JUDICIAL REVIEW OF UNENUMERATED RIGHTS: DOES *MARBURY*'S HOLDING APPLY IN A POST-WARREN COURT WORLD?

BY JOHN C. EASTMAN*

Last year law schools across the country celebrated the 200th anniversary of the Supreme Court's landmark decision in *Marbury v. Madison*, which firmly entrenched judicial review as a fundamental component of our constitutional system of government—so fundamental, in fact, that adorning the east wall of the Justices' dining room in the building that is home to the Supreme Court of the United States are portraits of William Marbury and James Madison, side-by-side, facing each other as if in eternal combat.[1] At Chapman Law School, where I teach, we marked the occasion with a re-enactment of the oral argument in the case. University of Southern California Law Professor Erwin Chemerinsky (who is now a member of the faculty at Duke Law School) and I were opposing advocates. Fifth Circuit Court of Appeals Judge Jerry Smith, of *Hopwood v. Texas*[2] fame, played the role of Chief Justice, while a combination of Chapman law students and undergraduate legal studies majors filled out the bench.

Complete transcripts of the original oral argument are not available, of course, so we were able to exercise a little literary license to fill in

* Professor of Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence; J.D., The University of Chicago Law School; Ph.D., M.A., The Claremont Graduate School; B.A., The University of Dallas. I gratefully acknowledge Dean Parham Williams and the Chapman Law School faculty research fund for support in the preparation of this article; Chapman law students Anthony Geraci, Amy Oakden, and Joe Mellema for their able research assistance; and Professors Bradley C. S. Watson (St. Vincent College), Edward Erler (California State University, San Bernardino), David Forte (Cleveland-Marshall College of Law, Cleveland State University), Matthew Franck (Radford University), and Nelson Lund (George Mason University Law School), who as participants at a panel sponsored by the Claremont Institute at the annual convention of the American Political Science Association entitled "Progressivism, Courts, and the Expansion of Rights: Reflections on the Bicentennial of *Marbury v. Madison*," provided helpful feedback on an earlier iteration of the ideas developed in this article.

1. *See, e.g.*, David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 350 (1996).

2. 236 F.3d 256 (5th Cir. 2000).

the gaps. I was there to argue Madison's case, for example, when no one appeared on Madison's behalf during the original proceedings, and various executive and legislative branch officials would not even provide Marbury's lawyers with documentary evidence of his nomination, confirmation, appointment, and commission.[3] I appeared specially only to challenge the Court's jurisdiction, and I began the argument with a motion that the Chief Justice recuse himself; it was, after all, Marshall's own failure while still Secretary of State to deliver Marbury's midnight commission that generated the controversy in the first place.

"Chief Justice" Smith thundered a question to me from the bench: "Are you accusing me of bias?" (Actually, the question from Judge Smith was quite tame, but I did imagine the responsive thunder that such a question might have evoked from Chief Justice John Marshall himself!). My response drew a predictable round of laughter from the crowd: "I would never make such an accusation, Mr. Chief Justice. But the mere *appearance* of bias is sufficient to warrant recusal here." "Chief Justice" Smith denied my motion—thankfully, as my Dean would undoubtedly have been upset with me were our star jurist to leave the bench in the opening moments of the argument—but I suspect Chief Justice Marshall would have denied the motion as well, despite his connection to the case and familial relationship with the real party in interest, President Thomas Jefferson, his cousin.

Why is it even arguably the case that Marshall should have recused himself? Nothing in the Constitution *explicitly* bars one from serving as judge in a legal case or controversy in which he has an interest. On the contrary, Article III provides that "the judicial power of the United States shall be vested in one Supreme Court," and Marshall, as Chief Justice, was clearly a member of the Supreme Court. To be sure, Article III also specifies that judges "shall hold their Offices during good Behaviour,"[4] and the Fifth Amendment guarantees that no one can be "deprived of life, liberty, or property without due process of law,"[5] but neither of these clauses *explicitly* prevented the self-interested Marshall from presiding over the case, and there was at the time no positive law pronouncement, no statutory code of judicial ethics, that barred a biased jurist from taking the bench.

Yet, even absent an express statutory prohibition, I think most of us

3. *See* 1 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 137–38 (P. Kurland and G. Casper eds., 1978).

4. U.S. CONST. art. III, § 1.

5. U.S. CONST. amend. V.

have the innate sense that a judge should not sit in judgment over a case in which he has a personal interest. Call it "bad" behavior for a judge, or a deprivation of the process that is due as a matter of fundamental fairness, but is it not evident that to pursue either inquiry necessarily requires that we look beyond the mere text of the Constitution, to some notion of justice that would help give substance to its provisions? It may well be, then, that the problem of judges ruling on unenumerated rights was with us long before Earl Warren ascended to the bench.

There is another problem underlying *Marbury*, at least as it has come to be interpreted, that needs to be addressed. Although in our re-enactment Professor Chemerinsky and I donned period dress—complete with wigs, knee-breeches, and buckled shoes!—the controversy over judicial review is as current as recent headlines. In July 2003, the Nevada Supreme Court ordered the state legislature to consider tax increases *by simple majority vote*, in violation of the two-thirds vote requirement of the Nevada constitution. The Court stated in the course of its opinion that it was the interpreter (apparently the only interpreter) of the state's constitution[6]—a broad expansion of Marshall's claim in *Marbury* itself. In August of the same year, a new controversy over the display of the Ten Commandments in public space erupted in Alabama, with federal judges pitted against a state Supreme Court Chief Justice, and both sides claiming the mantle of the Rule of Law.[7] And in November 2003, the Supreme Judicial

6. Guinn v. Nevada State Legislature, 71 P.3d 1269 (Nev. 2003).

7. Glassroth v. Moore, 335 F.3d 1282 (Ala. 2003); *see also* Roy Moore & Michael Knox Beran, *Sacred Texts Used and Abused,* WALL ST. J., Sept. 5, 2003, at W15; Quin Hillyer, *No More Moore*, NAT'L REV. ONLINE, Aug. 25, 2003, *at* http://www.nationalreview.com/comment/comment-hillyer082503.asp. Justice Gorman Houston, Senior Associate Justice of the Alabama Supreme Court, convened a conference of the Associate Justices to counteract Moore's refusal to obey the federal court order, reportedly "to assure that the State of Alabama is 'a government of laws and not of men,' as our Constitution requires." *Moore Profoundly Wrong*, MONTGOMERY ADVERTISER, Aug. 16, 2003, at A7. Alabama Attorney General Bill Pryor echoed the sentiment:

> Although I believe the Ten Commandments are the cornerstone of our legal heritage and that they can be displayed constitutionally as they are in the U. S. Supreme Court building, I will not violate nor assist any person in the violation of this injunction. As Attorney General, I have a duty to obey all orders of courts even when I disagree with those orders. In this controversy, I will strive to uphold the rule of law. We have a government of laws, not of men. I will exercise any authority provided to me, under Alabama law, to bring the State into compliance with the injunction of the federal court, unless and until the Supreme Court of the United States rules in favor of Chief Justice Moore.

Statement Of Attorney General Bill Pryor Regarding Announcement Of Chief Justice Moore That He Will Not Obey The Injunction Of The Federal Court, *at* http://209.157.64.200/focus/f-news/964327/posts (Aug. 14, 2003).

Court of Massachusetts ordered the county clerks of that state to begin issuing marriage licenses to same-sex couples, despite its own acknowledgement that neither the Massachusetts Constitution nor statutory law had ever been understood to extend "marriage" in such a fashion.[8]

When a court's resolution of an issue before it is concededly grounded in neither constitutional text nor the original principles and practice of those who drafted it, can the claim of judicial supremacy that has been attributed to Chief Justice Marshall still be made without fundamentally altering the very nature of our republican form of government? Is the post-Warren Court's jurisprudence of unenumerated rights different not just in degree but in kind from the jurisprudence of its predecessor courts, and if so, to what effect? My aim in this article is to explore these thorny questions.

I. FROM *MARBURY* TO *GUINN*: HAS THE NATURE OF JUDICIAL REVIEW CHANGED?

Before embarking on the principal inquiry, it is important to remember the precise claim that Chief Justice Marshall actually staked out in *Marbury v. Madison*. It was not, as many have apparently come to believe, that the courts are the *only* arbiter of constitutional questions.[9] Nor was it even that the Supreme Court is

8. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

9. During debate over various iterations of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, 2 U.S.C. §§ 431 *et seq.*, both proponents and opponents of the bill seemed to accept that the task of determining the bill's constitutionality was for the Supreme Court, not the Congress. *See* 144 CONG. REC. H7298-02 (Aug. 6, 1998) (Statement of Rep. Hutchinson) ("[M]y greatest objection to the legislation being proposed ... [is] that it has some constitutional problems."); *id.* (Statement of Rep. Hill) ("Even the advocates of Shays Meehan believe it may not meet constitutional muster."); 144 CONG. REC. S10063 (Sept. 9, 1998) (Statement of Sen. McConnell) ("There is virtually no chance—no chance—that the restrictions ... contained in McCain-Feingold will be upheld as constitutional."); 149 CONG. REC. S5738-01 (May 5, 2003) (Statement of Sen. Feingold) ("From the very beginning of our effort to reform the campaign laws over a period of 7 years, we knew that the Supreme Court of the United States would decide the fate of the law."); Committee on House Administration, Adverse Report to Accompany H.R. 2356, H.R. REP. 107-131, 107th Cong., 1st Sess., at 3 ("The attempt by H.R. 2356 to restrict issue advocacy is an unconstitutional overreach and would likely be struck down by the Court."). Many of the provisions so widely believed to be unconstitutional were ultimately upheld by the Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), of course, but the Court's decision was based, at least in part, on the presumption of constitutionality it owes to the actions of the co-equal branches, apparently even when those branches were themselves concerned about the constitutionality of their actions. *See id.* at 171 ("[W]e give 'deference to [the] congressional determination of the need for [BCRA §301(20)(A)(iv)] [as a] prophylactic rule.'") (quoting Fed. Election Comm'n v. Nat'l Conservation Political Action Comm., 470 U.S. 480, 500 (1985)); *see also* Mitch McConnell, *The Future is Now*, 3 ELECTION L. J. 123, 123 (2004) ("In one fell

the *final* arbiter of all constitutional questions, not just for the judicial branch but for all three branches of government, though that was certainly urged by Marbury's counsel, who made the following argument to the Court:

> This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer.[10]

Rather, Marshall made the much more limited, common-sense claim that, in a regime operating under a constitution by which only certain limited, enumerated powers were granted to the government, laws made in excess of that delegated authority could not be applied by judges bound by oath to uphold the Constitution.[11] The courts, then, were not only authorized to refuse to give unlawful statutes any effect in the cases before them, but were in fact obligated to take that course.

Marshall was not the first to make such a claim, of course. Alexander Hamilton made it explicitly in Federalist 78:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges

---

swoop and by a margin of only one vote, the Supreme Court bestowed upon Congress extraordinary authority to regulate speech... . In a Shermanesque manner, the Supreme Court marched through my best efforts to regain the liberties stripped by Congress. Section by section, the Supreme Court repeatedly tipped the scale toward alleged Congressional wisdom in the balancing act of regulating political speech."); Bobby R. Burchfield and Robert K. Kelner, *Great Cases, Like Hard Cases, Make Bad Law*, 3 ELECTION L. J. 211 (2004) ("Some might read McConnell as an invitation for further campaign finance regulation, and it might well turn out to be so. But it might also prove the high water mark for regulation, as Congress comprehends that the promise of such regulation has far exceeded its reality, and as the judiciary better understands the violence done to the First Amendment in the name of 'campaign finance reform.'").

10. 1 LANDMARK BRIEFS, *supra*, note 3, at 145.

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–79 (1803); *see also* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 174 (2001) (describing Marshall as holding that "only the people, acting in specially called constitutional conventions, could create a written constitution that limited and defined government and was 'permanent' and supreme over ordinary law"); *cf.* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (holding that contrary state laws must yield to the federal Constitution, laws and treaties).

would amount to nothing.[12]

Although in his Federalist 78 discussion Hamilton seems to limit judicial review to express constitutional prohibitions such as those contained in Article I, sections 9 and 10 of the Constitution (rather than the limits inherent in the enumerated powers listed in Article I, section 8), others were not so stingy. Oliver Ellsworth, for example, expressly contended during the Connecticut ratifying convention that judicial review would also be available to enforce the limits of the powers granted to the national government:

> This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.[13]

Indeed, the idea that judicial review would be used to insure conformity with *all* the Constitution's provisions—the limits of enumerated powers as well as the express prohibitions—seems to have been assumed by the delegates to the constitutional convention, even during a debate in which the convention rejected efforts to have the Supreme Court justices serve as a council of revision that would have a share in the President's veto power. George Mason noted, for example, that judges "could declare an unconstitutional law void."[14] Luther Martin, who opposed including Supreme Court justices in a council of revision, and James Wilson, who supported such a council, both agreed that judges, in their judicial capacity, would already have "a negative on the laws."[15] The debate over the council of revision was thus about whether the justices should *also* have the power to negate laws on policy grounds before they took effect, not whether they would be obliged, when asked to enforce an unconstitutional law in a case or controversy before them, to give effect to the unconstitutional law, the Constitution itself notwithstanding.[16]

---

12. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. Oliver Ellsworth, Speech in the Connecticut Ratifying Convention (Jan. 7, 1788), *reprinted in* JONATHAN ELLIOT, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196 (Ayer Co. 1987) (1859); *see also* Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 115–16 (2004) (quoting Ellsworth).

14. 2 THE RECORDS OF THE FEDERAL CONVENTION 78 (Max Farrand ed., 1911).

15. *Id.* at 76 (Martin); *id.* (Wilson) (noting that "the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights").

16. Randy Barnett has recently beat me to the punch on this, so I will not recite here all

Marshall's holding in *Marbury* is therefore really not very surprising. Each officer of government has an equal obligation, by oath, "to support [the] Constitution,"[17] and, as Randy Barnett has recently pointed out, each does so at the appropriate point in the constitutional process.[18] Should Congress deem a bill to be unconstitutional, it simply does not enact it.[19] Should the President deem a bill presented to him by Congress to be unconstitutional, he vetoes it.[20] And should the courts deem an enacted statute to be unconstitutional, they simply do not give it effect in cases that come before them. Thus far, there is perfect equality between the three branches of government (and, I should note, between the branches of the federal government and those of the state governments). As Madison himself noted in Federalist 49: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ."[21] That was the limit of Marshall's holding in *Marbury*—call it the first quarter of a constitutional competition. Indeed, had Marshall ruled otherwise, the courts would have been bound to accept Congress's interpretation of its own powers, and to that extent the judiciary would be inferior to, rather than the equal of, the legislative branch.

---

the historical evidence he relies upon beyond those few passages already cited. For his more complete discussion, see Barnett, *supra* note 13, at 121–28.

17. U.S. CONST. art. VI, cl. 3. Only the President takes a different oath, obligating him not just to support but, "to the best of [his] Ability, [to] preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 7.

18. *See supra* note 17.

19. *See, e.g.*, 2 ANNALS OF CONG. 1686 (1790) (rejecting, as unconstitutional, bill to loan money to glass manufacturer); 9 ANNALS OF CONG. 1712–27 (1796) (rejecting, as unconstitutional, bill to provide relief to Savannah, Georgia, after fire destroyed the city). For more on why Congress thought these bills did not qualify as spending "for the *general* welfare," as required by article I, section 8, clause 1 of the Constitution, see John C. Eastman, *Restoring the 'General' to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

20. U.S. CONST. art. I, § 7. President George Washington vetoed Congress's first attempt at reapportionment, believing it to be unconstitutional. Message from President Washington, HOUSE JOURNAL, 2d Cong., 1st Sess., at 563–64 (Apr. 5, 1792); *see also* Charles L. Black, *Some Thoughts on the Veto*, 40 L. & CONTEMP. PROBS. 87, 89–92 (1976) (listing use of veto by Presidents Washington through Tyler), *cited in* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 917 n.110 (2003). Although modern Presidents more frequently use the veto power because of disagreement with Congress over the policy served by a bill than because they view the bill to be unconstitutional, Washington himself treated the veto power as reserved for unconstitutional bills. Paul E. McGrael, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1140 n. 148 (2000) (citing FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 184–85 (1974)).

21. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

The constitutional competition gets interesting, though, when it moves into the second quarter and beyond; that is, when the branches disagree as to constitutionality. One possibility might well be that no law can take effect, and remain in effect, without the concurrence of all three branches of government, just as, absent a veto override, no bill can become a law without the concurrence of both houses of Congress and the President.[22] But the constitutional text itself already disclaims that possibility, at least in some circumstances. A presidential veto, on constitutional grounds,[23] can be overridden by a two-thirds supermajority vote of both houses of Congress, such that the bill will become law even over the constitutional objection of one branch of the government.[24]

Does this mean that the Congress is in fact more equal than the President in the separation-of-powers balance? Well, not exactly. It simply means that the Congress has a mechanism to pursue its view of the matter when it is adamant about both the constitutionality of its bill and the need for the policy sought to be achieved by it. But the President is likewise not without power to give effect to his view of a bill's unconstitutionality even in the event of a veto override, if he is in turn equally adamant. He can simply decline to enforce the new law, treating his constitutional obligation "to take care that the laws be *faithfully* executed"[25] as obliging him *not* to enforce laws that, in his view, would amount to a breach of his oath to "preserve, protect and defend" the Constitution itself.[26] Congress can, in turn, use its other powers to reassert its view once again. It can mandate that the executive branch take certain actions and attempt to limit executive action through statutory restraint;[27] bar funding to any department

22. *See* U.S. CONST. art. I, § 7, cl. 2.

23. The President is obliged to provide to Congress the reason he has vetoed a bill. *See id.* ("but if [he shall not approve the bill] he shall return it, *with his Objections*, to that House in which it shall have originated") (emphasis added).

24. *Id.*

25. U.S. CONST. art. II, § 3 (emphasis added).

26. Although controversial, a number of Presidents have asserted such a non-enforcement power. *See* DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER 53–57 (1992).

27. During the Nixon administration, for example, "Congress sought to limit the asserted war powers of the President, regulate executive budgetary authority, impose limitations on the exercise of emergency power, rationalize the use of information from presidential papers, and provide for independent investigation of high executive officers suspected of committing criminal offenses." Peter E. Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 434 (1989).

that does not accede to its wishes;[28] even impeach executive branch officials, up to and including the President himself, for their failure to execute the laws faithfully, as Congress interprets "faithfully."[29] The fact that the President and the Congress each has an answer to the other at every stage of this ping-pong match should come as no surprise; it necessarily follows from a system where co-equal branches were designed to serve as a check on one another,[30] with tepid or weak-hearted objections by either side losing out along the way to the determined certitude of the other. Even if the dispute rises to the level of impeachment—what we might call sudden death in our constitutional game—the President can ultimately defend his actions with an appeal directly to the people,[31] who in that event will render judgment at the next election and, as a result, be the final arbiter of the constitutional question, just as the theory of the Constitution says they should be.[32]

Indeed, this very scenario played out with the impeachment of President Andrew Johnson in the aftermath of the Civil War. Congress passed the Tenure of Office Act in 1867 to prevent President Johnson from removing cabinet-level appointees of the late President Abraham Lincoln. President Johnson vetoed the bill as an unconstitutional intrusion upon his appointment and removal power, but Congress overrode the veto and the bill became law. The President nevertheless refused to comply with the law, holding firm to his position as to its unconstitutionality when he fired Lincoln's Secretary of War, Edwin Stanton. The House of Representatives responded by voting for articles of impeachment against President Johnson, but the Senate backed down from the constitutional confrontation the Congress had initiated, voting 35-19 in favor of the

---

28. *See, e.g.*, THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse ... ."); *see also* Todd D. Peterson, *Controlling The Federal Courts Through The Appropriations Process*, 1998 WISC. L. REV. 993, 1008 (1998).

29. U.S. CONST. art. II, § 4.

30. *See, e.g.*, THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("unless [the legislative, executive, and judiciary] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which [Montesquieu's separation-of-powers] maxim requires, as essential to a free government, can never in practice be duly maintained").

31. By this, I do not mean the formal appeal to the people for constitutional amendment as spelled out in Article V. Rather, I mean the President's use of the bully pulpit to bring popular opinion to bear on members of Congress as they vote on articles of impeachment in the House or to convict in the Senate.

32. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that governments "derive[e] their just powers from the consent of the governed").

impeachment, one vote short of the two-thirds vote needed for conviction.[33]

Marshall's holding in *Marbury* was, as I noted, limited to the first quarter of this constitutional game. Indeed, Marshall cleverly wrote his opinion so as steadfastly to avoid taking the game beyond the first quarter. He did not issue a writ of mandamus to Secretary of State Madison, for example, or even compel any of the lower executive branch officers to testify over their objection,[34] because either order might well have been refused[35] as improperly rendering the executive branch subservient to the judicial branch.

So how then did we get from *Marbury* to *Guinn* and *Goodridge*, the cases I mentioned briefly at the outset of this paper? Nevada Governor Guinn filed a petition for a writ of mandamus, asking the Nevada Supreme Court to order the State Legislature to complete work on a tax increase to fund K-12 education for the coming fiscal year.[36] An extraordinary request in its own right, the remedy provided by the Nevada Supreme Court was even more audacious. Because the stand-off in the Legislature had been manufactured (or, perhaps, just so happened) to pit the education funding mandated by one provision of the Nevada Constitution[37] against the two-thirds vote requirement for tax increases contained in another, more recent provision of the Nevada Constitution,[38] the Nevada Supreme Court took it upon itself, without request even from the Governor petitioner in the case, to order that the Legislature proceed to consider a tax increase *"under simple majority rule,"* in acknowledged violation of the State Constitution.[39] In the course of rendering its opinion, the Nevada Supreme Court stated that it was taking the action pursuant to its role as interpreter of the State Constitution, as if neither of the

33. For more on this extraordinary set of events, see generally WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992), MILTON LOMASK, ANDREW JOHNSON: PRESIDENT ON TRIAL (1973), and MICHAEL L. BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973). *See also* Myers v. United States, 272 U.S. 52, 166–67 (1926); DOUGLAS W. KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 450–51 (2d ed. 2004).

34. *See* 1 LANDMARK BRIEFS, *supra* note 3, at 141, 142.

35. Alexander Hamilton noted in FEDERALIST 78, for example, that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments," suggesting that the executive might well decline to give such aid in a proper case. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

36. Guinn v. Nevada State Legislature, 71 P.3d 1269, 1272 (Nev. 2003).

37. NEV. CONST. art. 11, § 6.

38. NEV. CONST. art. 4, § 18(2).

39. *Guinn*, 71 P.3d at 1275–76 (emphasis added).

other two branches of government had any independent obligation to interpret the State Constitution themselves.[40]

Similarly, the Massachusetts Supreme Judicial Court in *Goodridge* took it upon itself to redefine both statutory and constitutional law, altering a couple of millennia of understanding of the nature of "marriage" in the process.[41] The Supreme Judicial Court noted that it was "mindful" that the decision "marks a change in the history of our marriage law" but concluded that the existing marriage laws had no rational basis, even while the Court purported to "give[] full deference to the arguments made by the Commonwealth."[42] The majority, chastising the three dissenting judges for "label[ing] the court's role as usurping that of the Legislature," asserted that the dissenters "misunderstand the nature and purpose of judicial review."[43]

Although both holdings are a significant expansion of the *Marbury* holding, they are not without precedent. Legal scholars have generally recognized that a similar expansion was undertaken by the Supreme Court itself in *Cooper v. Aaron*.[44] Relying on a statement of *obiter*

---

40. *Id.* at 1272.

41. Goodridge v. Dep't. of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

42. *Id.* at 948.

43. *Id.* at 966. In response to *Goodridge*, the Massachusetts legislature drafted a bill allowing same-sex couples to form civil unions with the benefits, protections, rights and responsibilities of marriage while preserving the definition of marriage. *See* S.B. 2175, 183d Gen. Ct., Reg. Sess. (Mass. 2003). Rejecting the constitutionality of the bill, the Supreme Judicial Court stated in an advisory opinion that the "the constitutional infirmity at issue" was not tangible benefits but exclusion "from the institution of civil *marriage*." In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (2004) (emphasis added). Subsequently, however, the Supreme Judicial Court faced a challenge to its subject-matter jurisdiction to hear and decide *Goodridge* under the Massachusetts Constitution, which states that "[a]ll causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision." MASS. CONST. part 2, c. III, art. V. In response, the Court asserted (contrary to the holding of *In re Opinions of the Justices to the Senate*) that *Goodridge* actually did not involve a "cause[] of marriage" and concluded that "[i]t was within the court's jurisdiction to resolve an adversary case requiring interpretation of the Constitution and a determination of the validity of our law." Goodridge v. Dep't of Pub. Health, Order of the Supreme Judicial Court, at *1–3 (May 7, 2004).

44. 358 U.S. 1 (1958); *see, e.g.*, Edwin Meese III, *The Law of the Constitution*, 61 TULANE L. REV. 979 (1987):

> In [*Cooper*], in dictum, the Court characterized one of its constitutional decisions as nothing less than "the supreme law of the land." Obviously constitutional decisions are binding on the parties to a case; but the implication of the dictum that everyone should accept constitutional decisions uncritically, that they are judgments from which there is no appeal, was astonishing .... In one fell swoop, the Court seemed to reduce the Constitution to the status of ordinary constitutional law, and to equate the judge with the lawgiver.

Id. at 987 (quoting *Cooper*, 358 U.S. at 18).

dictum from *Marbury* rather than the actual holding, the Supreme Court in *Cooper* held that the Governor of Arkansas was bound by a federal court constitutional interpretation in a separate school desegregation case to which neither the Governor nor the State of Arkansas was party:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[45]

Note just how significant an expansion of *Marbury* the Court's holding in *Cooper v. Aaron* really is. Whereas *Marbury* was on its face grounded in an equality of the branches, each having its own independent right and obligation to interpret and be bound by the Constitution in matters coming before it, the holding in *Cooper* is fundamentally grounded on the claim that the judiciary is superior to all other branches of government. Once the judiciary interprets the Constitution, everyone else is bound by that interpretation—not just those who were party to the case where the interpretation was provided, but all other public officials, executive as well as legislative, federal as well as state, who had no opportunity to be heard before the initial ruling was handed down. In other words, far from the judiciary being but one equal part in a sophisticated system of checks and balances where each branch checks the other, the judiciary becomes, under this view, the principal and final check on the rest of government, with nothing, not even the law itself, serving as a check on it.

45. *Cooper*, 358 U.S. at 18 (citation omitted).

II. IS TREATING THE *SUPREME* COURT AS SUPREME REALLY SUCH A PROBLEM?

One response to *Cooper v. Aaron* might be: "So what? Just what is wrong with having the Supreme Court be Supreme? The final word has to reside somewhere, and given the founders' concern with a legislative tyranny of the majority,[46] or a kingly executive tyranny,[47] would it not be preferable to place that final authority in the Supreme Court, sufficiently wise to render good judgments and sufficiently removed from the people so as not to be swayed by their temporary passions?" I will discuss two important objections to such a view. First, there is no reason to believe that the judiciary would not be just as susceptible to tyranny as other branches; indeed, the very independence of the courts might well make them more susceptible to tyrannical tendencies. Second, in practice, judicial supremacy operates less to restrain the other branches than to sanction their own breaches of the Constitution's limits and prohibitions.[48]

A. Supreme Authority Can Be Despotic Authority[49]

Thomas Jefferson early on saw the danger that any claim of judicial supremacy would pose. Writing to Abigail Adams shortly after the decision in *Marbury*, Jefferson acknowledged that the Court would be obliged to rule on the validity of the Alien and Sedition Act in any case that came before it involving a prosecution under the Act. But Jefferson was unwilling to treat any approval of the Act by the Court as binding upon him as President:

> The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, ... But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the Constitution. That instrument meant that its coordinate branches

46. *See, e.g.*, THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

47. *See, e.g., id.* at 303.

48. For an incisive inquiry into the philosophic leaps of logic that have led the Court to sanction broad interpretations of the Constitution's "capitalized clauses," resulting in clusters of law detached from original principle, see HADLEY ARKES, BEYOND THE CONSTITUTION 82 (1990) ("Vast new bodies of 'rights' have been created under rubrics marked by these clauses. Many lawyers and judges have come to see them as the names of whole subsets or sections of our jurisprudence, as though these clauses bore entirely separate logics and gave rise to distinct lines of juridical construction.").

49. *See, e.g.*, John N. Hostettler & Thomas W. Washburne, *The Constitution's Final Interpreter: We The People*, 8 REGENT U. L. REV. 13 (1997); *cf.* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1250–51 (1984).

> should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and Executive also in their spheres, would make the Judiciary a despotic branch.[50]

Jefferson did not simply arrive at this conclusion once he was President. As Madison reports in Federalist 49, Jefferson had proposed as early as 1783 that constitutional conventions should be called to correct breaches of the Constitution.[51] This was necessary, he argued, because it was the people, rather than any branch of government, who were the ultimate sovereign:

> As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority . . . whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.[52]

Nor did Jefferson's objection fade away with Jefferson himself. Abraham Lincoln, criticizing the Supreme Court's decision in *Dred Scott v. Sandford*,[53] made the identical point in his First Inaugural Address:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decision of the Supreme Court, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[54]

Of course, we must ask ourselves what it would be like if each

---

50. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 311 (Paul L. Ford ed., 1897), *quoted in* DOUGLAS W. KMIEC ET AL., THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION 212 (1998).

51. THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961).

52. *Id.* at 313–14. For a humorous account of this same point, see Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 682 (1995).

53. 60 U.S. (19 How.) 393 (1856).

54. Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953), *quoted in* Paulsen, *supra* note 52, at 685.

branch got to determine for itself questions of constitutional law. In one sense, *Cooper v. Aaron* seems relatively compelling by the nature of litigation. The Governor of Arkansas might not technically have been bound by the ruling in *Brown v. Board of Education* because he was not a party to it, but he surely would be bound by it (or rather, the lower courts would be bound by it to reach the same conclusion) should some plaintiff initiate parallel litigation to desegregate Arkansas schools. Is it really necessary to flood the courts with duplicative litigation, challenging futile objections of recalcitrant executive (or legislative) officials? Put in that light, *Cooper v. Aaron* seems perfectly sensible. Unless, of course, we agree with Jefferson's concern that allowing the judiciary to have the final, or indeed the only, say on matters constitutional would make of it a "despotic branch," not just unchecked by the other branches of government, but ultimately unanswerable even to the people themselves.[55]

The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[56] demonstrates just how the claim of judicial supremacy among the branches of government necessarily leads to a claim of judicial supremacy even against the will of the people themselves. In their plurality opinion, Justices O'Connor, Kennedy, and Souter made the extraordinary claim that the Court's decision in *Roe v. Wade*[57] resolved not just the constitutional question in the actual case before it, as Marshall's holding in *Marbury* held it was obligated to do, nor the further claim that it resolved it for all governmental officials in similar contexts, as *Cooper v. Aaron* held, but that it resolved it forever more, cutting off even debate on the correctness of the decision:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

---

55. *See supra* note 50 and accompanying text; *see also* Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 1 THE WRITINGS OF THOMAS JEFFERSON 160 (Paul L. Ford ed., 1892) ("[T]o consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.").

56. 505 U.S. 833 (1992).

57. 410 U.S. 113 (1973).

> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*.[58] But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[59]

By contending that they should not overrule *Roe* because to do so would be seen as "a surrender to political pressure," Justices O'Connor, Kennedy, and Souter rejected *the* foundational principle of our constitutional order, namely, that the people are the ultimate sovereign.[60] They rejected Jefferson, Madison, and the near-uniform opinion of our nation's founders. They rejected Lincoln (or rather embraced the consequence he feared, that should the Supreme Court itself have the final, unchecked authority to fix by interpretation the provisions of the Constitution, "the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal").[61] Indeed, the Justices demonstrated their utter ignorance of this fundamental maxim of republican government by erroneously noting earlier in the opinion that "*[t]he root* of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court."[62]

That these Justices reached these extraordinary conclusions—

---

58. The Court might have bolstered its point by noting that it had addressed the nation in such a fashion three times in its history—the third being in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). By limiting its assessment to the last hundred years, as it did, the Court was able facially to ignore the obvious problem that exists when the Court is manifestly wrong. Missing one out of three (67 percent) is a failing grade on many grading scales, and to those who think *Roe* was also manifestly wrong, missing two out of three (33 percent) is an abysmal record on which to base a claim of general acceptance.

59. *Casey*, 505 U.S. at 866–67.

60. *See, e.g., supra* note 32.

61. *See supra* note 54 and accompanying text.

62. *Casey*, 505 U.S. at 865 (emphasis added).

issued their incredible edict might be more apt—despite their express acknowledgement that *Roe* might well have been wrongly decided,[63] dispels any pretense that they were simply trying to enforce the commands of the Constitution against obstinate elected officials and a tyrannical majority of the citizenry, and we are left with the raw power of absolute judicial supremacy—"a despotic branch," to borrow again Jefferson's phrase.[64]

Besides, what would be wrong with the application of bilateral checks and balances between the court and the other branches, in much the same way as President and Congress check each other? Following a constitutional ruling, the other branches are not (or at least should not be) without power. The executive could decline to enforce a particular statute that had been held to be constitutional, for example, as Jefferson suggested, if it was adamant in its belief that the statute was unconstitutional.[65] Indeed, on Marshall's own reasoning in *Marbury*, such a course would seem to be compelled by the oath that the Executive himself takes to defend the Constitution.[66] Although the circumstances presented by *Cooper v. Aaron* are more problematic—namely, a court ruling that a particular governmental action is unconstitutional—Congress could limit the courts' jurisdiction to hold government officials in contempt for violating a rule that issued from a case in which they (or their office) was not a party, and such officials could then persist in the conduct until such time as a case was brought specifically against them.[67] At least one President reportedly believed that a chief executive could refuse to comply with a court's order to cease a particular action if he was really adamant in his view of the constitutionality (and presumably the necessity) of his action.[68]

---

63. *See id.* at 871 ("We do not need to say whether each of us, had we been Members of the [*Roe*] Court when the valuation of the state interest came before it as an original matter, would have concluded ... that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

64. *See supra* note 50 and accompanying text.

65. *See supra* note 25 and accompanying text.

66. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149 (1803) ("[T]he President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution.").

67. *See* U.S. CONST. art. III § 2 (In cases not affecting "ambassadors, other public ministers and consuls, and those in which a State shall be a party, ... the supreme Court shall have appellate jurisdiction ... with such exceptions and under such regulations as the Congress shall make.").

68. President Andrew Jackson, in response to the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is reputed to have said, "John Marshall has made his decision: *now let him enforce it.*" FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 392 (1993) (quoting 1 HORACE

The legislature, too, could more boldly use its powers to respond to what it considers to be erroneous judicial decisions. It could re-enact legislation contrary to the Court's ruling, prefaced with its own finding of constitutionality, as Congress did with The Federal Flag Protection Act of 1989,[69] a federal statute making it illegal to burn the flag, despite the Court's holding in *Texas v. Johnson* [70] that flag burning bans were an unconstitutional infringement of the Freedom of Speech protected by the First Amendment—or as Congress did when it enacted The Religious Freedom Restoration Act of 1993 ("RFRA")[71] to restore the compelling interest test when assessing generally applicable laws against free exercise of religion claims, despite the lower standard of review adopted by the Supreme Court in *Employment Division v. Smith.*[72]

Of course, just as with the ping-pong match between President and Congress described above, the Court could counter with its own assertion of power. It can strike down the new legislation just as it did the old, as it did in *United States v. Eichman,*[73] when it invalidated the Flag Protection Act, or in *City of Boerne v. Flores,*[74] when it invalidated RFRA. It could reiterate its ruling against one executive official when another appears before it in an identical case. But in both of these circumstances, it is (or at least should be, in a regime of co-equal branches) incumbent upon the Court to give added consideration to the now-more-adamant constitutional claims of its co-equal branches, perhaps even to be persuaded by them.

In *City of Boerne*, for example, Justice O'Connor took the opportunity presented by Congress's rejection of the Court's ruling in

---

GREELEY, THE AMERICAN CONFLICT 106 (1864)). Although there is some dispute about whether he actually made the statement, see, for example, NEWMYER, JOHN MARSHALL, *supra* note 11, at 454 (contending that the words were never spoken), it does seem to have been an accurate reflection of his views. *See* BRYAN WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS (2003); *see also* Edward A. Hartnett, *The Supreme Court and the American Character*, 11 SETON HALL CONST. L.J. 759, 763 n.19 (2001); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1926); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 346–47 (1956) (discussing the dispute). Many thanks to Professors Keith Whittington, Fred Shapiro, Catherine Struve, Matthew Franck, Bryan Wildenthal, Mark Alcorn, Trevor Morrison, and Ilya Somin for calling my attention to various aspects of this apocryphal story.

69. 18 U.S.C. § 700 (1989).

70. 491 U.S. 397 (1989).

71. 42 U.S.C. §§ 2000bb-2000bb-4 (1993).

72. 494 U.S. 872 (1990).

73. 496 U.S. 310 (1990).

74. 521 U.S. 507 (1997).

Employment Division to re-assess the correctness of that decision.[75] But the Court itself did not follow that course in *City of Boerne,* nor did it follow that course in *Cooper v. Aaron*, in *Eichman*, in *Casey*, or in countless other cases. Instead, the Court has reacted to the perfectly legitimate challenges to the validity of its prior decisions with an air of kingly nobility, treating the more vigorous assertions of constitutionality by elected government officials (who, after all, take the same oath as the judges take) as an affront to the Court's dignity, a challenge to the Court's station as first among equals.[76] In *City of Boerne*, for example, instead of joining in Justice O'Connor's reassessment (whether or not it chose to reaffirm the original ruling), the Court simply asserted that the matter had been preemptively settled by *Employment Division v. Smith*, and that Congress had no authority to say otherwise.[77]

This claim of ultimate and absolute supremacy is really an intolerable usurpation of power, and so it must be asked whether Congress and the President (or, perhaps, state legislatures and state executives) have any further check on the awesome power that courts have claimed for themselves. One possibility is legislative persistence. Congress can keep re-enacting statutes it believes to be constitutional despite court rulings to the contrary, as some have contended it did by enacting The Religious Land Use and Institutionalized Persons Act,[78] which once again challenged the holding in *Employment Division v. Smith.*[79] At some point, whether through change in personnel or just simple fatigue, the Court might back away from its initial ruling in the face of such repeated

75. 521 U.S. at 544–5 (O'Connor, J., dissenting).

76. *See, e.g., Eichman*, 496 U.S. at 315 ("The Government ... invites us to reconsider our rejection in [*Texas v.*] *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment. This we decline to do.") (citation and footnote omitted).

77. *See Boerne*, 521 U.S. at 534 ("We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.").

78. 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

79. I actually do not think that RLUIPA can fairly be characterized as a renewed challenge to the Court's decision in *Smith*. Instead, I think it more likely that with RLUIPA Congress conceded the correctness of *Smith* (or at least the Court's supremacy in making the decision) and simply tried to write a statute that would rely on other powers not addressed in *Smith* to reinstate the compelling interest test in contexts that the Court would permit. It is uncertain whether or not Congress, in enacting RLUIPA, will ultimately be successful. Federal circuits are currently split on the constitutionality of section 3 of RLUIPA. *Compare* Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (upholding section 3 against an Establishment Clause challenge) *with* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (striking down section 3 as contrary to the Establishment Clause), *cert. granted*, 125 S. Ct. 308 (U.S. Oct. 12, 2004) (No. 03-9877).

challenges.

Other possibilities are more bold, certainly more controversial, but not altogether without precedent. Congress might strip the courts of jurisdiction over the subject matter of a holding that Congress believes to be erroneous, arguably clearing the way for new legislation that would go unchallenged.[80] It might use the appropriation power to bar executive enforcement of the offending judicial decision.[81] It might even use the same "sudden death" power I described above—impeaching judges who persisted in the view, contrary to their oath of office, that the judicial branch was superior not only to the other branches but to the people themselves and their Constitution.[82] And the public trial in the Senate would afford a judge the same kind of bully pulpit to defend his action that the President had, with Senators fully aware that success in their next election might well turn on how well they make their case in the court of public opinion. Far from a constitutional crisis, this is precisely how a system of checks and balances is supposed to work, with the final decision on contested matters ultimately resting with the people themselves.

B. In Practice, Judicial Supremacy Means Judicial Abdication

There is a second, perhaps even more important, problem with the Court's claim of interpretive supremacy. As a result of that claim, ironically, the Court has ceased to be a real check on the other branches, becoming instead a blank check, providing cover for the elected branches to exceed their own constitutional authority or to ignore their own constitutional oaths and obligations. Jonathan Swift describes just this problem in *Gulliver's Travels*:

> [Stare decisis] is a maxim among . . . lawyers, that whatever has

---

80. *See, e.g.*, Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (upholding Congress's repeal of Supreme Court's appellate jurisdiction in habeas corpus cases arising out of Civil War).

81. *See, e.g.*, 149 CONG. REC. H7247-01 (July 22, 2003) (statement of Rep. Hostettler) (proposing amendments to H.R. 2799, The Departments Of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations Act of 2004, which would prohibit the use of any appropriated funds to enforce the judgments in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) and Glassroth v. Moore, 229 F. Supp. 2d 1067 (M. D. Ala. 2002)).

82. Some commentators have even suggested that Article III's lower standard for removal (i.e., anything less than "good behavior"), as compared with the Article II's impeachment standard (i.e., "high crimes and misdemeanors"), allows Congress to enact a different removal mechanism. *See, e.g.*, Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1212 & n.13 (1991).

> been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.[83]

So successful and complete has been the Court's assertion of sole and final interpretative authority that the elected branches rarely engage anymore in their own constitutional inquiries. Anything that the Court has previously said is permissible remains so, even if members of Congress think otherwise. Troubling enough when the Court has itself been scrupulous in addressing questions of constitutionality, the solace Congress finds in prior Court decisions is simply intolerable in matters where the Court has in the past candidly admitted that its decisions were not grounded in the Constitution, and where the Court nevertheless continues to adhere to such decisions on grounds of a misconceived stare decisis.[84] The New Deal-era Court's expansive interpretation of Congress's power under the Commerce Clause, for example, was grounded not in the Constitution itself but in the Court's view that the old limits of the Constitution were no longer workable in a modern commercial administrative state.[85] Similarly, while mouthing that the Spending Clause has limits, the Court has adopted an interpretation that renders any such limits utterly unenforceable.[86]

How has Congress reacted to such decisions? Just as one might suspect. The Court has told Congress that it has authority basically to regulate whatever it wants, if it can simply assert that, in the aggregate, the object of its regulation (or perhaps even the regulation

---

83. JONATHAN SWIFT, GULLIVER'S TRAVELS 256 (1950), *quoted in* SAUL BRENNER AND HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 (1995).

84. For a more complete discussion of this point, see John C. Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, *in* THE COURTS AND THE CULTURE WARS 127 (Bradley Watson ed., 2002).

85. *See, e.g.*, NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937) (holding that manufacturer's restriction on labor was burden and obstruction of commerce); Weiss v. United States, 308 U.S. 321, 329 (1939) (holding that *intrastate* communications was intended to be protected under Communications Act of 1934); U.S. v. Darby, 312 U.S. 100, 113-15 (1941) (allowing Congress, under Fair Labor Standards Act of 1938, to determine its own constitutional limitations on power to regulate commerce among the states); NLRB v. Fruehaf Trailer Co., 301 U.S. 49, 57 (1951) (finding that the National Labor Relations Act was valid exercise of Congress's power to regulate interstate commerce).

86. *Compare* United States v. Butler, 297 U.S. 1 (1936) (invalidating processing tax on agricultural products because control over agricultural production is reserved to the states) *with* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding federal statute conditioning state receipt of federal highway funds on adoption of minimum drinking age as valid use of Congress's spending power). For a more thorough discussion of the limits of the Spending Clause, as originally understood, see generally Eastman, *supra* note 19.

itself) has a substantial effect on interstate commerce, a hurdle that almost nothing will fail to surmount.[87] So Congress does not even bother to consider the constitutionality of its own actions; it has simply regulated whatever and wherever it wants. Similarly, the Court has told Congress that it can spend for whatever purpose it believes to be in the nation's welfare. Not surprisingly, Congress has spent like a bunch of drunken sailors—actually, worse than a bunch of drunken sailors; drunken sailors are usually forced to stop their spending spree when they run out of money!

To appreciate how pervasive the problem is, consider this. Not too long ago, some members of Congress were able to push through a resolution requiring that every new bill cite the source of constitutional authority for the bill.[88] The effort to induce members of Congress actually to consider the obligation imposed upon them by their oath of office was laughable. Any bill that was not authorized by a specialized clause of the Constitution, such as the patent clause, or the power to raise and support an army, was simply chalked up to "the Commerce Clause," if a regulation, or "the Spending Clause," if an appropriation.[89] What more need be said; the Court had given Congress a virtually unlimited blank check to legislate under each clause.

But the matter is worse even than I have just described. Through a series of decisions ostensibly designed to afford respect to its co-equal

---

87. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 118-29 (1942); Rancho Viejo LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003). The relatively few, and quite recent, cases to the contrary, *United States v. Lopez*, 514 U.S. 549, 560 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), are widely thought (though I myself do not subscribe to this view) to be short-term aberrations. *See, e.g.*, Lino A. Graglia, United States v. Lopez*: Judicial Review under the Commerce Clause*, 74 TEX. L. REV. 719, 767-71 (1996). Some commentators have suggested that the decisions themselves are ineffectual even with respect to the precise regulations at issue because Congress could decide to re-enact them as conditions on federal spending. *See, e.g.*, Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 554 (1997) (arguing that Congress could have used Spending Clause to enact Gun Free School Zones Act); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 131-32 (2002) ("Similarly, Congress could use its spending power to compel states to adopt a civil rights remedy for gender-motivated violence in order to receive federal funds for programs related to violence against women.").

88. *See* Enumerated Powers Act, H.R. 384, 108th Cong. (1st. Sess. 2003) (amending Chapter 2 of title 1, United States Code, to read: "Each Act of Congress shall contain a concise and definite statement of the constitutional authority relied upon for the enactment of each portion of that Act").

89. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 211–12 (2003) (upholding Congress's ability to enact Children's Internet Protection Act, which required public libraries to use internet filters as condition of receiving subsidies, as valid under Spending Clause).

branches of government, the Court has itself abdicated what little desire it had left to enforce the Constitution's limits. The Court *presumes* that acts of Congress are constitutional, despite the clear evidence that in most cases Congress does not even bother to address constitutionality.[90] The Court affords a great deal of deference to executive branch regulatory lawmaking,[91] despite the fact that the Constitution expressly assigns the lawmaking power to Congress,[92] despite the well-documented problem that administrative agencies are often captured by the very interests they were established to regulate,[93] and despite well-documented efforts by congressional committee chairman to achieve via implementing regulation what they could not achieve on the floor of Congress itself.[94] The Court also affords a great deal of deference to executive enforcement actions, effectively treating them as a determination by the executive that the statute being enforced is constitutional[95] despite the well-known policy of the Department of Justice to come to the defense of any agency action for which even a remotely colorable argument can be made[96]—arguments all too often based on the same expansive

---

90. Consider, for example, the remarks of Senator Exon on February 7, 1986, regarding the Gramm-Rudman bill:

> [I]t seems to me that the U.S. Senate, supposedly the most deliberative body in the world, was just brushing aside all constitutional questions. When it was brought up, it was kind of no, no; you must not talk about those kinds of things and get in the way of the political document that Gramm-Rudman will eventually come to be known as. That political document had to be forced through by various people with various reasons, most of which this Senator simply did not understand.

132 CONG. REC. S1212–13 (daily ed. Feb. 7, 1986), *quoted in* Vik D. Amar, *The Senate and the Constitution*, 97 YALE L. J. 1111, 1123 n.64 (1988). A 1966 poll revealed that 31 percent of all Congressmen thought it legitimate to pass constitutional questions along to the courts without considering them. *See* D. MORGAN, CONGRESS AND THE CONSTITUTION 8 n.8 (1966), *cited in* Amar, *supra*, at 1123 n.63.

91. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).

92. *See* U.S. CONST. art. I, § 1; *see also* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

93. *See, e.g.*, Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HAST. L. J. 905, 1023–24 (1990); Edna Earle & Jass Johnson, *"Agency Capture": The "Revolving Door" Between Regulated Industries and Their Regulated Agencies*, 18 U. RICH. L. REV. 95 (1983); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

94. *See, e.g.*, THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (Gordon Jones & John Marini eds., 1989).

95. *See, e.g.*, Virginia Dep't of Ed. v. Riley, 106 F.3d 559, 566 (4th Cir. 1997) (Luttig, J., dissenting in an opinion adopted by the majority at the rehearing en banc) (discussing the "traditional respect accorded to the Department [of Justice]" by courts).

96. *See, e.g.*, *Confirmation Hearing on the Nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States, Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 127 (2001) (statement

judicial interpretations that led Congress to abdicate its own similar responsibilities.

But if Congress is not considering the constitutionality of laws it passes, and if the executive is not considering the constitutionality of the laws it enforces, and if the judiciary is, through its doctrines of deference and presumption, also not really considering constitutionality, just who is? The answer, disconcertingly, is all too often no one, and the elaborate system of checks and balances that is supposed to ensure that each branch of the government exercises only the powers delegated to it by the people gives way to what might arguably be deemed a conspiracy to permit systemic violations of the Constitution.

III. THE COURT'S RECENT UNENUMERATED RIGHTS JURISPRUDENCE EXACERBATES THE JUDICIAL SUPREMACY PROBLEM.

As troubling as the case I have just presented might be, the problem is actually much worse than I have described. The title of this paper suggests that the problem of judicial supremacy is made worse by the Court's recent unenumerated rights jurisprudence. In a certain sense that is correct, but I prefer to place the principal blame with Oliver Wendell Holmes and the triumph of his life's mission (or at least one of them) in *Erie Railroad Co. v. Tompkins*[97] than with Earl Warren and any number of decisions that were imposed on the country by the Warren Court.

To be sure, the Warren Court's journey to the land of penumbral emanations from unenumerated rights allowed it to lay claim to a supremacy never envisioned by Chief Justice Marshall in *Marbury*. No longer need the Court point to some provision of the Constitution as authority to invalidate an act of Congress or of a state legislature; it was enough if the act offended the Court's own evolving sense of fairness. The transfer of power occasioned by the Warren Court's methodology from legislature to the courts, and even more fundamentally from the people to unelected judges, should be manifest.

---

of Theodore Olson) (Sup. Doc. No. Y4.J89/2:S.HRG.107-250) (noting Justice Department's "responsibility to do everything it can within reason to defend the constitutionality" even of statutes that President believes to be unconstitutional); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 OP. OFFICE OF LEGAL COUNS. 199 (1994) ("[I]f the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.").

97. 304 U.S. 64 (1938).

As I noted in the introduction, though, we have long acknowledged a role for the courts in giving effect to certain fundamental principles of justice, even if those principles were not elaborately spelled out in the positive law.[98] Although the Ninth Amendment does not explicitly assign such a power to the Courts, it certainly embraces the idea of unenumerated rights, and we should be hard pressed to deny to the courts any power to enforce such rights. As the ancient philosophers recognized, laws made in violation of the principles of the natural law were void.[99] Surely a court should not give such "laws" effect.

The problem was thus not with the Warren Court's resort to unenumerated rights. The problem arose earlier, with the Court's rejection of any standard by which to judge unenumerated rights. For Jefferson and the other founders of this nation, those who joined in the Declaration of Independence and those who drafted and ratified the Constitution, the claim of rights was self-evident and inalienable, grounded in the self-evident truth of human equality.[100] As readily as any Euclidean proof flows from its postulates, the necessity of government by consent, of limited government, even of judicial review itself, all followed from those initial truths. In such a world, it was possible to say, with some measure of certainty, that certain acts of the legislature (for they should not be called "laws") were unlawful even though not in violation of an express constitutional provision.[101] There were simply certain things that even a majority could not do, and an independent judiciary, trained in the principles of the common law (which was but the historical development of the natural law),[102] was perfectly well-suited to give effect to that unwritten higher law.[103]

---

98. *See supra* text accompanying note 6.

99. *See, e.g.*, MARCUS TULLIUS CICERO, 1 DE LEGIBUS, at 317 (Clinton Walker Keyes trans., 1928); MARCUS TULLIUS CICERO, 3 DE RE PUBLICA, at 211 (Clinton Walker Keyes trans., 1928) ("True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions.... It is a sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to abolish it entirely.").

100. *See, e.g.*, THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

101. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power .... An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

102. *See, e.g.*, *id.* at 388; Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960).

103. There is an intermediate method, of course, one which recognizes an immutable natural law but denies the courts the power to enforce it. Justice James Iredell, for example, partially dissenting in *Calder*, wrote:

That view of the world was challenged most openly by Oliver Wendell Holmes. Articulating a radically different view of the common law in his book of the same name,[104] Holmes staked out the position that today we know as legal realism. For Holmes, there was no such thing as a self-evident truth, which the common law sought to articulate. Rather, the common law was just the exercise of lawmaking power from the bench rather than from the halls of Congress. Taking aim at Justice Joseph Story, who adhered to the traditional view, Holmes wrote in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[105] that Story's opinion in *Swift v. Tyson*,[106] holding that federal courts were not bound by state court interpretations of state common law, reflected the notion that "There is one August corpus" of common law, "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute."[107] Story's belief in a "transcendental body of law" meant that the federal courts were as capable of rendering opinions attempting to articulate that body of law as were the state courts; the notion that they had to defer to what were in their view erroneous decisions of the state courts was therefore anathema to the very enterprise.

> It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so .... [I]t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; .... If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice ....

Calder, 3 U.S. at 399 (Iredell, J., concurring in the judgment). The founders may have addressed even this problem, however, as some constitutional provisions, such as the Privileges and Immunities and Republican Guarantee Clauses of Article IV, may well have been designed to codify the Declaration of Independence, which is to say, the principles of natural law. I explore this claim in John C. Eastman, *The Declaration of Independence as Viewed From the States*, *in* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 96 (Scott Gerber ed., 2002).

104. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

105. 276 U.S. 518 (1928) (Holmes, J., dissenting).

106. 41 U.S. 1 (1842).

107. Black & White Taxicab, 276 U.S. at 533 (Holmes, J., dissenting).

Holmes dissented in the *Black & White Taxicab* case, but his position emerged victorious a decade later in *Erie.* In that case, the Court held that when sitting in diversity and applying state law, federal courts were as much bound by state court common law pronouncements as they were by state legislative acts.[108] This, according to the Court, because the notion that the courts were simply trying to discover and apply some inherent truth was not true.[109] There was no such thing as truth.[110]

At first blush, *Erie* appears an unlikely source of the Warren Court's expansion of judicial power. After all, on its face the case actually *restricts* the power of the federal courts vis-à-vis the state courts. But by unhitching the common law from its natural law mooring, the Court also unhitched the doctrine of unenumerated rights from its own natural law mooring, leaving the Court free to become a roving commission, striking down any act of any legislature that infringed upon its own evolving sense of fairness.

With the Courts now routinely staking a claim to what really amounts to absolute power, the only question that remains is why should the rest of us—elected officials or the people generally—continue to tolerate any measure of judicial review. No particular expertise in the natural law is required,[111] if the very idea of a natural law has been rejected. No particular skill in statutory or constitutional construction is required, if the provisions of statute and constitution are not to be binding. All that is required is for the courts to assert that, in their view, some statute is an improper infringement of some evolving or new-found right, as they see it (or even more obnoxiously, as they believe the people see it). Yet it is difficult to articulate why the judicial branch, as opposed to the democratically elected legislative, should claim to be the authoritative interpreters of the public's desire for newfound and unenumerated rights. Luther Martin, arguing against having the Supreme Court serve as a council of revision, noted during the constitutional convention that "A

108. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

109. *Id.*

110. *See, e.g.*, Herbert Hovenkamp, *Harmony & Dissonance: The* Swift *&* Erie *Cases in American Federalism*, 34 HASTINGS L.J. 201, 224–26 (1981). *But see* Jack Goldsmith & Steven Walt, *Essay:* Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 709–12 (1998).

111. *Cf.* Prohibitions Del Roy, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (1607) (Sir Edward Coke) (rejecting King's claim that he was as capable as interpreting law as courts, because he did not have the study and experience necessary for task of interpreting natural law), *reprinted in* KMIEC ET AL., *supra* note 50, at 37–38.

knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."[112]

Indeed, do not the elected branches have a better claim to authority for this new enterprise? After all, elected officials at least have to face public opinion every election cycle and suffer its wrath if they are wrong. And in a world grounded in the rejection of any immutable truth, legislative pronouncements have the added advantage of being able to claim that they reflect majority will.

The right solution, of course, is for the courts to turn back to a jurisprudence grounded in the natural law principles of the Declaration of Independence—Justice Clarence Thomas has at times embarked upon just such a task.[113] But absent a recourse to such principles, the courts should not be surprised if legislatures, executives, and even the people themselves give less and less credence to their dictates. A "Rule of Law" that is itself lawless is not the kind of "law" that generates (or deserves) respect. In other words, we can expect many more Judge Roy Moores unless and until the Holmesian heresy is finally defeated and the "least dangerous branch" taken down from its pedestal and restored to its co-equal station in the government, exercising judgment and not will.

112. THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 14, at 76.

113. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).