I know, the Court had never before issued such a sweeping denial of national legislative authority.REF

Thus the City of Boerne Court, by spelling out the full implications of Cooper's "ultimate interpreter" doctrine, brought the development of judicial supremacy in American constitutional law to virtual completion. Modern judicial review is driven by a logic which affords the Supreme Court ultimate freedom to strike down laws merely because the justices believe those laws to be inconsistent with the Constitution, no matter what kind of constitutional issue is raised by the law in question, and even if the constitutional provision involved contains a clear constitutional assignment of authority to another branch of government (such as the Section 5 commitment to Congress of power to enforce the Fourteenth Amendment). The other branches of the government are then expected to march to the Court-imposed drumbeat, even to the point of conforming future policy choices to judicial preferences.

In Cooper, City of Boerne, and the other dozen-or-so cases since 1958 in which the Court has asserted its conclusive constitutional authority, it has relied on Marbury v. Madison for support. But if the account of Marbury given above is accepted, Marbury cannot be read to support this kind of authority, because the cases are not on the same footing. Marbury involved Article III's original-appellate jurisdictional distribution, a provision directly addressed to the Court. On the other hand, Cooper and City of Boerne involved the Fourteenth Amendment, whose enforcement provision is directly addressed to Congress. As we have seen, Marbury contains no assertion of an exclusive authority in the Court to bind other parts of the government, except in cases of a judiciary nature or in cases in which there can be no doubt of a constitutional violation. Thus Marshall's decision in Marbury v. Madison cannot support judicial supremacy in any way whatsoever. If we take the Court's own historical record seriously, we must again conclude that judicial supremacy originated neither in Marbury nor in the Constitution. It is instead a doctrine established by the Warren Court and subsequently advanced by its successors.

Judicial Review in the Constitution

Although modern judicial supremacy is often regarded as a development of judicial review, these are two completely different concepts. Constitutional judicial review is simply the authority of a court (any court) to disregard an otherwise applicable law in the decision of a particular case, when it determines that law to be incompatible with an applicable constitutional provision. As such, judicial review is a normal part of the judicial function and is a power possessed by any court with authority to apply constitutional law in the decision of cases and controversies.

By contrast, judicial supremacy, as it is presently understood, refers to the power of federal courts—the Supreme Court in particular—to issue binding, conclusive proclamations on the meaning of all provisions in the United States Constitution and to have them apply to individuals and entities who were not parties to the lawsuit that resulted in the judicial proclamation. Judicial supremacy occurs at the expense of other constitutional actors—for example, Congress, the states, and the executive—while judicial review does not. In other words, the cost of judicial supremacy is paid by other branches of government, whose constitutional decisions are not binding on the courts although those of the courts are binding on them. This creates an imbalance in the distribution of constitutional authority.

The Constitution is clear on the judicial role, and, while it authorizes judicial review, it does not authorize judicial supremacy. As is well known, the Constitution establishes three main branches of national government. In Article I, Section 8, specific lawmaking duties are assigned to Congress, and in Article II, Sections 2 and 3, presidential duties are assigned. Judicial duties are assigned to the Supreme Court—and lower federal courts that Congress chooses to establish—in Article III, Section 2. The judicial power is precisely defined as the power to decide cases arising under "this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

After assigning powers to the national government, the Constitution then places some limitations on

how national and state power can be exercised. This is done primarily in Article I, Sections 9 and 10. After the Constitution was adopted, the First Congress proposed ten amendments, which became part of the Constitution in 1791. These amendments, now referred to as the Bill of Rights, were designed to impose additional limits on the national government. The final article in the Bill of Rights is the Tenth Amendment, which reserves to the states all powers not assigned to the national government or denied the states. Certain powers granted to the national government are not denied the states and can therefore be exercised by both levels of government. These are usually referred to as "concurrent" powers. Examples are the powers of taxation and commercial regulation.

When the state and national governments exercise concurrent powers in a way that conflicts, Article VI of the Constitution grants supremacy to the national government. The national supremacy clause of Article VI reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In other words, state judges are instructed by Article VI to refuse to apply state laws that are "contrary" to national laws "made in Pursuance" of the Constitution. If they fail to do this, Article III, Section 2, which extends national judicial power to all cases and controversies arising under the Constitution, empowers the federal courts to overrule the state courts. This is where the power of judicial review originates. It is important to make note of the precise constitutional language in these provisions because the power and extent of judicial review hinges on the presence or absence of a single word.

Note that the supreme law of the land includes the Constitution itself, but also: (1) laws enacted by Congress that are in accordance with, or "pursuant" to, the powers granted by the Constitution and (2) federal treaties. "Pursuant," or "in Pursuance thereof," in this context, means "following from," "in accordance with," or just plain "constitutional." This implies that Congress and the state legislatures may well pass certain laws that are not pursuant to the Constitution. Such laws would not be part of the "Supreme Law of the Land." Since only laws pursuant to the Constitution are part of the "Supreme Law of the Land," a federal or state court deciding a case in which a national law applies must determine whether that law is "pursuant" to the Constitution or not. Otherwise, the courts would be forced to apply unconstitutional laws when deciding cases. This would lead to legislative supremacy, a doctrine no more intended by the Framers than was judicial supremacy.

In the Judiciary Act of 1789, the first Congress explicitly enacted the Founders' understanding of the above-described relation between Articles III and VI, authorizing the United States Supreme Court to reverse or affirm any judgment of a state's highest court in which a national law is invalidated or in which a state law is upheld against a constitutional challenge.REF In other words, if a state court refuses to enforce a national law, then the Supreme Court is authorized to either reverse or affirm that

state court decision, depending on whether it deems the law to be constitutional. If the Court reverses the state court decision, then it is effectively saying that the national law in question is pursuant to the Constitution. If the federal court affirms the state court decision, then it is effectively saying that the national law in question is not pursuant to the Constitution. This implies that state—as well as federal—courts have the power to invalidate national laws.

The Limits of Judicial Review

Judicial review is therefore fully authorized in the Constitution, but only in a very restrictive form. Constitutional judicial review is merely the power to disregard, or refuse to apply, a law that the court deems not pursuant to the Constitution when deciding a particular case. Strictly speaking, as Abraham Lincoln said of the notorious Dred Scott decision, the Court's decision applies only to the parties in that case, not to anyone else.REF This is literally true of all judicial decisions, since the binding effect of a court's ruling has strict legal application only to the parties in the particular case or controversy before that court. The judicial function is reactive, not proactive. Subsequent litigants may expect future courts to follow precedents established by the Supreme Court, but the political branches of government may attack the Court's decision and even provide for continued enforcement of the law if they believe the Court's decision striking it down is unconstitutional. A law deemed by the courts to be not pursuant to the Constitution is not wiped off the books. It is simply not applied in a judicial proceeding.

Moreover, James Madison's notes on the constitutional convention reveal that the Framers had a particular understanding of the scope of the judicial power outlined in Article III, Section 2. During the discussion of the phrase extending the federal judicial power to cases arising under the Constitution, laws, and treaties of the United States, this power was acknowledged to be limited to "cases of a judiciary nature."REF Cases of a judiciary nature are cases involving laws directed to the courts themselves—for example, jurisdictional statutes or constitutional provisions directing the courts to perform particular functions in specific ways.REF This suggests that another important reason for judicial review is to give the courts a way to protect themselves from efforts by other branches of government to control their activities in ways not authorized by the Constitution.

One example of such an effort took place in the 1790s, when President George Washington asked the Supreme Court for advice on a legal matter. The justices declined to offer such advice, stating in a letter to Washington that becoming advisors to the executive without a case before the Court would violate Article III's provision extending the judicial power only to "cases and controversies."REF Another example is found in the Marbury case itself, in which Congress imposed on the Court the duty to hear and decide cases involving public officials outside the original jurisdiction provided in the Constitution.

As we have seen, a closely-related limitation on judicial review that was widely acknowledged during the Founding era was the restriction of its use to "clear cases."REF These are cases in which the plain meaning of the Constitution has been unarguably violated by another branch of government. For

example, if a state passes an ex post facto law and prosecutes someone for violating it, a court with such a case before it would be bound to disregard the law, since Article I, Section 10 explicitly prohibits states from enacting ex post facto laws.

Outside this narrow range of cases, there is nothing in the Constitution that compels the other branches of government to bow to the Court's judgment on every constitutional issue. Of course, both state and national courts may set aside laws they think were not made pursuant to the Constitution in cases appropriate for judicial resolution, but the limited form of judicial review established in the Constitution does not authorize the federal courts to "strike down" any law that federal judges do not happen to like. Strictly speaking, according to Article VI, judicial review is designed primarily to prevent state courts from refusing to enforce valid national laws that the state judges do not like.

Let me explain a bit more here, closely attending to the crucial distinction between power and authority. Of course, courts have the raw power to make any constitutional ruling that they like in a case before them, but their legitimate authority to overrule the decisions of other branches of government extends only to cases of a judiciary nature and to clear, unarguable constitutional violations. This means that when a court overturns a legislative or executive act in a doubtful case not of a judiciary nature, the affected branch is not constitutionally bound to honor that decision as it pertains to other non-parties not before the court. That is because, in such a case, though the court had the power to decide the case, it did not have the constitutional authority to bind Congress and the President to its ruling.

The limited form of judicial review established in the Founders' Constitution allows the judicial branch to protect itself against encroachments of other branches of government, to protect individual rights in clear cases in which another branch of government has unarguably violated the Constitution, and to perform the critical judicial function of resolving disputes peacefully and in accordance with standing law. It does not allow the courts to deny the other branches of government the power to interpret the Constitution for themselves within their own acknowledged constitutional spheres of authority.

The Founders and the Judicial Function

As we have seen, judicial review of national law in the United States is constitutionally grounded in the Article III extension of federal judicial power to cases "arising under" the Constitution, laws, and treaties.REF The most explicit statement regarding the scope of this power is found in James Madison's Notes on the Federal Convention. According to Madison, the Founders extended federal judicial power to such cases only after it had been generally agreed "that the jurisdiction given was constructively limited to cases of a Judiciary nature."REF

Madison expounded further on the scope of judicial power in his remarks of June 17, 1789, during congressional debates over the President's removal power. Arguing in support of vesting this power solely in the President, and responding to the charge that the legislature had no right to interpret the

Constitution (via vesting of the power by statute), Madison flatly denies the power of any branch of the national government (including the judicial) to "determine the limits of the constitutional division of power":

I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial. But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point....There is not one government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case.REF

Thus the cases "of a judiciary nature" agreed to by the Framers of the Constitution in 1787 are exactly those cases mentioned by Madison in the Removal Debate of 1789 which, "in the ordinary course of government," the exposition of the "constitution devolves upon the judicial." Under this view, it is only in cases which involve constitutional provisions directly addressed to the courts that the Supreme Court's refusal to apply relevant law is necessarily final.

In cases involving constitutional provisions addressed to other branches of government (e.g., the Article I, Section 8 "necessary and proper" clause), the Court may surely refuse to apply the law, but it may not do so with finality in the strict sense. Even though the Court's decision may bind the parties in a particular case, Congress may nonetheless refuse to acknowledge the constitutionality of the Court's ruling—as President Lincoln did in Dred Scott's case—and even provide for subsequent enforcement of the statute.REF Congress may even go so far as to utilize its power to regulate the Court's appellate jurisdiction so as to discourage or prevent future appeals on the question of the law's constitutional validity.REF In such instances, it is the judgment of Congress, not that of the Court, which will be "final." On the other hand, if the case involves such a constitutional provision as that in the Sixth Amendment's right to confront one's accusers in a federal criminal trial, then the Court's decision on the constitutional question will necessarily be final, since carrying on any federal criminal trial requires a court, and federal trial courts are bound by rulings of the Supreme Court.

From this perspective, Madison's theory of judicial review partitions constitutionally defective laws into two categories. One category includes those instances in which judicial finality is appropriate because final authority to refuse application of an unconstitutional law rests in the courts by virtue of the nature of the judicial function. The most obvious example is an act which operates

“unconstitutionally” on a court’s performance of its own duties. In the other category, although the Court may pronounce its own opinion on the constitutional issues involved, there is no reason to regard its opinion as conclusive against that of Congress or the President because the performance of judicial duty in such instances is unaffected by the alleged constitutional infirmity of the law. Taking this crucial distinction seriously is absolutely fatal to any doctrine of judicial supremacy. Yet it is exactly this distinction that forms the basis of that portion of Marshall’s Marbury opinion that has been so often used to support modern judicial supremacy.

Judicial Review in the Early Republic

Ironically, the case which best illustrates Madison’s narrow theory of review is also the case which has been most often used to support modern judicial supremacy. Compounding this irony is the fact that the case involved Madison himself (albeit nominally) as a party. In Marbury v. Madison, Chief Justice John Marshall, writing for a unanimous Court, held a provision of the Judiciary Act of 1789 (which extended the Supreme Court’s original jurisdiction to all federal officials) to be in contravention of Article III of the Constitution (which restricted the Court’s original jurisdiction to cases involving “ambassadors, public ministers, consuls, and states”). Marbury is a case of judiciary nature in the purest sense because it involved not only constitutional and statutory provisions aimed directly at the Court, but also involved a constitutional provision which embodied a clear restriction on judicial power. This means that the Court could not have applied the statute in Marbury without at the same time violating the Constitution. It also means that the Court’s refusal to apply the law left the other branches of government no alternative but to comply with its decision (i.e., to do nothing) because the Court, by enforcing a constitutional restriction on judicial power, essentially did nothing. Its decision therefore amounted to a “final,” or “ultimate” interpretation of the Constitution.

If this sounds like a strange basis for judicial review, it should be remembered that virtually all exercises of constitutional review by courts in the early American republic were of the Marbury type. That is, they involved courts resisting legislative attempts either:
(a) to impose extra-constitutional duties on judges, (b) to interfere with judicial procedure in ways that were unauthorized by the Constitution, or (c) to usurp judicial functions outright.

In the first category, one may point to the Invalid Pensioner Cases of the 1790s,REF to the Correspondence of the Judges,REF and to Marbury itself. In the second category, one can refer to the many early cases involving statutory suspension of jury trials.REF In the third, we have frequent instances of legislative usurpation via passage of bills of attainders and ex post-facto laws.REF

If one has trouble imagining judicial review so confined in its scope, it is probably because the modern American mind, conditioned by more than a half-century of judicial supremacy, can hardly help but regard the judicial branch as a co-equal partner in the public policymaking process. But it was doubtless to prevent such participation by judges in policymaking that the Founders circumscribed the jurisdiction and power of courts so narrowly in the first place. And just as surely, it was to prevent being dragged into such processes that early American judges strongly utilized their limited power of

constitutional review to safeguard their independence, both by resisting legislative encroachment on legitimate judicial functions and by refusing to intrude themselves upon domains they (and the Founders) regarded as better left to others.

Marshall recognized this clearly in Marbury, drawing a clear distinction between the issue of constitutionality and that of judicial review; that is, between (a) a law being incompatible with the Constitution, on the one hand, and (b) a court's having the power to nullify such a law, on the other. In Marshall's words, granting that "the constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts," does it nonetheless follow that an act, "repugnant to the constitution, notwithstanding its invalidity, binds the courts, and obliges them to give it effect?"REF Answering this question with a qualified "yes," Marshall articulates the theory of judicial function for which Marbury is justly celebrated:
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, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.REF

In other words, the "essence of judicial duty" for a court when confronted with a law of alleged unconstitutionality is to determine which of the two rules described by Marshall in the quotation above is to be applied in a given case. In other words, the court must determine whether the law should be applied in spite of its alleged constitutional infirmity or overturned because of it. Since all laws invalidated in Marshall's time either imposed extra-constitutional duties on judges, interfered with judicial procedure, usurped judicial functions, and/or were unarguably clear constitutional violations, it stands to reason that only in cases of this type was judicial invalidation considered appropriate. Cases of this type, those "of a judiciary nature," normally involve constitutional provisions that furnish direct rules for the courts. Most provisions of this type are found in Article III, Amendments 4-8 of the Bill of Rights, and some provisions of Article I, Sections 9 and 10.REF The classic example of a case of judiciary nature is one that Marshall himself used in Marbury: the Treason Clause (Article III, Section 3), which requires either a confession or the testimony of two witnesses in open court to the same overt treasonable act. Suppose Congress enacts a law allowing a conviction for treason on the basis of the testimony of one witness, or requiring the testimony of three. The Court cannot apply such a law without violating an explicit constitutional restriction on judicial power, and thus judicial invalidation is entirely appropriate. For a hypothetical example from the Bill of Rights, suppose that Congress, in a zealous attempt to suppress subversion, amends the federal rules of criminal procedure so as to make it possible for the government to obtain a conviction on a charge of treason on the basis of compelled testimony. This situation presents a clear-cut case of a judiciary nature precisely because the Court cannot apply the statutory provision without at the same time violating the Fifth

Amendment's prohibition of such testimony in judicial proceedings.

Reformulating Marshall's quotation above as a question allows formulation of a rule which will help to determine whether any particular case is one of a judiciary nature. In each case, one must ask: "Can the Court apply the law in question without itself violating a constitutional restriction on judicial power?" If the answer to this question is no, then the case is one of a judiciary nature, and the Court will have no sensible alternative but to invalidate (refuse to apply) the law. If, on the other hand, the answer is positive, then the case is non-judiciary in nature, and the Court should apply the law, whether or not the justices believe that the law itself violates the Constitution, so long as the law in question does not clearly contradict the Constitution.

Constitutional Separation of Powers

As Professor Keith E. Whittington has persuasively argued, "For judges who wish to exercise the power of judicial review, adherence to the original meaning of the Constitution is the only choice that is justifiable.… Judges are entitled to respect when asserting that a law is null and void only when they can back up such assertions with a persuasive explanation of how the law violates the meaning of the Constitution as it was framed and ratified."REF

Adoption of Marshall's approach would represent a return to the original constitutional separation of powers. It would confine the scope of judicial review in cases involving the constitutional power of the other branches of the government to those "of a judiciary nature," and to cases in which the constitutional violation is so clear as to be unarguable, leaving to other branches of government the right to construe constitutional provisions addressed to them. It would authorize judicial invalidation of laws only when to do otherwise (i.e., to uphold the law) would cause the Court either to violate a constitutional restriction on judicial power or to apply an unarguably unconstitutional law.REF

Because of our 60-years long addiction to judicial supremacy, some may fear that adoption of this approach, which—again—is really nothing more than the original constitutional separation of powers, would put an end to constitutional law as we presently understand it, leaving us in the grip of a tyrannous Congress free to pass laws that violate our rights. But closer examination of the historical record does not confirm such fears. To be sure, had the Supreme Court followed this approach throughout its history, the majority of the cases wherein congressional acts were nullified would have been decided differently. For example, of the 128 cases in which federal laws were invalidated between 1789 and 1985, only 38 were "of a judiciary nature."REF Yet when the other 90 cases—those of a non-judiciary nature—are examined more closely, one finds that roughly two-thirds of these cases subsequently have been over-ruled or so thoroughly emasculated as to have effectively disappeared from our constitutional law.REF More recent decisions will have to await the test of time, but this survey suggests that when the Court steps outside the original separation of powers and overturns national laws in cases of non-judiciary nature or of doubtful unconstitutionality, its decisions are more likely to be overturned by subsequent Courts. Thus restoration of the Madisonian theory of constitutional review would hardly reduce our constitutional law to a shambles. Instead, it would more

likely eliminate the Court's more questionable interferences with national legislative policy.

Another fear that is voiced often by those who are skeptical about the constitutional restoration advocated in this article is that its adoption would produce "anarchy" or "chaos" in constitutional decision-making. It may be acknowledged that short-run problems—mostly of a political nature—would arise from a wholesale and immediate return to the Founders' Constitution. Some legal confusion may result as judges are forced to step back from the more aggressive pose they have become accustomed to during the rise of judicial supremacy. Expectations of individuals and groups that have come to rely on the courts to provide a second forum for what really are failed legislative policy arguments (often overriding the democratic process via the creation of new supposedly "constitutional" rights) will be disappointed.

These short-run problems will have to be met with long-run adjustments. For example, legislatures will need to get back into the rights-creating business themselves, as they are—and have always been—the appropriate institution for creating new rights. Let us also note that, as the rise of judicial supremacy has been incremental, like a slowly-advancing disease, so may the remedy need to be a slowly-advancing cure. Finally, I would argue that a measure of constitutional uncertainty is healthy in a democratic republic. Surely proponents of judicial supremacy are on shaky ground here. After all, 20th century judicial review—and the so-called "living constitution" that it has generated—has produced its own brand of chaos. The Court's failed efforts to resolve the abortion controversy and its muddled First Amendment jurisprudence are but two rather obvious examples. More important, if the price of avoiding some short-term instability in our constitutional jurisprudence is the trashing of the very Constitution on which that jurisprudence pretends to be based, then paying that price amounts to sawing off the branch on which we sit.

In any case, such problems are far beyond the scope of this essay, and well beyond the competence of this writer to address. My purpose in this essay has been to draw the sharp contrast between the Founders' Constitution and the "living constitution" that has been obscured in the largely politically-driven effort to pretend that the distinction does not exist, that the constitution the courts have fashioned in the past several decades is merely a natural, "interpretive" outgrowth of the one handed down to us by the framers in 1787. It is not. Our constitutional republic has been living a lie, and it is now time for a "sober second thought."

The idea that final authority to interpret the Constitution must reside in some single part of the government is itself a myth, without foundation in the Constitution. This can hardly be put more graphically than it was by James Madison in the Removal Debate of 1789, quoted above in full but which bears repeating here in part: "There is not one government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the

community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case."REF

The historical record is a testament to the good sense of Madison and the Founders. They knew what we have apparently forgotten, that courts are charged primarily with the vital function of resolving disputes between individuals peacefully and impartially so as to prevent alternative resolution by force of arms. This is arguably the most important activity of any governmental office in a constitutional republic, and it cannot likely be performed well by any but the "least dangerous branch." But that branch is only "least dangerous" because its independence allows it to be apolitical and thus truly impartial. When the judiciary attempts self-aggrandizement by purporting to resolve politically divisive issues without appropriate legal or constitutional foundation (as it did in Dred Scott, Roe v. Wade, Obergefell, and a plethora of other cases), it
usurps the authority of the American People and becomes the "most dangerous branch." It also puts the entire machinery of peaceful dispute-resolution at risk, and thereby undermines the traditional source of its own legal authority.

The Founders also knew something else that we seem to have forgotten. If we are to have a healthy representative democracy, we must have healthy representation, and that means representatives fully engaged in constitutional decision-making. Making policy based solely on public opinion, fashions of the day or electoral projections, while leaving constitutional issues for the courts to decide, simply will not do. A half-century ago, constitutional historian Donald G. Morgan, in a book warning of the danger of an already-advancing judicial monopolization of the Constitution, reported being struck by "the solicitude with which citizens and officials [in the early constitutional period], when contemplating measures of government action, probed constitutional issues."REF Jefferson believed that "congressional involvement with constitutional inquiries" was "essential to an informed electorate," the "safest depository of ultimate power."REF Madison viewed such constitutional involvement as essential to the integrity of Congress itself:
It is incontrovertibly of as much importance to this branch of the government as to any other that the Constitution should be preserved entire.... The breach of the Constitution in one point, will facilitate the breach in another; a breach in this point may destroy that equilibrium by which the House retains its consequence and share of power.REF

Madison suggested famously in the Federalist that if men were angels, we would not need government. He might have gone on to elaborate the full irony of the situation: The very same condition that creates the regrettable yet undeniable necessity of government is—alas—the condition that ensures that no one is really up to the job. That is why the separation of powers was such an overpowering concern for Madison and the Framers. Limiting "final" constitutional review by the Court to cases of a judiciary nature and to unarguable constitutional violations leaves to other branches of government the authority to determine the reach of their own constitutional powers. It preserves the co-equality accorded to each branch of the government by the Founders. It strengthens the separation of powers by emphasizing the constitutional responsibilities of Congress and the President. And it

restores the American people to their rightful place in our republican constitutional order.

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