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

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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.

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."[1] 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.[2] 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

1. Jeremy Bentham, "A Fragment on Government: Appendix," in J.H. Burns and H.L.A. Hart, eds., *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government*, (New York: Oxford University Press, 1977). See also Lon L. Fuller, *Legal Fictions*, (Palo Alto: Stanford University Press, 1967), p. 57.
2. On the important contributions of Frank Goodnow, first president of the American Political Science Association, and Woodrow Wilson, 28th president of the United States, to this revolutionary effort, see Robert Lowry Clinton, "Dreams of a Perfected Beehive: Our Two Constitutions," in *New Oxford Review*, November 2015, pp. 22–28.

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.[3] 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,[4] 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.[5] The living constitution springs from a

3. See Winton U. Solberg, ed., *The Federal Convention and the Formation of the Union of the American States* (Indianapolis: Bobbs-Merrill, 1958), p. 78. For discussion of the debates surrounding the Council Proposal and its ultimate rejection, see Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1989, 1991), pp. 57–60.
4. Alexander Hamilton, *The Federalist* No. 78., https://avalon.law.yale.edu/18th_century/fed78.asp (accessed June 11, 2020).
5. See generally Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (Lawrence, Kansas: University Press of Kansas, 1997).

secularist progressivism that denies the very existence of natural law and natural rights.[6] 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.[7] 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

6. See generally Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington, Delaware: ISI Books, 2009).

7. See generally Robert Lowry Clinton, "Democracy, the Supreme Court, and Our Two Constitutions," *Faulkner Law Review*, Vol. 8, No. 1 (Fall 2016), pp. 1–27. See especially pp. 14–17 for a brief discussion of some of the cases that exemplify this "subtle importation."

8. *Obergefell v. Hodges,* 135 S.Ct. 2584, 2607-08 (2015).

the Fourteenth Amendment,[8] 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."[9] 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."[10] 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.

9. Ibid., p. 2626 (Chief Justice John Roberts, dissenting).
10. Quoted in Ralph A. Rossum and G. Alan Tarr, *American Constitutional Law, Vol. 1: The Structure of Government, 10th ed.* (Boulder, CO: Westview Press, 2017), p. 2.

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.[11]

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.[12] 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."[13]

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

11. See Robert Lowry Clinton, *Marbury v. Madison and Judicial Review, chaps. 4-6* (Lawrence, Kansas: University Press of Kansas, 1989, 1991). See also *The Federalist* No. 78, where Alexander Hamilton famously declared that, in any government featuring a separation of powers, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution...." David Wootton, ed., *The Essential Federalist and Anti-Federalist Papers* (Indianapolis: Hackett Publishing Co., 2003), p. 284.

12. The first unequivocal use of *Marbury* to support judicial supremacy appears to have been that of Edward J. Phelps, who, in an 1879 Address to the Second Annual Meeting of the American Bar Association, praised the Marshall Court for establishing "that salutary principle, set forth with utmost clearness and unanswerable force in the early case of *Marbury against Madison*, followed up from time to time by repeated decisions, and adopted by all jurists and all courts ever since, that the Constitution of this country has by an inevitable necessity, reposed in the judicial department of the government, the sole determination and construction of the fundamental law of the land." Quoted in Clinton, "Democracy, the Supreme Court, and Our Two Constitutions," *Faulkner Law Review*, Vol. 8, No. 1 (Fall 2016), pp. 1–27, esp. pp. 12–13.] The falsity of Phelps's declaration is breathtaking. As we shall see, *Marbury* had set forth no such "salutary principle," there had been no "repeated decisions" following it up, and there had certainly been no adoption of any such principle "by all jurists and all courts ever since." What did follow Phelps's assertion was a debate over the scope of the judicial function in scholarly journals and books during the past two decades of the 19th century. See Clinton, *Marbury v. Madison and Judicial Review*, chap. 10, esp. pp. 166–175, for an extended discussion of this debate. The debate culminated with the Supreme Court's first-ever citation of *Marbury* in support of judicial review (though not judicial supremacy) in the Income Tax Case. See *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. (1895), p. 554.

13. Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989), pp. 1–2.

many of the most vital aspects of life in the American polity.[14] 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.[15]

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.[16] 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 evermore-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

14. Commenting further in a 2003 article, Nagel notes the "astonishing range" of modern constitutional interpretation: "The modern Court not only sees most constitutional issues as legal, it also sees most social issues as constitutional. What accounts for the constitutionalizing of so many issues—from voting rights to gay rights to abortion rights?".... It is, of course, logically possible for all constitutional issues to be entirely legal but, nevertheless, for most policy disputes to lie outside the ambit of constitutional law." Robert F. Nagel, "Marbury v. Madison and Modern Judicial Review," *Wake Forest Law Review*, Vol. 38 (2003), pp. 613–633 and esp. p. 628. Yet nowadays policy disputes no longer lie outside the ambit of constitutional law unless the courts choose to leave them there, and with increasing frequency the courts have chosen otherwise.

15. Advancing judicial supremacy is not confined to the United States. For an excellent comparative critical analysis of the increasingly global judicialization of human rights law in its relation to legislation, see Gregoire Webber, et al., *Legislated Rights: Securing Human Rights through Legislation* (Cambridge and New York: Cambridge University Press, 2018).

16. This distinction was the cornerstone of the famous 1986 speech delivered by Attorney General Edwin Meese at Tulane University. In this speech, Meese powerfully made the case that the Constitution was superior to the ordinary constitutional law developed by the Supreme Court, and pointed out some of the logical consequences of denying the distinction, including (1) the Court would be unable to overrule itself in a constitutional case, (2) citizens would not be able to respond legitimately to a disagreeable decision, (3) there would be no standard by which to criticize unfounded decisions of the Court. See Edwin Meese, "The Law of the Constitution," October 21, 1986, reprinted in *Tulane Law Review*, Vol. 61, No. 5 (April 1987), pp. 979–990, https://heinonline.org/HOL/LandingPage?handle=hein.journals/tulr61&div=38&id=&page= (accessed June 9, 2020). Subscription required.

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.[17] 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.[18]

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.[19] Perhaps most tellingly, the Supreme Court itself did not claim that its constitutional decisions were "final," "ultimate," or "conclusive" until 1958.[20] 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."[21]

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,[22] emerging in full flower only in the 1950s.[23] During earlier periods, questions about constitutional meaning were not generally regarded as solely,

17. Clinton, *Marbury and Review*, pp. 72–77.

18. Clinton, *Marbury and Review*, p. 113.

19. See generally Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1999), chap.1, and Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999), chaps. 1–4. See also, Clinton, *God and Man in Law*, p. 24.

20. See *Cooper v. Aaron*, 358 U.S. 1, at 18 (1958). See also Meese, "Law of the Constitution"; Clinton, *Marbury and Review*, pp. 14–15; and *God and Man in Law*, p. 15.

21. See Clinton, *Marbury and Review*, p. 121, notes 46–48 and accompanying text. The exception for cases of a judiciary nature reflects the Court's successful assertion, in *Marbury*, of its power to construe constitutional provisions in such a way as to make possible their application as law, but only in the decision of cases involving the performance of judicial functions. This approach accords with the Founders' extension of federal judicial power at the Philadelphia Convention only after it had been "generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature." See Max Farrand, 2 *Records of the Federal Convention of 1787*, p. 430 (New Haven: Yale University Press, 1911).

22. See, for example, Robert G. Street, "How Far Questions of Policy May Enter into Judicial Decisions," *Report of the Sixth Annual Meeting of the American Bar Association* (1883), pp. 179–193; William M. Meigs, "The Relation of the Judiciary to the Constitution," *American Law Review*, Vol. 19 (1885), pp. 175–203; James R. Doolittle, "The Veto Power of the Supreme Court," *Chicago Law Times*, Vol. 1 (1887), pp. 177–186. See generally references in Clinton, *Marbury and Review*, p. 286, note 32, and in note 12, above.

23. See references in note 20, above.

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.[24] 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.[25]

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*,[26] 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*.[27] 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.[28]

24. On the "Letters of Brutus," probably penned by prominent Antifederalist Robert Yates, and Alexander Hamilton's (Publius's) response to them, see Clinton, *Marbury and Review*, pp. 69–71. Brutus clearly saw vast potential for expansive judicial development in the 1787 Constitution; but his worst fears did not materialize until more than a century-and-a-half later. The relevant letters of Brutus may be found in Cecelia Kenyon, ed., *The Antifederalists* (Indianapolis: Bobbs-Merrill, 1966), pp. 334–357. Tocqueville's best discussion of the level of judicial power being exercised roughly a half-century after the Constitution's adoption may be found in Alexis de Tocqueville, *Democracy in America*, 2 vols., trans. George Lawrence, ed. J. P. Mayer and Max Lerner (New York: Harper & Row, 1966), pp. 89–93. See also Clinton, *God and Man in Law*, p. 27.

25. Clinton, *Marbury and Review*, chap. 6.

26. 358 U.S. 1 (1958).

27. *Brown v. Board of Education I*, 347 U.S. 483 (1954); *Brown v. Board of Education II*, 349 U.S. 294 (1955).

28. 358 U.S. 1 (1958), p. 18: "This decision [*Marbury*] 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." See note 20, with accompanying text, above.

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.[29] 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."[30] 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.[31]

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.[32] 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

29. Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (Lawrence, Kansas: University Press of Kansas, 1997), pp. 35–36.

30. Jeremy Bentham, "A Fragment on Government: Appendix," in J.H. Burns and H.L.A. Hart, eds., *The Collected Works of Jeremy Bentham*. See also Lon L. Fuller, *Legal Fictions*, p. 57. See note 1 and accompanying text, above.

31. Hadley Arkes has recently noted the Court's leading role in fostering the cultural degeneration that has led some to despair of political solutions to contemporary problems altogether. See "When Politics Reshapes the Culture," in *The Catholic Thing*, July 16, 2019: "According to this argument, we've lost in the courts because we have lost in the culture, and so the object is to change the culture. But that line of argument misses at once what has been plainly before us: the Supreme Court, pronouncing with the authority of law on the things rightful and wrongful, has been the main Engine in the coarsening and corruption of our culture. And our friends miss this point because they have never absorbed Aristotle's understanding, at the very beginning of political philosophy, on the necessary connection between the logic of morals and the logic of law." See also Arkes, "A Word in Defense of Autonomy," in *The Catholic Thing*, July 30, 2019, https://www.thecatholicthing.org/2019/07/30/a-word-in-defense-of-autonomy/ (accessed June 12, 2020). See also the cases referenced in note 7, above.

32. That is, cases in which no person could reasonably doubt the incompatibility between the Constitution and the law being applied. See Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, Connecticut: Yale University Press, 1990), chap. 3, pp. 59–63. Snowiss refers to this rule as the "doubtful case" rule. A later version of the rule—rearticulated, no doubt, because its author feared that it was being forgotten—appeared a century later in a seminal article by James Bradley Thayer. According to Thayer, laws may be invalidated by courts only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." James Bradley Thayer, "The Origins and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review*, Vol. 7, No. 3 (October 25, 1893), pp. 129–156, esp. p. 144. See also Wallace Mendelson, "The Influence of James Bradley Thayer upon the Work of Holmes, Brandeis, and Frankfurter" in Mendelson, *Supreme Court Statecraft: The Rule of Law and Men* (Ames, IA: The Iowa State University Press, 1985), chap. 1.

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.[33] 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."[34]

33. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); See also Snowiss, *Law of Constitution*, p. 87. In 1792, Supreme Court justices were required to travel to various locations ("ride circuit") to sit with circuit judges deciding cases. The issue in Hayburn's Case was the Invalid Pensioners Act of 1792, according to which disabled veterans of the War of Independence were required to apply to the circuit courts to obtain their pensions. The five Supreme Court justices sitting on circuit courts refused to enforce the act because it authorized the judges to perform administrative functions subject to review by the Secretary of War and by Congress and thus violated the separation of powers. See *United States v. Yale Todd* (unreported at the time), summarized by Chief Justice Roger Taney in *United States v. Ferreira*, 13 Howard (54 U.S.) 40 (1851), pp. 52–53. Speaking of the judgments in both *Hayburn* and *Todd*, Taney said that the administrative power "proposed to be conferred on the Circuit Courts of the United States [by Congress] was not judicial power within the meaning of the Constitution, and was therefore unconstitutional, and could not be lawfully exercised by the courts."

34. Michael Stokes Paulsen, "The Irrepressible Myth of Marbury," *Michigan Law Review* Vol. 101, No. 8 (August 2003), pp. 2705–2743, esp. p. 2708.

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.[35]

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,[36] the Court could not provide the requested relief because the congressional act upon which Marbury relied was unconstitutional.

35. The following summary of the *Marbury* case is adapted from Robert Lowry Clinton, "*Marbury v. Madison,*" in *The Oxford Companion to American Law*, ed. Kermit Hall (Oxford: Oxford University Press, 2002), pp. 549–550.

36. A ministerial duty is a duty imposed on an executive or administrative official by law. In Marbury's case, by an act of Congress passed on September 15, 1789, the Secretary of State was charged with the duty to safeguard official documents of the United States (including judicial commissions) and produce copies for interested parties for payment of ten cents. Since this duty was imposed by Congress (i.e., by law), it cannot be dispensed with at the discretion of the executive. Madison arguably violated this law by failing to produce Marbury's commission. This is the basis for Marshall's distinction between "ministerial" and "discretionary" acts, which is the foundation of the doctrine of political questions. See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, pp. 170–173 (1803).

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.[37] 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.[38] 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

37. See note 33, with accompanying text, above.

38. Marshall used one such example in his *Marbury* opinion, the Export Tax Clause of Article I, Section 9, in which it is declared that "no tax or duty shall be laid on articles exported from any state." Marshall employed this example to defend the proposition that the courts should be allowed to "look into" the Constitution in some cases: "Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?" (5 U.S. 137, p. 179). According to Erik M. Jensen, "Justice Marshall obviously thought those questions were no-brainers. And if the judiciary is going to keep its eyes open, as the Marbury Court concluded it must, Congress shouldn't even try to impose such a prohibited duty." Erik M. Jensen, "The Export Clause," *Florida Tax Review*, Vol. 6 (2003), pp. 1–75, esp. p. 4.

to serious doubt among reasonable people, the Court should enforce the law because it does not *clearly and indubitably* violate the Constitution.[39] 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.[40] 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)[41] 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)[42] 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)[43] 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

39. Indeed, few—if any—cases involving "symbolic speech" would have been thought in the early American republic to present any constitutional issue at all—let alone a "clear" or "indubitable" one. The category of symbolic speech is wholly a 20th century imposition of the Court. See *Stromberg v. California*, 283 U.S. 359 (1931), for the first such instance.

40. See Snowiss, *Law of Constitution*, pp. 60–62. See note 32, with accompanying text, above.

41. *Cooper v. Telfair*, 4 U.S. (4 Dall.) (1800), p. 19.

42. *Hylton v. United States,* 3 U.S. (3 Dall.) (1796), p. 175.

43. *Calder v. Bull,* 3 U.S. (3 Tall.) (1798), p. 399.

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.[44]

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

44. For extensive discussion of this issue, and the jurisprudential world of the Founders, see Robert Lowry Clinton, "The Supreme Court Before John Marshall," *Journal of Supreme Court History*, Vol. 27, No. 3 (2002), pp. 222–239, esp. pp. 232–233. See also Clinton, "Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence," *The John Marshall Law Review*, Vol. 33, No. 4 (2000), pp. 935–971. For an excellent discussion of the bearing of the *Federalist Papers* on clear versus not-so-clear constitutional violations, as well as other aspects of the scope of judicial power as understood by people in the Founding era, see Carson Holloway, "Against Judicial Supremacy: The Founders and the Limits on the Courts," Heritage Foundation, *First Principles* No. 71, January 25, 2019, https://www.heritage.org/sites/default/files/2019-01/FP-71.pdf. It is appropriate here to mention the familiar references in contemporary constitutional commentary to Delphic (ambiguous or unclear) constitutional provisions. Often this so-called "ambiguity" is put forward as justification for allowing the courts free rein in the interpretation of such provisions, which might include, for example, double jeopardy, jury trials, due process and a number of other (mostly Bill of Rights) provisions. The idea is that, since an "ambiguous" provision has no clearly definable meaning, the court is entitled to interpret the provision however it likes, so long as it can muster a plausible-sounding argument to support it. But this is a mistake, which is based on the failure to make a clear distinction between "ambiguity" and "generality." The double jeopardy clause, for example, is not ambiguous, though it is stated in the broadest, most general terms. Its purpose is (and always has been) to prevent government from using courts as a weapon to subject defendants to multiple prosecutions when it is unable to convict with a single one. The clause in the Fifth Amendment simply forbids subjecting defendants to double jeopardy. It says nothing about whether jeopardy attaches only after a final judgment of conviction or acquittal, or after a jury is impaneled, or after evidence is taken. Such determinations are made in some jurisdictions by legislatures and in others by courts. In the United States, it appears that Congress has, for the most part, chosen to leave such determinations to the courts, and thus any uncertainty in the meaning of the concept is due to conflicting court decisions. It is the same with such questions as the number of people on juries, which has usually been a matter of legal practice, not of constitutional law. The Constitution says only that there will be jury trials in certain circumstances. Legislatures may specify the requisite number if they choose, and in most instances the courts should defer to those judgments. Otherwise it is up to the courts to determine based on legal history and practice. This is also true of other so-called "ambiguous" provisions, such as—most notoriously—due process. Like double jeopardy and trial by jury, due process is stated in highly general terms, yet given that generality, it does not follow that its meaning is not readily definable, at least as it was understood in the Founding era (and it is the Founders' Constitution that we are concerned with in this essay). Due process became ambiguous only as the result of erroneous court decisions in the modern era that enlarged its scope beyond anything imaginable by the Founders (e.g., substantive due process).

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*.[45] In fact, *Marbury* was not cited as authority for any kind of constitutional judicial review until the 1887 case of *Mugler v. Kansas*,[46] and not in support of the broad-gauged review characteristic of modern times until *Cooper v. Aaron* in 1958.[47]

45. *Dred Scott v. Sanford*, 19 Howard 393 (1857).

46. 123 U.S. 623 (1887), p. 661. Actually, the *Mugler* reference is the first time in the history of the Court that *Marbury* is cited in support of the principle the courts may enforce constitutional limitations on any legislative body (in this instance, on a state legislature). See Clinton, *Marbury and Review*, p. 120 for a fuller discussion of this case.

47. *Cooper v. Aaron*, 358 U.S. 1 (1958), p. 18. See note 20, with accompanying text, above. See also Clinton, *Marbury and Review*, chap. 7; Clinton, *God and Man in Law*, p. 38.

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*.[48] 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.[49] 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."[50]

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

48. 117 S.Ct. 2157 (1997).

49. Prior to RFRA, the Court itself had narrowed the scope of religious liberty in *Employment Div., Dept. of Human Resources of Oregon v. Smith*. 494 U.S. 872 (1990), in which the Court overturned the "compelling interest" standard in free exercise cases that it had used since its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, a Seventh-day Adventist was discharged by her South Carolina employer because she refused to work on Saturday, the Sabbath Day of her faith. Unable to find other employment, she applied for unemployment benefits under state law; but her claim was denied because the South Carolina Employment Security Commission held that her refusal to work on Saturday did not constitute "good cause" for failing to accept "suitable work when offered." The State Supreme Court upheld the Commission's ruling; but the U.S. Supreme Court reversed, on the ground that Ms. Sherbert's disqualification as a beneficiary infringed her right to free exercise of religion, and any incidental burden on free exercise must be justified by a "compelling state interest" in the policy causing the burden. The state failed to demonstrate such a compelling interest. Conversely, in *Smith*, the Court upheld Oregon's denial of benefits to members of the Native American Church who had been dismissed from their jobs as drug rehabilitation counselors because of peyote consumption. The Court declined to invoke the compelling interest standard where workers had lost their jobs due to violation of otherwise valid criminal laws. The congressional response was swift and dramatic, enacting RFRA by a near-unanimous vote.

50. 117 S. Ct. 2157, p. 2164.

accordance with it.[51] So far as I know, the Court had never before issued such a sweeping denial of national legislative authority.[52]

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.

51. 117 S. Ct. 2157, p. 2168.

52. It might be argued that the Court reinforced *Boerne*'s denial of congressional authority in the Shelby County decision, in which the Court struck down the sections of the Voting Rights Act (*Shelby County v. Holder*, 570 U.S. 529 (2013)). In a way, this is true, though there are important distinctions between the two cases. First, the *Shelby* Court did not rest its decision on the principle that the congressional authority to enforce the Civil War Amendments was merely "remedial" not "substantive," as the *Boerne* Court had done. In fact, Chief Justice John Roberts' opinion for the Court in *Shelby* ignored the distinction, as Justice Ruth Bader Ginsburg pointed out forcefully in her dissenting opinion. Second, according to the *Boerne* Court, its decision rested in large part on what the Court referred to as an environment in which Congress had acted "against the background of a judicial interpretation of the Constitution already issued." The tone of the Court's opinion suggests that this head-on challenge to its authority may have been the chief factor motivating its decision.

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.[53] 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.[54] 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

53. See 1 Stat. 73, 85 (1789).

54. Abraham Lincoln, "Speech on the Dred Scott Decision" (June 26, 1857). Indeed, Lincoln went further, refusing to acknowledge the decision "as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision." Hadley Arkes notes that Lincoln's position on *Dred Scott* amounted to a tacit invitation to Congress for a response, which came in 1862 when Congress enacted (and the President signed) a law forbidding the extension of slavery into the territories. Arkes argues further that Lincoln's position constitutes a "refuge" from unconstitutional Supreme Court decisions, since "A mistaken decision by the Court could be better borne because it could be limited to the particular case at hand, and it may be overruled." Hadley Arkes, "The Constitution and the Sources of Refuge," *The Catholic Thing,* January 14, 2020, https://www.thecatholicthing.org/2020/01/14/the-constitution-and-the-sources-of-refuge/ (accessed June 12, 2020).

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."[55] 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.[56] 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."[57] 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."[58] 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.

55. See Max Farrand, 2 *Records of the Federal Convention of 1787*, 430 (New Haven: Yale University Press, 1911).
56. See note 21, with accompanying text, above.
57. Maeva Marcus et al., eds., "Correspondence of the Judges," in *Documentary History of the Supreme Court of the United States, 1789–1800*, Vol. 6 (New York: Columbia Univ. Press, 1998), pp. 743–758.]
58. See note 32, with accompanying text, above.

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.[59] 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."[60]

59. United States Constitution, Article III, Section 2: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

60. Farrand, *Records*, Vol. 2, p. 430. According to. B. F. Wright, Madison's meaning points to "a theory of judicial review which did not recognize the courts as the exclusive or final interpreters of all parts of the Constitution." Ralph A. Rossum says that Madison did not believe "that the Court's interpretations were superior to or entitled to precedence over those of Congress or the President. He claimed only that the Court should have final authority to pass on constitutional questions that affected its own duties and responsibilities, that is, that were of a 'judiciary nature'." Benjamin F. Wright, *The Growth of American Constitutional Law* (Chicago: University of Chicago Press, 1967), p. 18. Ralph A. Rossum, "The Courts and the Judicial Power," in *The Framing and Ratification of the Constitution*, eds. Leonard Levy and Dennis Mahoney (New York: Macmillan, 1987), p. 236.

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.[61]

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

61. Hobson, Charles F. and Robert A. Rutland, eds., *The Papers of James Madison*, 15 vols. (Charlottesville, Virginia: University Press of Virginia, 1979), Vol. 12, p. 234.

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.[62] 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.[63] 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

62. See note 54, with accompanying text, above. Of course, the courts can still enjoin the government from depriving an individual of life, liberty, or property based on what has previously been ruled an unconstitutional law, but only on a case-by-case basis.

63. The Court explicitly upheld this congressional authority in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Although the authority has engendered controversy among legal scholars, and has been discussed and distinguished a number of times by the Court, it has never been overruled. See *United States v. Klein*, 80 U.S. 128 (1872), pp. 145–147; *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), and the cases cited therein. For an excellent historical overview and thorough discussion of the Exceptions Clause, see Ralph A. Rossum, "Congress, The Constitution, And the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause," *William & Mary Law Review*, Vol. 24, No. 3 (1983). The Court could have relied on this authority in *Boumediene v. Bush* (553 U.S. 723 (2008)), but chose to ignore it. There the Court invalidated provisions in the Military Commissions Act of 2006 (MCA), which eliminated federal court jurisdiction to hear habeas submissions from detainees designated "enemy combatants." The Court held that the act violated the Suspension Clause of Article I, Section 9, Clause 2 of the Constitution, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Whatever one thinks about the result in this case, since the Founders' theory of judicial review limits the power of courts to overturn acts of coordinate branches of government to cases that unconstitutionally impair judicial functions and to cases that present unarguable constitutional violations, the Court's decision should be regarded as erroneous on both counts. First, the act of Congress in question does not unconstitutionally impair judicial functions because Congress is granted power to regulate the jurisdiction of the federal courts (by the Exceptions Clause of Article III, Section 2) and is empowered (by the Suspension Clause) to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," (which Congress had so concluded after 9/11). Second, the case presents no "unarguable" constitutional violation, as the Court itself admitted. After pretending to base its decision largely on the history of the common law writ of habeas corpus as it was understood in the Founding era, purporting to employ an "originalist" interpretive approach, the Court concluded that the record was unclear (i.e., "arguable") and chose to override the judgment of the political branches despite the obvious arguability of its conclusions regarding the historical record. The Court's decision was based on an undefined "functional" separation of powers theory that is little more than a bald declaration of judicial supremacy. In reaching its decision, the Court majority violated time-honored principles of judicial restraint, declaring that there was no good reason to accept the judgment of Congress and the President on how to handle enemy prisoners-of-war. According to Justice Scalia's dissenting opinion, the Court majority fabricated "a clear constitutional prohibition out of pure interpretive equipoise" and was simply an exercise of raw power (without legitimate constitutional authority): "What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy.... Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction.... And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme."

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,[64] to the Correspondence of the Judges,[65] and to *Marbury* itself. In the second category, one can refer to the many early cases involving statutory suspension of jury trials.[66] In the third, we have frequent instances of legislative usurpation via passage of bills of attainders and ex post-facto laws.[67]

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

64. See, e.g., *Hayburn's* Case, 2 Dallas 409 (1792). Here, five Supreme Court justices sitting on circuit refused to enforce an act of Congress authorizing the judges to perform administrative functions subject to review by the Secretary of War and by Congress because the act violated the separation of powers. See note 33, with accompanying text, above. See also *Case of the Judges*, 4 Call (Va.) 135(1788); *Turner v. Turner*, 4 Call (Va.) 234 (1792); *Page v. Pendleton*, Wythe's Reports 211 (Va) 1793; *Kamper v. Hawkins*, 1 Va Cases 21 (1793).

65. August 8, 1793. Here the Court refused to render an advisory opinion requested by the President and Secretary of State, on the ground that such an opinion would be "extrajudicial" and thus violate the separation of powers. See David P. Currie, "The Constitution in the Supreme Court: 1789-1801," *University of Chicago Law Review*, Vol. 48, No. 4, Article 2 (1981), pp. 819–885, esp. p. 829. See note 57, with accompanying text, above.

66. See, e.g., Austin Scott, "Holmes v. Walton: The New Jersey Precedent," *American Historical Review* 4 (1899): 456-469; *Trevett v. Weeden* (Rhode Island, 1786), reported in J.B. Thayer, *Cases on Constitutional Law*, 2 vols. (Cambridge, Mass.: George H. Kent, 1895), Vol. 1, pp. 73–78; *Bayard v. Singleton*, 1 Martin (N.C.) 42 (1787). See generally William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review*, Vol. 76 (May 1978), pp. 893–960. See also *Bowman v. Middleton*, 1 Bay (S.C.) 252 (1792); *Stidger v. Rogers*, 2 Sneed (Ky.) 129 (1802); *Enderman v. Ashby*, 2 Sneed (Ky.) 53 (1801).

67. See, e.g., *Commonwealth v. Caton*, 4 Call (Va.) 5 (1782); *Kamper v. Hawkins*, 1 Va. Cases 21 (1793); *Caldwell v. The Commonwealth*, 2 Sneed (Ky.) 129 (1802). Recall that, in addition to being straightforward constitutional violations, bills of attainder are deliberate attempts by legislatures to impose penalties on particular individuals, thus bypassing regular judicial processes, and 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.

obliges them to give it effect?"[68] 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.[69]

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.[70] 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

68. 1 Cranch (5 U.S.) 137 (1803), p. 177.
69. 1 Cranch (5 U.S.) 137 (1803), pp. 177–178.
70. The *habeas corpus*, attainder, and *ex post facto* provisions are obvious examples.

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."[71]

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

71. Keith E. Whittington, "How to Read the Constitution: Self-Government and the Jurisprudence of Originalism," Heritage Foundation *Report: First Principles Series,* No. 5, (May 1, 2006), p. 1, http://thf_media.s3.amazonaws.com/2006/pdf/96515_1.pdf.

to violate a constitutional restriction on judicial power or to apply an unarguably unconstitutional law.[72]

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."[73] 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.[74] 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

72. I have been asked a number of times by readers of earlier drafts of this essay to articulate a rule that clearly distinguishes arguable from unarguable constitutional violations. The best I can do is to say that a law presenting an unarguable constitutional violation is a law that no reasonable person, upon considered reflection, could regard as compatible with the Founders' Constitution. Confusion arises over this distinction because we no longer live in the jurisprudential world of the Founders' Constitution. Rather, we live in the bizarre world of late-20th and early-21st century constitutional jurisprudence—the world of the "living constitution," with the imperial judiciary at the helm. In this world, where everything is arguable and thus all line-drawing essentially arbitrary, there can be no truly unarguable constitutional violation in the last analysis. The distinction between arguable and unarguable constitutional violations was plain to early American legal practitioners who trusted the authority of reason and the widely-acknowledged canons of interpretation inherited from the common law. Finally, we should remember that, although law has precision, it is not mathematics; if it were, there would be no room for judgment—and no need for judges. Thus a reasonable enquirer can only expect to find "that degree of precision in each kind of study which the nature of the subject at hand admits." Aristotle, *Nicomachean Ethics* I.3., trans. Martin Ostwald ((Indianapolis: Bobbs-Merrill, 1962), p. 5. See also note 32, with accompanying text, above.

73. See Clinton, *Marbury and Review*, pp. 117–121 and 207–211.

74. See ibid., pp. 121 and 208–210. Most of these cases had been originally decided on the ground either of (a) the now-discredited Fifth Amendment "economic" due process, (b) the likewise-discredited Tenth Amendment "dual federalism," or (c) the Court's mere opinion that Congress had overstepped its constitutional authority.

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."[75]

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."[76] Jefferson believed that "congressional involvement with constitutional inquiries" was "essential to an informed electorate," the "safest depository of ultimate power."[77]

75. See note 61, with accompanying text, above.
76. Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* (Cambridge, Massachusetts: Harvard University Press, 1966), p. vii.
77. Quoted in ibid., p. 362.

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.[78]

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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78. Quoted in ibid.